Dioxin Developments

By: *James V. Aiosa, Esq.*

Report Cites Dioxin in Sediment at Former Boise Cascade Mill in Salem, Oregon

Engineering consultants conducting a sediment investigation ("SI") at a former paper mill in Salem, Oregon, have reported finding high levels of dioxins and furans at the site.

Background

Geosyntec Consultants prepared a report entitled "Willamette Slough Sediment Investigation" for the Oregon Department of Environmental Quality to characterize surface and subsurface sediments for dioxins and furans in the vicinity of the former Boise Cascade Salem Mill located near 315 Commercial Street SE in Salem, Oregon (the "Site").

As explained by Geosyntec, the SI area is located in the Willamette Slough, between Minto Island and downtown Salem. The Site first was developed in the mid-1880s, and served as the Salem Flouring Mills, a lumber mill, and a pulp and paper mill industrial complex.

During the 1950s, Geosyntec said, the Oregon Pulp and Paper Company – which included a pulp mill, digester, holding tanks, and bleaching plant – operated at the Site, using the wood pulping method known as "krafting."

Geosyntec pointed out that, in 1962, Boise Cascade purchased the facilities, including a large part of Minto Island, and continued to operate there through 1982.

The Geosyntec Findings

In its report, Geosyntec said that it found "high concentrations" of dioxins and furans in the sediment within the Willamette Slough.

Given the historical operations of a pulp and paper mill at the Site, Geosyntec reasoned, it was "likely that unregulated discharges" of dioxins and furans had occurred in the Willamette Slough and nearby Pringle Creek and had been deposited in bed sediments over time.

In fact, Geosyntec said, it could be "generally concluded" that the source of dioxins and furans in the sediments in the Willamette Slough was "likely to be the former paper mill."

Dioxin: Legislative Developments

By: *Lawrence S. Han, Esq.*

Members of Congress Call for Cleanup of San Jacinto Waste Pits

Republican and Democratic members of the House of Representatives from Texas are calling on the Environmental Protection Agency ("EPA") to remove all contamination from the San Jacinto Waste Pits.

The EPA is close to proposing a long term remedy for the 14-acre San Jacinto River Waste Pits site in Harris County, Texas. A growing number of House members from the area are advocating a full cleanup.

Republican Congressman Ted Poe said to a local newscast, "I support the EPA's efforts for a full removal of the waste. Action is long overdue. In addition, the people who polluted the water should pay for the cleanup of the damage that they created."

Republican Congressman Pete Olson has been quoted as saying, "The communities directly impacted by this Superfund site have assessed and requested full removal of the contamination. I support our local leaders charged with protecting their residents and my fellow Houston colleagues who are advocating for this effort at the federal level."

In addition, Republicans Brian Babin and Randy Weber and Democrats Gene Green and Sheila Jackson Lee have supported full removal of all contamination at the site.

The Science of Dioxin

By: *Paul V. Majkowski*

Taipei Medical University Doctor Claims Dioxin is Linked to Premature Ovarian Failure

A physician from Taipei Medical University reportedly suspects that an increase in "premature ovarian failure" is due to increased exposure to environmental pollutants such as dioxin.

A recent news story in *The Taipei Times* asserted that physicians from Taipei Medical University had found a "surge of patients" suffering from "premature ovarian failure."

The story said that the director of the University Center for Reproductive Medicine at the medical school, Tseng Chi-jui, attributed the purported increase to an "increased exposure to environmental persistent organic pollutants, such as dioxin."

Dr. Dean Lee Mao-sheng, of the Taichung Lee Women's Hospital, reportedly said, however, that other factors, such as immune-system diseases, hereditary problems, endometriosis, and ovarian surgery, also could lead to premature ovarian failure.

International Dioxin Developments

By: *James V. Aiosa, Esq.*

Boiler #1 at Durham York Energy Centre Is Approved for Restart

Covanta Durham York Renewable Energy Limited, the operator of the Durham York Energy Centre ("DYEC"), has received approval to restart Boiler #1.

Background

The DYEC is a new, state-of-the-art $286-million solid waste-to energy incinerator in Southern Ontario near Toronto built and operated by Covanta Durham York Renewable Energy Limited and owned by the Regions of Durham and York.

