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By: Thierry R. Montoya, Esq.

Article One

Dredging and Filling of Wetlands Deemed an "Occurrence" Under a Contractor's Commercial General Liability Policies (Case No. 1:16CV648, N.D. OH. March 16, 2017)

Plaintiff is an Ohio based construction company that entered into two road projects for the City of Willoughby, Ohio. Defendant, Travelers Indemnity Company ("Travelers") is an insurance company providing coverage to Plaintiff under two Commercial General Liability policies, from February 1, 2002 through February 1, 2003, and February 1, 2003 through February 1, 2014. In December 2004, the Army Corps of Engineers issued a Cease and Desist Order halting all construction on the basis that both road projects were located on protected wetlands. The United States and the State of Ohio Environmental Protection Agency (collectively the "Government") filed suit against Plaintiff in 2011alleging violations of the Clean Water Act ("CWA"). Plaintiff timely tendered its defense and indemnity under the policies—alleging breach of contract and declaratory relief. Travelers denied coverage twice and when brought into this suit filed a Judgment on the Pleadings on all of Plaintiff's claims. Travelers alleged that it had no duty to defend nor indemnify under the policies as there was no "accident or fortuitous" event, therefore, there was no "occurrence" to trigger coverage. Travelers further argued that its absolute pollution exclusion in the policies forecloses any duty to defend or indemnify. The court denied Travelers' "occurrence" claims based on the sufficiency of Plaintiff's factual allegations set forth in its complaint, but granted judgment to Travelers on its absolute pollution exclusion.

Background

Regarding the "occurrence" claim, Travelers alleged that it had no duty to defend nor indemnify Plaintiff under the policies as there was no accident or fortuitous event. Rather, Travelers alleged, the Government's claims against Plaintiff stemmed from its affirmative conduct and decision, including Plaintiff's failure to obtain the required CWA section 404 permits before commencing construction and its decision to discharge dredged and fill material into the waterways. Further on this point, Travelers alleged that the Government was not seeking damages against Plaintiff, rather only statutory penalties and injunctive relief, thereby negating Plaintiff's ability to show that there damage to the property in order to trigger coverage.

Contrastingly, Plaintiff alleged that environmental damage constituted property damage under the law and under the allegations of the complaint—which the court was bound to construe and true under the laws governing its review on a Judgment on the Pleadings. Furthermore, Plaintiff argued that where there was an "occurrence" under the policy involved questions of intent to cause an injury—question of fact unsuited for resolution on a Judgment on the Pleadings. Finally, Plaintiff alleged that the pollution exclusion did not apply because dredged and fill material did not meet the policy's definition of "pollutant."

Court's Rationale

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007). According to the Sixth Circuit, the standard set forth in

Thierry R. Montoya represents clients in all matters involving air, soil, and water.

He has achieved successful results for both public and private sector clients in a variety of complex environmental, land use, construction, and eminent domain matters.

Thierry's practice includes environmental litigation under CERCLA, RCRA, the Clean Water Act, Proposition 65, and state and federal and common law.

Thierry R. Montoya, Esq.
AlvaradoSmith
1 MacArthur Place,
Suite 200
Santa Ana, CA 92707
714-852-6800
tmontoya@alvaradosmith.com

www.AlvaradoSmith.com

Article One (cont.)

Dredging and Filling of Wetlands Deemed an "Occurrence" Under a Contractor's Commercial General Liability Policies

Twombly "obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible." Weisbarth v. Geauga Park Dist*., 499 F.3d 538, 541 (6th Cir. 2007)-quoting *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2nd Cir. 2007). For instance, "*Iqbal* interpreted *Twombly* to require more concrete allegations only in those instances in which the complaint, on its face, does not otherwise set forth a plausible claim for relief." *Weisbarth*, 499 F.3d at 542.

The parties did not dispute that Ohio law governed the interpretation of relevant contracts for insurance. The policies were written for an Ohio contractor, and the work occurred on property located in Ohio.

