Groundwater Contamination and its Effects on a Small Municipality: A Case Study of Lindsay Olive Growers and the City of Lindsay

INTRODUCTION

For years, Lindsay Olive Growers, Inc. (LOG), located in the small Central Valley town of Lindsay, California, operated one of the world's largest olive processing plants.[1] Founded in 1916, the cooperative consisted of 311 local olive growers.[2] The city of Lindsay garnered international prominence for its position in the olive market, becoming a "one company" town. In the late 1980's, however, several problems combined to bring about the eventual demise of LOG. These problems included heavy competition from various domestic labels and the 1990 crop freeze that destroyed most of the Central Valley's produce, thus increasing the influx of olives from overseas.[3]

On September 18, 1992, LOG went out of business, rendering over 400 Lindsay citizens unemployed.[4] Unfortunately, LOG's legacy of industrial waste keeps its memory alive in the minds of Lindsay citizens and state officials.

Since the late 1960's, lined evaporative ponds had been used to contain the salty discharge that resulted from olive processing.[5] Despite the presence of single-ply liners, the ponds leaked brine water into the soil, contaminating the underground water supply. In 1986 and 1987, the

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[1] *California City Endures a Series of Misfortunes*, N.Y. TIMES, Oct. 18, 1992, § 1, at 42.

[2] *Id.*

[3] Henry Schacht, *2 Big California Olive Co-ops are Merging*, S.F. CHRON., Nov. 25, 1991, at B2.

[4] *Lindsay Olive Finds a Buyer, but Town Still in Trouble*, S.F. CHRON., Sept. 19, 1992, at B1.

[5] Central Valley Regional Water Quality Control Bd., *Staff Report, City of Lindsay Industrial Wastewater Facility, Tulare County* (undated) (recommending adoption of a cease and desist order) (referred to in Notice of Public Hearing Scheduled for June 28, 1991 (June 7, 1991)) [hearinafter *Staff Report*].

first lawsuits[6] were filed by nearby landowners against the city of Lindsay and LOG for water pollution.

This comment will consider municipal liability for the improper disposal of industrial wastewater originally created by a third party. A case study of the groundwater contamination caused by Lindsay's inadequate disposal of LOG's wastewater will be reviewed to set the problem in context. The role insurance companies and state agencies play in this expensive and environmentally devastating situation will also be explored.

I. BACKGROUND

Water contamination is defined as

> an impairment of the quality of the waters of the state by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease. It includes any equivalent effect resulting from the disposal of waste, whether or not the waters of the state are affected.[7]

The protection and maintenance of water quality falls under the jurisdiction of the State Water Resources Control Board,[8] a division of the California Environmental Protection Agency (Cal/EPA). This five-member board is charged with implementing state policy for water quality in accordance with water quality law.[9]

Implementation of California Water Code section 13000 at the local level is governed by water quality control boards. There are nine regions in California,[10] each with a regional water quality control board (RWQCB) appointed by the governor.[11] The city of Lindsay and LOG are located within the territorial jurisdiction of the Central Valley Re-

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[6] Halopoff v. City of Lindsay, No. 129123 (Super. Ct. Tulare County filed July 30, 1987); Harshaw v. City of Lindsay, No. 126778 (Super. Ct. Tulare County filed Feb. 17, 1987); Primer Ag, Inc. v. City of Lindsay, No. 125530 (Super. Ct. Tulare County filed Nov. 12, 1986); F&L Farm Co. v. City of Lindsay, No. 122572 (Super. Ct. Tulare County filed Mar. 24, 1986); Pallet Repair & Recycling, Inc. v. City of Lindsay, No. 121731 (Super. Ct. Tulare County filed Jan. 20, 1986).

[7] CAL. WATER CODE § 13050(k) (West Supp. 1994).

[8] *Id.* § 13001.

[9] *Id.* § 13000 ("The Legislature finds and declares that the people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state.").

[10] *Id.* § 13200 (listing regions as North Coast, San Francisco Bay, Central Coast, Los Angeles, Santa Ana, San Diego, Central Valley, Lahontan, and Colorado River Basin).

[11] *Id.* § 13201.

gional Water Quality Control Board (CVRWQCB). Duties of the regional boards include, in part, maintaining water quality control, including the prevention and abatement of nuisance, cultivating self-policing waste disposal programs, and reviewing and classifying any currently operating waste disposal sites.[12]

The contamination incurred by Lindsay's underground water basin deeply concerns state and regional water officials. Decades of salty discharge accumulated in the aquifer has resulted in environmental damage that will be felt for years to come by Lindsay's local residents.