The facility can process up to 140,000 tons of waste each year, generating some 17.5 megawatts of renewable energy – enough to power between 10,000 and 12,000 homes.

Boiler #1 was brought offline at the end of May following reports of high emission limits for dioxins and furans from that boiler.

Status

The company said that the restart of Boiler #1 would involve using natural gas to bring the combustion chamber temperature up to 1,000 degrees Celsius. Once the boiler reaches 1,000 degrees Celsius, waste gradually is to be introduced until self-sustained combustion can be achieved with only the waste.

Covanta said that it will continue to test, inspect, and monitor several operating parameters of Boiler #1. The company streams emissions monitoring data in real time and posts the data online at the project website (www.durhamyorkwaste.ca), and on a large electronic board outside of the visitor's center.

Learn more:

"One Boiler Remains Offline at Durham York Energy Centre," at http://www.rivkinradler.com/publications/international-dioxin-developments-8/;

"High Dioxin/Furans Levels Lead Covanta to Temporarily Shut Down Boiler at Durham York Energy Centre," at http://www.rivkinradler.com/publications/international-dioxin-developments-7/;

"Covanta Report: Waste to Energy Emissions Down, Recycling Up," at http://www.rivkinradler.com/publications/dioxin-developments-10/;

"Ontario Authorities and Incinerator Operator Disagree About Test Results," at http://www.rivkinradler.com/publications/international-dioxin-developments-4/;

"Compromised Samples Led to Incinerator's False High Emission Results, Report Finds," at http://www.rivkinradler.com/publications/the-science-of-dioxin-6/.

Dioxin: Regulatory Developments

By: *Lawrence S. Han, Esq.*

EPA Proposes $11 Million Cleanup for Standard Chlorine Chemical Site on the Hackensack River

The U.S. Environmental Protection Agency ("EPA") has proposed a plan to clean up contamination at the Standard Chlorine Chemical Company, Inc. Superfund site in Kearny, New Jersey.

Background

The 25-acre site is part of the New Jersey Meadowlands and on the banks of the Hackensack River. According to the EPA, past manufacturing operations by various companies led to "extensive contamination of the site" with "a number of hazardous chemicals" including polychlorinated biphenyls ("PCBs") and dioxin.

The EPA said that the site was used for chemical manufacturing by various companies from the early 1900s to the 1990s. Operations at the site included the refinement of naphthalene for use in the production of certain industrial products, the processing of liquid petroleum naphthalene, the manufacturing of lead-acid batteries and drain-cleaner products, and the packing of dichlorobenzene products. According to the EPA, the soil, groundwater, and two lagoons were contaminated with dioxin, benzene, naphthalene, PCBs, and volatile organic compounds. The site was littered with tanks and drums containing hazardous substances including dioxin and asbestos, the EPA said.

After sampling the site and requiring short-term pollution control measures, the New Jersey Department of Environmental Protection ("NJDEP") requested that the EPA add the site to the Superfund list. The site was added to the federal Superfund list in September 2007.

As the EPA pointed out, actions have been taken by parties responsible for the pollution with oversight by the NJDEP and the EPA. Dioxin and asbestos were collected and disposed of at facilities licensed to receive the waste and many of the contaminated buildings on the site were demolished and removed, the EPA said. It added that two contaminated lagoons had been emptied of water, filled with clean material, and covered and that a slurry wall had been installed between the site and the Hackensack River to keep contamination from moving into the river.

A system of pumps is being used to bring the polluted groundwater to the surface where it can be cleaned. Fish consumption warnings have been issued for the Hackensack River.

To date, the EPA said, the cleanup of the site has been conducted and paid for by Apogent Transition Corp., Beazer East, Inc., Cooper Industries, LLC, and Occidental Chemical Corporation with oversight by the EPA. Tierra Solutions, Inc., participated on behalf of Occidental Chemical Corporation, the EPA said.

The EPA Plan

The EPA's new plan proposes a targeted cap that would extend over the remaining uncovered areas, as well as upgrades to existing covers, to prevent soil disturbance.

Some areas of the site where soil is heavily contaminated already have been covered by a cap to prevent contaminants from spreading, and the EPA's proposed plan calls for a cap that would extend over all areas not yet covered, as well as upgrades to existing caps.