Occurrence

Ohio law holds that the allegations as set forth in the complaint against the insured determines the scope of the insurer's duties. *Ohio Gov't. Risk Mgt. Plan v. Harrison*, 155 Ohio St.3d 241, 246 (2007). "The insurer must defend the insured in an action when the allegations states a claim that potentially or arguably falls within the liability insurance coverage. However, an insurer need not defend any action or claims within the complaint when all the claims are clearly and indisputably outside the contracted coverage." *Id.*

The Governments' complaints allege that Plaintiff discharged pollutants into waters of the United States in the City of Willoughby, without authorization from the Corps and in violation of the CWA. Specifically, these complaints allege that Plaintiff constructed roads and sewers at the projects from August 2001 through December 2004 and "discharged dredged or fill material from point sources into water of the United States without a permit." *Id.*

Under Plaintiff's policies, it was insured for "property damage" caused by an "occurrence. Property damage was defined as:

"a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it."

Occurrence meant accidental, including continuous or repeated exposure to substantially the same general harmful conditions.

Plaintiff argued that it was a factual issue whether its dredging and filling of wetlands was an occurrence under the policies because it contended that the resulting contamination was accidental—thereby negating the court's ability to grant a judgment on the pleadings as all facts in the complaint must be construed as true.

The policies do not define "accidental," granting the court, under Ohio law, the right to apply the term's ordinary meaning. Under Ohio law, "accident" is defined as "unintended and unexpected happenings." *Owens-Illinois, Inc. v. Aetna Cas. and Sur. Co*., 990 Fs2d 865, 872 (6th Cir. 1993).

Whether Plaintiff's acts were accidental or intentional will determine whether there was an occurrence under the policies—thereby triggering coverage. The Sixth Circuit held that whether an insured acts were expected or intended are issues of fact. *Lumbermens Mut. Cas. Co. v. S W Indus., Inc*., 39 F.3d 1324, 1330 (6th Cir. 1994). "Whether [Plaintiff's] discharge of dredged and fill material into protected waters without a permit was an "occurrence" is a factual issue and the Court cannot hold as a matter of law that the [Plaintiff's] actions are clearly and indisputably outside the contracted coverage." *Id.,* internal citations omitted.

Property Damage

The Government's complaints sought statutory penalties and injunctive relief for the damages to the wetlands. As Ohio courts have held, pollution constitutes property damage under similar insurance policy language. *Kipin Indus., Inc. v. Am. Universal Ins. Co.,* 41 Ohio App. 3d 228-230-31 (1987)-we hold that "property" includes "the interests of the federal and the state governments in the tangible environment and its safety." *Id*. Therefore, when the environment has been negatively impacted by pollution to an extent requiring governmental action or expenditure, or both, for the safety of the public, there is "property damage." *Id*. As such, Plaintiff has, arguably, presented a claim for property damage.

Pollution Exclusion

Plaintiff alleged that dredging and filling operations did not involve pollutants as defined under the policies. Plaintiff relied on the case of *Andersen v. Highland House Co*., 93 Ohio St. 3d 547 (2001) where the Ohio Supreme Court held that carbon monoxide emitted from a malfunctioning residential heater was not a pollutant under the policy's pollution exclusion because it was not expressly enumerated under the policy as a pollutant. The *Andersen* Court relied on the intent of the parties, finding that as commercial and residential property managers and owners—defendants were greatly concerned with deaths and injuries from carbon monoxide poisoning and considered themselves protected under the policies and it was reasonable to believe they had coverage for premises hazards. The Ohio Supreme Court citing with approval a New Jersey superior court holding that "We would be remiss if we were to simply look to the bare words of the exclusion, ignore its raison d'etre, and apply it to situations which do not remotely resemble traditional environmental contamination." *Id*., at 552.

Here, the court applied the absolute pollution exclusion as: i) there was no credible dispute that the underlying complaints were complaints of "traditional environmental contamination"; ii) Plaintiff could not plausibly argue that under the definition of dredge and fill in both the CWA and Ohio statute that such are anything but "contaminants" under the plain language of the policies. *Id*.

Conclusion

Plaintiff exercised skill and sound reasoning to avoid losing coverage on occurrence and property damage grounds. However, the absolute pollution exclusion could not be defeated as 33 U.S.C.A section 1362(6) defines dredge and fill as pollutants. Moreover, section 1362(19) further defines "pollution" as "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of the water." *Id*.