Lindsay is a small, rural town with a population of approximately 9,000 residents. Prior to the closure of LOG, the city of Lindsay and LOG blended almost interchangeably. Residents either worked for LOG or knew someone who did. "The town lived by a simple creed: What was good for Lindsay Olive was good for Lindsay."[13]

The close ties between the city and company slowly unraveled as it became clear that salty discharge from olive processing denigrated groundwater in the surrounding area. The friction increased when state officials took notice of the contamination and issued new requirements for waste disposal to the city.[14]

The disposal of salty discharge derived from olive processing had been a recurring problem. Prior to the 1950's, brine water was disposed of directly into ditches in the surrounding area.[15] Starting in 1951, the wastewater was pumped into unlined evaporative ponds and percolating ponds, along with domestic sewage, by order of the state of California.[16] Beginning in 1960, the state determined that the ponds were causing degradation to the groundwater, and in 1967 the city was ordered to cease and desist its operations by the CVRWQCB.[17]

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[12] *Id.* §§ 13225(a)-(b), 13226.

[13] Mark Arax, *One-Two Punch Brings a Town to Its Knees: Lindsay is Left Reeling After an Olive Firm Shuts Down. It is the Latest in a Series of Economic and Environmental Blows to Hammer the Central Valley Community,* L.A. TIMES, Oct. 1, 1992, at A3.

[14] *Waste Discharge Requirements*, CVRWQCB Res. Nos. 51-32 (May 24, 1951), 60-125 (June 23, 1960), 63-183 (July 18, 1963), 65/66-60 (Jan. 21, 1966).

[15] Interview with Paul Hager, City Attorney for the city of Lindsay, in Fresno, Cal. (May 24, 1994).

[16] *Waste Discharge Requirements*, CVRWQCB Res. No. 51-32, *supra*, note 14.

[17] *Cease and Desist Order for City of Lindsay and Lindsay Olive Growers Olive Brine Disposal Ponds, Tulare County*, CVRWQCB Cease and Desist Order No. 67-84 (Jan. 20, 1967), *rescinded by* CVRWQCB Rescind the Cease and Desist Order No. 71-331 (June 25, 1971), *replaced with Waste Discharge Requirements for City of Lindsay Industrial Brine Ponds*, CVRWQCB Order No. 71-309 (June 25, 1971), *superseded by Waste Discharge Requirements for City of Lindsay Industrial Brine*

To comply with new wastewater disposal standards, the city constructed evaporative ponds to contain the brine wastewater.[18] By 1973 the city had created about 225 acres of lined evaporative ponds[19] on its own property to receive the briny discharge. A separate sewage system pumped the wastewater into the ponds. The liners were eventually torn by rodents, however, and wastewater leaked into the underground water basin.

In 1984, new state regulations[20] required that evaporative ponds be lined with two layers of plastic along with layers of gravel and clay. The city of Lindsay protested, asserting that the ponds did not leak and the cost of such requirements prohibited their implementation. The following year, a city worker employed to maintain the ponds alerted state officials that the ponds were definitely leaking. The state tested wells in the vicinity and confirmed the existence of groundwater contamination. At that time, the state took no action against either the city of Lindsay or LOG, hoping that the two entities, with their historically close ties, would work out a cleanup arrangement.

Three years later, the CVRWQCB issued new waste discharge requirements to the city of Lindsay.[21] Findings of groundwater contamination were noted, followed by cleanup orders and new requirements for operation of the waste disposal facility.

While the city of Lindsay and LOG worked with the state on implementing these new requirements, LOG was experiencing considerable financial problems. The company lost over $18 million during the 1989-1991 years[22] due to increasing domestic and foreign label competition and the 1990 crop freeze. On September 18, 1992, LOG sold its label and inventory to Bell-Carter Foods, a Sacramento-based firm.

In October 1992, the CVRWQCB ordered the city and LOG to begin a comprehensive program to close the existing ponds due to noncompliance with regulations, provide a fresh water supply to residents,

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Ponds, CVRWQCB Order No. 83-004 (Jan. 28 1983).

[18] CVRWQCB Staff Report, *supra* note 5.

[19] CVRWQCB Cleanup and Abatement Order No. 92-708 (undated; effective Sept. 21, 1992), *modified by* Cleanup and Abatement Order, Special Order No. 94-280 (Sept. 16, 1994).

[20] CAL. CODE REGS. tit. 23, §§ 2510-2601 (1994) (also referred to as subchapter 15).