The EPA's plan proposes the demolition of five dilapidated buildings remaining on the site and the continuation, maintenance, and operation of all the previous cleanup remedies. The EPA's plan proposes land use controls such as a deed notice and other controls that would prohibit the use of the groundwater and prohibit using the site for any residential purposes.

The EPA said that it would conduct a review within five years to ensure the effectiveness of the cleanup.

The EPA estimated that this segment of the cleanup would cost $11 million.

Speaking With Len Rivkin

By: *Paul V. Majkowski*

We spoke recently with Leonard L. Rivkin, the founding partner of Rivkin Radler, about his experiences in the Agent Orange litigation.

Leonard L. Rivkin, the founding partner of Rivkin Radler, has decades of experience as national trial counsel in high profile, landmark, and precedent-setting cases.

Len served as lead counsel on the Agent Orange class action suit and was national coordinating counsel for a major asbestos manufacturer in claims against the United States and the company's government contractor defense. He represented a major insurer in one of the largest bank failures in American history. Throughout his career, he has represented insurers' interests in some of the most challenging environmental-related insurance coverage litigation across the United States.

We spoke recently with Len, who remains of counsel to Rivkin Radler, about his experiences in the Agent Orange litigation.

Paul V. Majkowski: Hi, Len. How did it come to be that you represented the Dow Chemical Company in the Agent Orange matter?

Leonard L. Rivkin: Well, I started to represent them through my relationship with the Fireman's Fund Insurance Company, which I had represented starting in the late 1960s. Dow Chemical was insured by Fireman's Fund and the case came up where Dow was having some problems with counsel defending a case that they were on. They spoke to Fireman's Fund and Fireman's recommended that Dow see me personally and talk to me, and that I might be able to help them on the case. They did and I was on the case.

This was the *Ezagui* case, where we met in my office with the attorneys in 1972. I tried the case and we won. The co-defendant was held liable for something in the six figures.

Since I started representing Dow in 1972 and I got some good results, when the Agent Orange case came out in 1978, they contacted me and that's what started it.

Mr. Majkowski: How did your representation in the Agent Orange case affect the firm?

Mr. Rivkin: In the beginning, I handled all Dow cases personally as they came in. This one, however, had the feeling that it was going to grow. As the case went on, I had help on the case from lawyers at the firm as well as paralegals. When the case was about to be tried, we had in the office, besides me, 25 lawyers, full time on the case, and over 25 paralegals all working full time.

As the case moved on, it gradually took over my night and day.

I ended up with bullet holes in my office window and, sometime shortly thereafter, Dow retained a private detective agency to advise us, staying in the office on security. It ended up with my being covered at home with these private detectives as well as having the file room doors in our office locked by the detective agency. The firm continued on at its own pace but my team was covered full time during the pendency of the case.

Mr. Majkowski: Prior to the Agent Orange cases, were you previously involved in representing chemical manufacturers in toxic tort class actions?

Mr. Rivkin: Other than some minor cases, I have no present memory of handling a chemical manufacturing or any toxic tort case before Agent Orange with one exception. The exception was a natural gas tank explosion in Staten Island in 1973 where 40 men were killed when the gas tank collapsed on them as they were doing repair work on the tank.

Dow had the "non-burning" insulation in the tank which words "non-burning" were, in fact, printed on the insulation. There were a number of other defendants and Dow asked me to represent them and after having done all of my detective work and research, I felt very sincerely that Dow's part had nothing to do with the explosion.

We ultimately settled the case with Dow paying approximately 11 percent of the gross settlement. The client was thrilled and this, of course, preceded their assigning me to Agent Orange.

Mr. Majkowski: Did you have any trepidation about taking on the Agent Orange litigation?

Mr. Rivkin: By trepidation I assume you mean my concern on the effect on my life or limb. The answer is yes. As I mentioned earlier, I had bullet holes in my office window. I had bomb threats and death threats. Bullet proof vests were assigned to the team of the eight or nine lawyers who attended the case in court. Security guards were posted at my home and at the office. That's basically it – with one exception.