For questions, comments or further information please contact Thierry R. Montoya at:

714.852.6800
tmontoya@alvaradosmith.com
www.AlvaradoSmith.com

Article Two

EPA's Interpretation on How to Exercise its "Residual Designation Authority" ("RDA") Was Controlling

Conservation Law Foundation, Inc. & Charles River Watershed Association, Inc. v. United States Environmental Protection Agency
(Case No. 16-10397-RGS, D. Mass. March 24, 2017)

Plaintiffs filed a citizen suit under the provisions of the Clean Water Act [33 U.S.C § 1365] alleging that EPA failed under 40 C.F.R. § 124.52 to issued NPDES permit applications to various commercial, industrial, institutional, and high-density residential stormwater point sources along the Charles River ("River"). The gravamen of Plaintiffs' argument was that EPA, in approving the Charles River Total Maximum Daily Loads ("TMDLs")—made an implicit determination that under its RDA that stormwater dischargers along the River must obtain NPDES permits. EPA filed a motion to dismiss Plaintiffs' complaint alleging that it had not "substantively determined" that NPDES permit triggers were met by simply statutorily mandating creation of a TMDL; EPA alleged that RDA must be exercised separately from the TMDL process. The district court granted EPA's motion to dismiss holding that "[n]othing in the plain text of the CWA or regulations, however, precludes the EPA's [interpretation of how the RDA is to be exercised]." *Id*.

Background

CWA 303(d) requires states to identify waters within their boundaries for which technology-based effluent limits and other pollution control requirements "are not stringent enough to implement any water quality standards." States must, therefore, identify those waters failing to meet water quality standards, in spite of full compliance by dischargers with all conditions and limitations in NPDES permits, and all applicable nonpoint source controls. States must prioritize their impaired waters based on the severity of the pollution and the type and use of the waterway. The states' lists of impairs waters, also called "waters quality limited segments," are commonly referred to as 303(d) lists.

After identifying and ranking water quality limited segments, states must prepare a TMDL for each pollutant impairing each segment. A TMDL is a calculation of the maximum quantity, or load, of a pollutant that may be added to a water body from all sources, including natural background sources, without exceeding the applicable water quality criteria for that pollutant. States must submit their §303(d) lists and TMDLs to EPA every two years (states were exempted from this requirement in 2000), which then has 30 days to approve or disapprove them. If EPA disapproves a state's submittal, EPA must prepare its own list and/or TMDLs for the state's waters within 30 days. States must incorporate approved TMDLs into their water quality management plans.

At issue are three TMDLs approved by EPA for the River. All three TMDLs include stormwater flows in their wasteload allocations for point and nonpoint sources. The first and second TMDL addressed "nutrient" pollution to the River—dividing the River into two stretches, the upper/middle River, and the lower River. In both of these stretches, nutrient pollution, predominately from phosphorus, fostered the abundant production of plant life, toxic algae, degrading water quality and deterring recreational activities.

The third TMDL addressed pathogen pollution, including bacteria such as fecal coliform and other pathogens endangering the health of persons drinking or are exposed to the polluted water.

Court's Rationale

The jurisdictional issue for the court turns on the contextual meaning of the word "determines" as it appears in the RDA. 49 C.F.R. § 122.26 (a)(9)(i)(C), (D). Plaintiffs' complaint alleged that EPA, in approving the TMDLs at issue, made the necessary determinations. Plaintiffs explained that the process of approving a TMDL necessarily involved reviewing and approving the wasteload allocations for point and nonpoint sources, respectively. "Thus, the argument goes, the TMDLs, with their underlying wasteload allocations and targeted reductions in contaminates, amount to a determination that unpermitted stormwater discharges are contributing to violations of water quality standards. If follows, Plaintiffs asserted, that the EPA must carry out its duty to notify the discharger in writing of its determination and send [a permit] application form with the notice." *Id.*, internal citations omitted, citing to 40 C.F.R. § 124.52(b).

EPA countered by attacking Plaintiffs' theory that a nondiscretionary duty logically attaches if the TMDLs constitute determinations under the RDA. Although EPA did acknowledge that the TMDL process resulted in the identification of sources of pollution for the relevant sections of the River, and further still, that a TMDL could provide a basis on which EPA could exercise its RDA—that exercise, however, in EPA's opinion, would have required an "express determination" resulting from an "affirmative exercise[]" of the RDA that is independent of the TMDL process. *Id*.