[21] *Waste Discharge Requirements*, CVRWQCB Res. No. 87-054 (Mar. 27, 1987). Coincidentally, the CVRWQCB denied the city of Lindsay's and LOG's request that they be exempt from the provisions of subchapter 15. CVRWQCB Res. No. 87-053 (Mar. 27, 1987).

[22] *See Lindsay Olive Finds a Buyer, but Town Still in Trouble*, *supra* note 4.

provide a closure plan that would protect against further contamination of groundwater, determine the extent of damage the brine water had already caused, and provide a method of cleanup and remediation of the regional groundwater.[23]

The closure of LOG devastated the surrounding area. An estimated cleanup bill of $30 million has stunned the city of Lindsay, which operates on an annual budget of $1 million. The situation worsened when LOG formally declared bankruptcy on February 5, 1993.[24]

Mandates from the CVRWQCB are still in effect, and a cleanup effort is expected despite the closure of LOG. However, no effort has been made because the city is still in litigation with several landowners over the pollution of the water supply.

II. LITIGATION

In late 1986, lawsuits were filed against LOG and Lindsay for nuisance, trespass, and negligence, and against the city of Lindsay for inverse condemnation. The initial plaintiffs consisted of five separate landowners.[25] All five had land in close proximity to the evaporative ponds. Each plaintiff claimed that his water had been clean at the time of acquisition of property, that subsequent actions by the defendants had polluted the water supply, and that crop damage had resulted.

After a four-and-one-half-month trial, a jury rendered verdicts in favor of three of the plaintiffs in the aggregate amount of $2.6 million.[26] The city of Lindsay was found solely liable for the judgment, as LOG successfully argued at trial that contracts between LOG and Lindsay concerning maintenance of the ponds had left the city responsible for any damage caused by improper or inadequate disposal techniques.

The city of Lindsay is appealing the judgment,[27] and the case is currently under review by California's Fifth District Court of Appeal. The plaintiffs who won the judgment are counter-appealing,[28] arguing that the award of damages should be doubled. Moreover, Lindsay is cur-

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[23] CVRWQCB Cleanup and Abatement Order No. 92-708, *supra* note 19.

[24] *In re* Lindsay Olive Growers, Inc., No. 93-10616-A-11-F (Bankr. E.D. Cal. filed Feb. 5, 1993).

[25] F&L Farm Co. v. City of Lindsay, No. F016555 (Cal. Ct. App. 5th filed Sept. 9, 1991).

[26] *Id.*

[27] *Id.*

[28] *Id.*

rently suing LOG for indemnification,[29] asserting that the city followed guidelines for disposal set by LOG engineers, and that equity demands LOG pay its share of any damage caused by improper disposal of salty discharge. That case is awaiting trial.

III. LIABILITY

While lawsuits are still being conducted, and state mandates are still in effect, groundwater contamination caused by the inadequate disposal methods remains. The practical effect of this environmental degradation is inaction on the part of all players involved. Eight years after the first lawsuits were filed, two years after the state issued its last cleanup mandate, the ponds still sit untouched, empty now, with enormous damage lying just below in the aquifer. The remaining issue is liability: who should pay for the cleanup and the judgments?

A. Municipal Liability

The collection, treatment and disposal of city sewage falls within municipal jurisdiction.[30] Cities are therefore free to impose various restrictions and conditions upon contributors of large quantities of industrial waste to the city sewer system.

California Government Code section 54739, amended in 1991, provides that a local agency[31] may require any of the following from dischargers of industrial waste: (1) pretreatment of the waste prior to its entry into the system; (2) prevention of industrial waste entering the sewage system; and (3) payment of excess costs to the local agency for supplementary treatment plants considered necessary due to the entry of such industrial waste to the collection system.[32] Violation of section 54739 can result in the levying of stiff monetary fines.[33]

As a result of section 54739, other government codes and anti-pollu-

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[29] City of Lindsay v. Lindsay Olive Growers, No. 92-155672 (Super. Ct. Tulare County filed Oct. 20, 1992).

[30] City of Glendale v. Trundsen, 308 P.2d 1, 4 (Cal. 1957); Loop Lumber Co. v. Van Loben Sels, 159 P. 600, 602 (Cal. 1916); Cramer v. City of San Diego, 300 P.2d 235, 238 (Cal. App. 1958).

[31] CAL. GOV'T CODE § 54725 (West Supp. 1994) (defining a local agency as "any city, county, utility district, public utility district, sanitary district, county sanitation district, or any municipal or public corporation or district authorized to acquire, construct, own, or operate a sanitation system, a sewer system, or both.").

[32] *Id.* § 54739.

