

Real Estate/Environmental Liability News

ROUTE TO:

Your Source for Significant Cases, Successful Strategies and Regulatory News

Volume 11, Number 9

March 3, 2000

Water rights

9th Circuit orders United States to provide drainage to California community

The 9th U.S. Circuit Court of Appeals recently held that the U.S. Department of Interior and the Bureau of Reclamation were in violation of a federal act through their failure to provide drainage to the Westlands area of California. (*Firebaugh Canal Co., et al. v. United States, et al.*, No. 95-15300 (9th Cir. 2/4/00).)

San Luis Act

The San Luis Act of 1960 required that either the state of California or the U.S. Department of Interior provide certain portions of California with water for irrigation and drainage. An earlier feasibility report for the project, specifically referenced in the act, discussed the need for an interceptor drain to convey water 197 miles for disposal. In 1961, California declined to provide the master drain for the act, and in 1962, the Secretary of the Interior notified Congress that it would begin construction of the interceptor drain. By 1968, about 40 percent of the drain was built as well as a regulating reservoir for the drain en route to its planned terminus.

(See **DRAINAGE** on page 6)

Conflict of interest

EPA employee not prohibited from acting as spokesperson for public interest environmental groups

The D.C. U.S. Circuit Court of Appeals concluded that an employee of the Environmental Protection Agency was not in violation of 18 USC § 205, a criminal conflict-of-interest statute, for his activities on behalf of public interest environmental groups and his comments on proposed environmental impact statements related to land use plans. (*Van Ee v. Environmental Protection Agency*, No. 99-5147 (D.C. Cir. 2/8/00).)

Jeffrey Van Ee is an electrical engineer at the National Exposure Research Laboratory in Las Vegas. The laboratory is part of the EPA. A resident of the Las Vegas area for more than 25 years, Van Ee actively participated in various state and local environmental groups. Van Ee's volunteer work included contact with a number of federal agencies. In 1990, the EPA reprimanded Van Ee for participating in a meeting with the Bureau of Land Management, which focused on a proposed land transfer and the appropriate treatment of endangered desert tortoises. The EPA warned Van Ee that under Section 205 he inappropriately acted as an agent of the Sierra Club Legal Defense Fund.

Section 205 prohibits a federal employee from acting as agent or attorney for a private party in any "particular matter" in which the United States has an interest. Van Ee, after his reprimand, sought guidance from

(See **SPOKESPERSON** on page 8)

Inside

County ordinances

County must include natural resource in comprehensive community plan to regulate the resource 2

Toxic torts

10th Circuit disallows application of collateral estoppel absent evidence of breach of specific duty 3

Real estate

Lead contamination impact on property values significant 4

Insurance limitations

Insurer had no duty to defend successor corporation against EPA suit 7

Constitutional property rights

7th Circuit upholds landowners' equal protection claims 9

Statutory interpretation

N.J. court requires disclosure by residential developers 10

Insurance coverage

Landfill operator denied recovery under insurance policies for pollution discharge 11

Underground storage tanks

Fuel distributor not liable for ground contamination 12

*Real estate***Lead contamination impact on property values significant**by *John A. Kilpatrick**

Lead paint contamination has become a widespread problem in the United States, with an estimated 21 million U.S. residences potentially contaminated. However, lead contamination from other sources is significant as well, and the contamination issues are typically not well understood.

How much lead is around?

A study of the first 951 sites listed on the **National Priorities List** found heavy metals at 59 percent of those sites, with lead being the most commonly cited metal (also chromium, arsenic, and cadmium were common). Pre-school-aged children and fetuses are considered the most vulnerable to exposure, with four epidemiological factors cited:

1) The developing nervous system of the fetus has increased susceptibility to toxins;

2) Young children play in dirt and place their hands and other objects in their mouths, increasing the opportunity for soil ingestion;

3) Lead absorption from the gastrointestinal tract is greater in children than in adults; and

4) Nutritional deficiencies of iron or calcium, often prevalent in children, may actually facilitate lead absorption and exacerbate the toxic effects of lead.

Typical soil in the United States contains about 50 parts per billion (ppb) of lead. However, soils in contaminated areas may exhibit lead content beyond 10,000 ppb. While lead-paint flaking is certainly one potential cause, the **U.S. Department of Health and Human**

(continued on next page)

**John A. Kilpatrick is a valuation analyst with Mundy Associates LLC in Seattle.*

Case studies show impact of lead contamination on home values

West Dallas, Texas — Lead from a smelter operation contaminated the soil around 170+ residences in the surrounding neighborhood to a level above 2,000 ppb. Remediation was ordered, and the smelter was closed. Since the smelter was also a major local employer, house price diminution can be attributed both to general economic factors as well as contamination. In total, home prices in the area declined as much as 54 percent.

Portsmouth, Va. — Residences surrounding a bronze and brass foundry were found to have lead contamination exceeding 500 ppb. The local tax assessor granted a 15 percent value reduction due to

stigma. However, properties nearest the foundry had few buyers, and price diminution of up to 50 percent was noted.

Everett, Wash. — Owners of a now-closed lead smelter have been forced to buy up homes adjacent to the smelter, and home buyers in the surrounding neighborhood have been denied mortgages.

Tacoma, Wash. — Despite a healthy economy, homes surrounding a now-closed lead smelter suffered a diminution in value of over 15 percent resulting from lead contamination of up to 800 ppb in soils.

conduct by Cotter to each of the *Dodge* plaintiffs. As the 10th Circuit opined, "... our concern is not that the jury did not find negligence on one or more specific allegations, but the general finding under the negligence instruction fails to identify what the jury found sustained by the evidence." Accordingly, the court concluded that the jury verdict in *Boughton* could not be construed to have been dispositive of the issue of whether Cotter breached a specific duty to the *Dodge* plaintiffs.