(Cont.)

Article Two (cont.)

EPA's Interpretation on How to Exercise its "Residual Designation Authority" ("RDA") Was Controlling

When analyzing an agency's opinion as to the interpretation of its own regulations, an agency cannot take a position which contradicts the plain language of a regulation, [*United State v. Coal for Buzzards Bay*, 644 F.3d 26, 33 (1st Cir. 2011)], an agency's interpretation of its own regulations is generally "controlling unless plainly erroneous or inconsistent with the regulation," [*Auer v. Robbins*, 519 U.S. 452, 461 (1997), quoting from *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989). This law applies even though the agency interpretation appears for the first time in a legal brief—as presently occurred. *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208-09 (2011).

Plaintiffs cited to the language of the RDA to argue that its specific use of term "determines" means that NPDES stormwater permits are required "whenever EPA *substantively* determines that the permit triggers are met, regardless of the process leading that that conclusion." *Id*. As support, Plaintiffs rely on the fact that the regulations and the CWA use the word "determines," rather than the phrase, "makes a determination," which Plaintiffs agree would require an independent process for exercising the RDA. *Id*. However, the court did not find that either the plain text of the CWA or its regulations precluded EPA's interpretation that the imposition of the RDA requires and independent process.

Plaintiffs admitted that neither the CWA nor its regulations spoke on how the RDA was to be exercised. "Nor is their reading of 'determines' so plainly obvious when the regulation is read, as it must be, as a whole. *Id*. Although there could be some merit to Plaintiffs argument in some context, the court held that "any interpretive weight given to that choice is outweighed by the sole reference to the TMDL procedure in the RDA. 40 C.F.R. § 122.26(a)(9)(i)(C) provides that an RDA determination may be based on "wasteload allocations that are part of [TMDLs] that address the pollutant[s] of concern," clearly implying that the RDA can be exercised separately from the TMDL. *Id*., internal quotations omitted. The result being that, at best, Plaintiffs argued that the meaning of "determines" was ambiguous—rendering EPA's interpretation of the terms, reasonable as it was, as the "tiebreaker" for the court. *Visiting Nurse Ass'n Gregoria Auffant, Inc. v. Thompson*, 447 F.3d 68, 72-73 (1st Cir. 2006).

In addition to the textual language, case precedent holds that TMDLs, standing alone, do not create legally enforceable obligations—although on other CWA questions. *See, Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 792 F.3d 281, 291, n.4 (3rd Cir. 2015). This approach makes sense as the purpose of a TMDL is to evaluate sources of water pollution, which does not lead to the conclusion that the analysis underlying the TMDL is, itself, a determination under the RDA.

EPA's interpretation of the River TMDL's enforces the court's opinion. Here, the TMDLs noted that stormwater runoff leads to River pollution, but they did not state that NPDES permits for stormwater discharges were necessary in order to meet water quality targets, nor did they identify a particular category or list of point sources for which a permit would be required. That analysis was reserved for a separate "determination" under EPA's RDA authority.

Conclusion

Here's what the relevant EPA regulations say. They require an NPDES permit when:

"(C) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that storm water controls are needed for the discharge based on wasteload allocations that are part of "total maximum daily loads" (TMDLs) that address the pollutant(s) of concern; or

(D) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States."

About Thierry R. Montoya

Thierry R. Montoya has achieved successful results for both public and private sector clients in a variety of complex environmental, land use, construction, and eminent domain matters. Thierry's practice includes environmental litigation under CERCLA, RCRA, the Clean Water Act, Proposition 65, and state and federal and common law.

Thierry also represents clients in natural resources issues involving water, oil and gas interests, air and water permitting and violations including NPDES and Title V.

On the land use side, Thierry provides permitting, zoning, CEQA/NEPA, and eminent domain expertise. Thierry also represents public and private sector clients in construction biddings, contracting, and litigation.