[33] *Id.* § 54740(a) ("Any person who violates . . Section 54739 may be civilly liable in a sum of not to exceed twenty-five thousand ($25,000) a day for each violation.").

tion ordinances, cities have engaged in various methods to control and/or diffuse the amount of industrial waste taken in by their sewage facilities. In the county of Los Angeles, for example, a surcharge is imposed upon nonresidential users of sewer systems that discharge large volumes of industrial waste.[34] Moreover, a permit is required for such discharge.[35]

Case law supports the notion of municipal control of intake of industrial waste into the sewer system.[36] A local agency's need to maintain treatment facilities in compliance with state law has underscored judicial endorsement of municipal regulation for industrial wastewater discharge.

Dischargers who violate these regulations are liable not only to the municipality, but also to any party damaged by the industrial waste. Even where no violation of an ordinance was found, courts have assigned liability to the original source of waste, rather than to the municipality responsible for its disposal, where a third party has successfully proven damage.

In *Klassen v. Central Kansas Cooperative Creamery Association*,[37] plaintiff landowner sued defendant company for polluting his underground water source, resulting in the death of his livestock. Defendant answered that wastewater from the plant was discharged into the city's sewer system pursuant to city approval. It was discovered that groundwater pollution had occurred because the city's sewer system was inadequate to contain defendant's discharge.

Defendant argued that although it emptied its waste products into the sewer system, it had no control over the city's operation of that system, and therefore could not be held liable if wastewater leaked from the sewer and caused damage.

The *Klassen* court rejected the argument, citing the trial court's finding that "the fact that the waste matter reached plaintiff's premises through the city's sewer system was no defense"[38] "It was the duty of

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[34] County Sanitation Districts of Los Angeles County, an agency which functions through joint exercise of powers agreements, oversees the operations of 26 county sanitation districts, each of which has adopted, in essentially identical form pursuant to CAL. GOV'T CODE §§ 54725-54740, a statute referred to as the "Wastewater Ordinance." The surcharge provisions are contained in WASTEWATER ORDINANCE §§ 409-410.

[35] *See* WASTEWATER ORDINANCE, *supra* note 34, § 401.

[36] *See, e.g.*, Rauland Div., Zenith Radio Corp. v. Metropolitan Sanitary Dist. of Greater Chicago, 293 N.E.2d 432 (Ill. 1973).

[37] 165 P.2d 601 (Kan. 1946).

[38] *Id.* at 605.

the company to take care that these products did not escape or that they were so treated that when they left its property they had lost their capacity to do damage."[39]

State and regional water officials follow the *Klassen* court's reasoning in their efforts to find "point of source" violators of state water quality objectives. Dumping industrial waste into the city sewer system will not transfer responsibility of disposal to the municipality, nor will it relieve the discharger of liability should damage ensue. With increasingly sophisticated resources, water officials are better able to pinpoint dischargers of industrial waste and assign liability to that party.

Early California Foods (ECF), a Visalia-based olive processing company, discharges its briny wastewater into the city's sewage facility. The CVRWQCB has already imposed restrictions upon Visalia concerning the content of its sewage. If Visalia is unable to comply with those restrictions, it has the ability to curtail discharge by ECF in an effort to come into compliance. Furthermore, if excess levels of salt continue to be found in the sewer system, or damages are incurred, the CVRWQCB can assign the liability to ECF as the responsible party.

The situation in Lindsay is vastly different. For years, LOG contracted with the city to manage the disposal of its wastewater. The city constructed a *separate* sewage system designed to transport LOG's waste to special ponds located on city property and solely created to contain the brine. LOG paid the city as much as $900,000 per year to dispose of its industrial wastewater.[40]

The making of those contracts was the city's fatal flaw in view of its current position as sole liable party for cleanup and judgment costs. The law will penalize a discharger which wrongfully uses the city sewer system to dump its industrial waste. But when the city contracts with a company, for a generous sum, to accept all of its waste, that company will not be held liable if the city does an inadequate job of disposing of the waste. The specialized nature of the contracts sets LOG apart from all others who simply use the city's domestic sewer system. State water officials and the judicial system are unwilling to find LOG liable for improper disposal of LOG's wastewater when contracts existed that specifically assigned the city the responsibility of disposal. In this situation, basic contract principles apply.[41] One con-

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[39] *Id.* at 607.

[40] *Ground Water Contamination: City Files Suit Against Defunct Olive Plant Over Salty Ground Water*, Cal. Env't Daily (BNA), Nov. 23, 1992, *available in* LEXIS, ENVIRN Library, BNACED File.