Emotional distress claim

On the claim by the *Dodge* plaintiffs for damages for emotional distress as a result of an increased fear of cancer, the 10th Circuit affirmed the district court's ruling granting summary judgment to Cotter. The *Dodge* plaintiffs argued that they were entitled to recover for emotional distress for fear of cancer under *Boryla v. Pash*, 960

P.2d 123 (Colo. 1998), where the **Colorado Supreme Court** recognized a right to recover damages for an objective fear of developing cancer.

However, in upholding the ruling of the District Court, the 10th Circuit stated that *Boryla* was a medical malpractice case. As the 10th Circuit noted, the Colorado Supreme Court drew a clear distinction between fear of cancer in cases involving medical malpractice and fear of cancer in toxic tort cases.

Thus, the court reversed and remanded the case for a new trial. However, the court affirmed the order granting summary judgment on the fear of cancer claim.

Opinion: Senior Circuit Judge Porfilio.

Counsel for Dodge plaintiffs: Suzelle M. Smith and Don Howarth, Howarth & Smith, Los Angeles.

Counsel for Cotter Corp.: John L. Watson, Freeborn & Peters, Denver.

Services also points to air-borne lead contaminating the soil around homes. In urban areas, this lead can come from incinerators, waste disposal, and smelters. In rural areas, this may come from lead mining operations, and will most commonly take the form of cerussite (lead carbonate), anglesite (lead sulfate), massicot (lead oxide), or lead sulfide.

Evidence exists that atmospheric lead most commonly enters the soil as lead sulfate or is converted rapidly to lead sulfate at the soil surface. In soils with a pH of 5 or more and with at least 5 percent organic matter, atmospheric lead is retained in the upper 2-5 cm of undisturbed soil, according to a 1986 EPA study.

Lead may mobilize from soil when lead-bearing soil particles run off to surface waters during heavy rains. Lead may also mobilize from soil to atmosphere by downwind transport of smaller lead-containing soil particles entrained in the prevailing wind, according to a 1977 National Science Foundation report. This latter process may be important in contributing to the atmospheric burden of lead around some lead-smelting and Superfund sites that contain elevated levels of lead in soil.

The downward movement of lead from soil by leaching is very slow under most natural conditions, according to the NSF (1977). The conditions that induce leaching are the presence of lead in soil at concentrations that either approach or exceed the sorption capacity of the soil, the presence in the soil of materials that are capable of forming soluble chelates with lead, and a decrease in the pH of the leaching solution (e.g., acid rain) (NSF, 1977). Partial favorable conditions for leaching may be present in some soils near lead-smelting and NPL sites that contain elevated levels of lead in soil.

How much lead is too much?

So — how much lead is too much? In a 1988 HHS study, "The Nature and Extent of Lead Poisoning in Children in the United States: A Report to **Congress**," it was concluded that soil contamination levels above 500 to 1000 ppb will begin to affect lead levels in children's blood streams. A study in the late 1980s found elevated children's blood levels of lead with soil contamination as low as 250 ppb. The HHS report goes on to cite six epidemiological studies which find elevated children's blood levels in lead industrial communities (e.g. — smelter or other heavy industry) and two studies which find elevated blood levels in mining communities.

Measuring the direct value impact of lead contamination is often difficult due to general economic conditions. If an industrial site or mine is found to be a pollution source, it is often ordered closed, and the surrounding neighborhood may suffer accordingly. However, the impacts of the lead contamination can be separated from these economic impacts, and are found to be a significant cause of property value diminution.

Conference Calendar

- **April 4 & 5, Washington Marriott Hotel, Washington, D.C.**
Risk-Based Decision-Making: How Contaminated Property Deals Get Done
 For more information, call (800) 966-7475.
- **April 10-14, Wyndham Midtown Atlanta**
The RCRA Compliance Institute, sponsored by Government Institutes
 For more information, call (301) 921-2345 or contact www.govinst.com.
- **April 27-28, Wyndham Hotel, Washington, D.C.**
Environmental Impact Assessment: NEPA, sponsored by ALI-ABA and the Environmental Law Institute
 This advanced two-day course covers the present state of the law and practice pertaining to NEPA, "little NEPAs," and the EIS process.
 For more information, call (800) 253-6397.
- **May 16-19, Sheraton Colorado Springs Hotel, Colorado Springs, Colo.**
The Natural Resources Institute, sponsored by Government Institutes Division
 For more information, call (301) 921-2345 or contact www.govinst.com.
- **May 18-19, Westin Galleria, Mexico City, Mexico**
Mexico and The Environment 2000, sponsored by Government Institutes
 For more information, call (301) 921-2345 or contact www.govinst.com.
- **May 18-19, Sheraton Colorado Springs Hotel, Colorado Springs, Colo.**
Environmental Sampling & Data Analysis, sponsored by Government Institutes
 For more information, call ((301) 921-2345 or contact www.govinst.com.
- **May 18-19, Crowne Plaza Hotel, Arlington, Va.**
The Storm Water Discharge Regulations Course, sponsored by Government Institutes Division
 For more information, call (301) 921-2345 or contact www.govinst.com.
- **June 12 & 13, Wyndham Hotel, Washington, D.C.**
Latin America: Environmental Regulations and Compliance, sponsored by Government Institutes Division
 For more information, call (301) 921-2345 or contact www.govinst.com.
- **June 27 & 28, Hotel Intercontinental, Chicago**
Environmental Risk and Insurance Management for Contaminated Property Transactions
 For more information, call (800) 966-7475.