Article Three

Plaintiff's Complaint Properly Names "Phosphorus" and "Ammonia as Nitrogen" as "Hazardous Substances" Under CERCLA

Citizens Development Corporation, Inc. v. County of San Diego
(Case No: 12CV0334 GPC KSC, S.D. California, March 23, 2017)

This case arises from the alleged contamination of the surface water and groundwater in and around Lake San Marcos. The Regional Water Quality Control Board ("Board") issued an Investigative Order alleging that Citizens Development Corporation ("Plaintiff") had released pollutants into the Lake. In response, Plaintiff filed this action against the Defendants, alleging that each was responsible for the discharges that contaminated the Lake and surrounding waters. At issue in this ruling is Defendant, Hollandia Dairy's ("Hollandia") Motion for Judgment on the Pleadings alleging that all claims alleged against it, Plaintiff's claims and Defendants' cross-claims, have failed to state valid claims under CERCLA because they have not plead the release of any actionable "hazardous substances." The court rejected the argument holding that Plaintiff's pleadings, upon which all cross-claims are based, indentifies phosphorus, ammonia as nitrogen, and nutrients found in fertilizers, pesticides, and sewage as CERCLA-qualifying "hazardous substances."

Background

Plaintiff alleges that the Lake has been contaminated by discharges stemming from a variety of sources, including, but not limited to, improper waste disposal, poor or unmanaged landscaping practices, sanitary sewer overflows, septic tank failures, groundwater infiltration, the presence and operation of "the dam," and other "non-point sources discharges," caused by recent storm events and dry weather conditions. These discharges are alleged to have been generated by the real property that is located within the San Marcos Creek watershed and the upgradient of the Lake, which includes the farmland owned and operated by Hollandia Dairy.

Based on these allegations, Plaintiff's complaint alleged causes of action for: i) CERCLA; ii) declaratory relief under CERCLA; iii) continuing nuisance; iv) continuing trespass; v) equitable indemnity; vi) declaratory relief under California state law; and vii) injunctive relief under RCRA as to Defendant Vallecitos only. *Id*. The premise of Plaintiff's complaint was that Hollandia, and the other Defendants, contaminated the Lake by releasing known "hazardous substances" into its watershed. Plaintiff identified such "hazardous substances," as "nitrogen, phosphorus, and nutrients found in fertilizers, pesticides and sewage." *Id*.

Responding Defendants asserted cross-claims against each other, including: i) contribution under CERCLA; and ii) indemnity, offset, and contribution under state law. Hollandia's cross-claims were premised "upon the same events, subject matter, and claims made by [Plaintiff] in its complaint against Hollandia." Id.

Hollandia's motion for judgment on the pleadings challenges all of the claims and cross-claims made against it.

Court's Rationale

When deciding a Rule 12(c) motion, "the allegations of the non-moving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false." *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc*., 896 F.2d 1542, 1550 (9th Cir. 1989). The gravamen of Hollandia's motion was that all of the opposing parties failed to state valid claims under CERCLA as they had not plead the release of any actionable "hazardous substances." *Id*.

CERCLA section 102 defines "hazardous substances," in relevant part, as "*any* element, compound, mixture, solution or substance designated pursuant to section 9602 of this title." 42 U.S.C. sections 9601(14) (emphasis added). Section 9602, in turn, delegates the determination of "hazardous substances" to the EPA. *Id*. at section 9602. The EPA has designated "[t]he elements and compounds and hazardous wastes appearing in table 302.4 as hazardous substances under section 102(a) of the Act [CERCLA]." 40 C.F.R section 302.4.

Plaintiff's complaint identifies phosphorus, ammonia as nitrogen, nutrients found in fertilizers, pesticides, and sewage as qualifying "hazardous substances." *Id*. Both "phosphorus" and "ammonia" are listed as "hazardous substances" under Table 302.4. Plaintiff has, therefore, pled "hazardous substances" for purposes of CERCLA.

In retort, Hollandia alleged that none of the opposing parties plead actionable "hazardous substances" because the Board's Investigation Order addresses "[n]utrients not CERCLA 'hazardous substances', and because the Board issued the Investigation Order for '*nutrient impairment*' by nitrates and phosphates in [the] Creek and Lake" not for "phosphorus: and "ammonia." *Id*. "Stated differently, Hollandia is arguing that the Court should disregard [Plaintiff's] allegations because Hollandia was not responsible for the release of 'phosphorus' and 'ammonia,' but rather for other non-hazardous materials." *Id*.