One day, when we were meeting with the security people, they said that the attorneys who will try or will, in fact, be in court with the trial, could they please identify themselves because they would be given bullet proof vests and would they please stand up so they could be noticed. They had their names taken and were noticed by the security agents and every lawyer in the room stood up.

Mr. Majkowski: What for you was the most daunting aspect of the case and how did you overcome it?

Mr. Rivkin: It was a case where veterans of the wars were the plaintiffs, and you're right in asking me that question. Frankly, as a combat veteran in World War II, with a Silver Star and two Purple Hearts, what would you say to that?

I wanted to stay on it and accept it and I told the client this and, after 10 years of having represented them in various matters, they invited me out to study the chemistry of the Agent Orange case and various products with them in their offices and laboratories in Michigan. And I felt very strongly that the Agent Orange products sold to the government did not cause or contribute to the veterans' injuries.

So I took the case.

Maybe the litigator in me would have taken it anyway if Dow's position caused a little doubt but fortunately I did not have to make that choice because their product left no doubt in my mind, scientifically as much as I could handle it and questioned it.

I repeat: Their product scientifically and otherwise could not have contributed to cause any injury or death to combat veterans.

Mr. Majkowski: Amplifying a little bit about what you just said and about more of the nuts and bolts of the case, how did you learn the science?

Mr. Rivkin: How did I learn the science? Ninety percent of me learning the science was me being educated by intelligent people from Dow Chemical in Michigan. I really think I learned a lot about it there. Additionally, heavy science was involved in the Staten Island explosion case where the tank collapsed and 40 workers were killed in 1973. At that time, I got my first opening to what science was all about.

Mr. Majkowski: What are your views on best practices concerning how to represent a client in a high profile media driven case like Agent Orange?

Mr. Rivkin: I would say "preparation, preparation, preparation." Lawsuits cannot be handled in an intelligent matter unless every facet of it involves detailed preparation with support staff, visits with the clients, visits with the scientists, reading scientific journals, and, in any way possible, reviewing matters with detective agencies on the case as well.

Also, I would add to that, intense preparation, that you should keep in mind that motion practice is in many ways vital, in my opinion, and was the most important way in the Agent Orange case to educate the judge.

Mr. Majkowski: Tell us about Judge Weinstein, the "Dean of Mass Torts."

Mr. Rivkin: Judge Weinstein was and is a mover and shaker. He is, as your question poses, really the Dean of Mass Torts. The bottom line on Judge Weinstein in the Agent Orange case was that I sincerely believe the case would not have settled without his involvement. His reputation as a mover and shaker applied to that case like no other judge I know in having tried cases over all the years before many judges.

As far as my client in the Agent Orange case, they were very pleased with Judge Weinstein's work and involvement, especially since we supplied (by "we," I mean "Dow") 31 percent of the Agent Orange sold to the government and, in the settlement, we paid 19.5 percent of the entire package.

Mr. Majkowski: Agent Orange often is thought of as the seminal mass tort case, so what advice would you have for the lawyer representing the next Agent Orange torts case?

Mr. Rivkin: By lawyer, you refer to defense attorneys?

Mr. Majkowski: Yes.

Mr. Rivkin: I think it is vital to have a support staff that you have confidence in. I will give you one example in the Agent Orange case about how vital it was: I was reading an article about Agent Orange in one of the scientific magazines when I came across a review of a committee that met in London where one of the scientists in the committee discussed in detail the knowledge of 2,4,5-T and mentioned the fact that through these particular scientists at the meeting, our government people at the meeting were given evidence of the fact that 2,4,5-T in Dow's chemical was limited to below 20 percent. This proved vital for our cause because it indicated that the government knew all about Agent Orange and Dow's product before they ordered the product.

The way in which we got the details on this was after I read the article, I called one of my support staff and asked them to please travel to London and contact the scientist that reviewed this at the meeting and see what you can come up with. The man I sent – Dr. Stanley Pierce – happened to be a lawyer and a scientist and he came back with the fact that the scientists I referred to before would cooperate fully with Dow in defense of this matter on that point and would be available as witnesses when we started the trial.

Mr. Majkowski: What you're saying is that you have to do the leg work.

Mr. Rivkin: The leg work, the reviews, the studies, the staying up nights is an absolute necessity.

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