There were two obvious flaws in Hollandia's argument. First, Hollandia misread the Investigative Order. Contrary to Hollandia's position, there are no contradictory allegations between Plaintiff's complaint and the Investigative Order. The Investigative Order states:

> "…The Lake is listed as impaired in that the water quality does not attain beneficial uses of the Lake designated in the San Diego Water Board's Water Quality Control Plan due to *ammonia as nitrogen, phosphorus and nutrients*. These excessive nutrients contribute to eutrophiction problems such as periodic algal blooms, confirmed presence of cyanobacteria toxins, and occasional fish kills at the Lake."

That Investigative Order singles out "ammonia as nitrogen" and "phosphorus" as pollutants—undermining Hollandia's argument that "nutrients" formed the exclusive basis for the Investigative Order.

Article Three (cont.)

Plaintiff's Complaint Properly Names "Phosphorus" and "Ammonia as Nitrogen" as "Hazardous Substances" Under CERCLA

The second flaw in Hollandia's argument was that is amounted to an improper factual challenge on the pleadings. "Hollandia avers that it could not have caused the release of 'phosphorus' or 'ammonia as nitrogen; into the Lake, because cows produce nitrates, phosphates, and 'naturally occurring ammonia' and none of those substances are listed as 'hazardous substances' under CERCLA…The pleadings, however, do not identify 'phosphates' and 'nitrates' and 'naturally occurring ammonia' as the 'hazardous substances' at issue…The pleadings also do not identify cow manure as the source of Hollandia's contamination. Instead, the pleadings simply claim that Hollandia, through the use of its land, released 'phosphorus' and 'ammonia as nitrogen' into the Lake." *Id*.

At this point in the case, it "…is simply not proper to use a Rule 12 motion to challenge factual matter in the complaint to proffer competing factual allegations. The Court's sole focus is on the sufficiency of the pleadings, not whether the pleadings will ultimately prove to be true." *Id*.

Conclusion

Hollandia also argued the absurdity in concluding that "nitrogen, phosphorus, and nutrients" as "hazardous substances" because to do so would "expose everyone in the watershed [of the Lake] for fertilizer runoff, wild and domesticated animal droppings and plant material." *Id*. Hollandia concluded that such an interpretation would render the "entire planet [into] a Superfund site since all life forms excrete waste." *Id*. Such arguments are no longer tenable under *A&W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1110 (9th Cir. 1998), which rejected the "absurdity" of reading CERCLA liability too broadly. This decision held:

> "Read as the EPA suggests, CERCLA seems to give the agency carte blanche to hold liable anyone who disposes of just about anything. Drop an old nickel that actually contains nickel? A CERCLA violation. Throw out an old lemon" It's full of citric acid, another hazardous substance. It's not surprising that an agency would urge an interpretation which gives it such broad discretion. Perhaps more surprisingly is that CERCLA leaves us little choice but to agree…" *Id*.

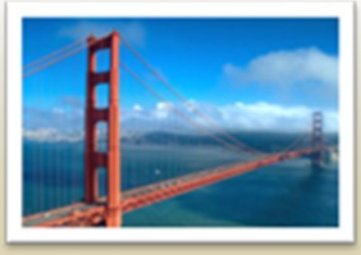
The court then went on to conclude that section 9601's list of "hazardous substances" did contain any "minimum level requirement" because the plain language of the statute left no room for limiting interpretation. *Id*. To the extent, therefore, that a substance appears in Table 302.4, that fact is dispositive on whether there is a "hazardous substance' in issue.

About AlvaradoSmith

AlvaradoSmith is experienced in all facets of public and private project development and implementation, environmental review and compliance, and natural resource law. We represent public utilities, public agencies, private developers, commercial property owners, and private landowners in major facilities and infrastructure development projects, land acquisition, pipeline development, soil and groundwater cleanups, and renewable energy projects. We know the ins and outs of environmental and natural resource law compliance.

Los Angeles
633 W. 5th Street
Suite 1100
Los Angeles, CA 90071
Tel: (213) 229-2400
Fax: (213) 229-2499

Orange County
1 MacArthur Place
Suite 200
Santa Ana, CA 92707
Tel: (714) 852-6800
Fax: (714) 852-6899



San Francisco
235 Pine Street
Suite 1200
San Francisco, CA 94104
Tel: (415) 624-8665
Fax: (415) 391-1751