[41] Liability of a government entity under contract is usually the same as that of a

tracting party is not responsible for the other's inadequate performance of the contract which adversely affects third parties.

Had the city of Lindsay not made these contracts with LOG, thereby possibly forcing LOG to use the domestic sewer line, liability for subsequent damage caused may have been jointly borne. As it currently stands, LOG was able to successfully argue in court that it should, based on the very essence of the contracts, escape liability for any judgments rendered in favor of plaintiff landowners. Moreover, state and regional water officials look primarily to the city, rather than LOG, for cleanup costs because of those contracts.

Currently, the city is suing LOG for indemnification. Its main contention is that "such contracts . . . obligate LOG to pay all costs associated with the disposal of its olive brine . . . . [T]he cleanup, . . . crop losses . . . and loss of property value to third parties . . . are costs [within the meaning of the contracts].[42] Additionally, the city argues that it detrimentally relied on the recommendations of LOG engineers for disposal of the olive brine, and so equity demands LOG pay a share of the $2.6 million judgment. This case is awaiting trial while the parties wait to see if the $2.6 million judgment awarded in *F&L Farms*[43] is reversed by the appellate court.

Clearly, the circumstances in Lindsay provide a message to other municipalities similarly situated. Assignment of liability for groundwater contamination is a particularly volatile and ever-increasing occurrence. Methods of wastewater disposal previously considered acceptable are now termed hazardous and polluting. Parties engaged in the operation of disposal are thus held liable for the damages. It would be prudent for municipalities to refrain from contracting to dispose of a third-party's industrial wastewater. While the financial returns from the contract can be tremendous, the risk of future liability for yet unknown contamination is simply too great for municipalities to undertake.

B. Insurance

The issue of insurance coverage for environmental damage, cleanups, and judgments is a crucial one for a small town such as Lindsay. With LOG not only out of business but bankrupt, the city of Lindsay must

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private party. Bilardi Constr. v. Spencer, 6 Cal. App. 3d 771 (1970).

[42] Brief for Plaintiff at 5, City of Lindsay v. Lindsay Olive Growers, No. 92-155672 (Super. Ct. Tulare County filed Oct. 20, 1992).

[43] F&L Farm Co. v. City of Lindsay, No. F016555 (Cal. Ct. App. 5th filed Sept. 9, 1991).

turn to alternative sources to help fund its obligations.

Contemporary liability insurance policies generally provide coverage on an "occurrence" basis, defined as an accident which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.[44]

Regardless of its obligation concerning payment of claims or judgments, the insurance company almost always has a duty to defend the insured. "If there is any doubt as to whether the charges against the insured state a claim within the coverage of the policy, such doubt will always be resolved in favor of the insured."[45]

The same cannot be said for the duty to indemnify. "The question of which insurance carrier must indemnify for the occurrence or occurrences of pollution is a separate and perplexing question."[46] Insurance policies are designed to cover events that occur accidentally.[47] By contrast, events which occurred with the insured's intent or knowledge are generally considered outside the scope of the policy. In *Town of Tieton v. General Insurance Co.*,[48] contamination of a property owner's well was caused by seepage from a sewage lagoon. The town, owner and operator of the lagoon had knowledge of the potential hazard of pollution. When landowners sued the town for pollution to their wells, the town turned to its insurance company for coverage under its comprehensive liability policy. The insurer refused to indemnify. The *Tieton* court upheld the insurance company's decision, noting that "[n]o one contends that the contamination of the well was intended. Yet, the lack of such intent does not by itself compel us to conclude that such result was 'caused by accident.' The element of foreseeability cannot be ignored."[49]

Interpretation of insurance policies and the scope of coverage for accident-based occurrences was curtailed in the late sixties with the introduction of certain policy exclusions, notably the pollution exclusion clause. Although exclusions had previously been included in policies,

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[44] James L Rigelhaupt, Jr., Annotation, *Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured*, 31 A.L.R.4th 957, § 2[a], at 971-76 (West 1994 & Supp. 1995).

[45] Aetna Casualty & Sur. Co. v. Martin Bros. Container & Timber Prods. Corp., 256 F. Supp. 145, 148 (D. Or. 1966).

[46] Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co., 451 A.2d 990, 994 (Super. Ct. N.J. 1982).

[47] Richard F. Hunter, *The Pollution Exclusion in the Comprehensive General Liability Insurance Policy*, 1986 U. ILL. L. REV. 897 (1986).

[48] 380 P.2d 127 (Wash. 1963).

[49] *Id.* at 130.

major revisions undertaken in the late sixties[50] brought to the forefront certain coverage exclusions.

For the past thirty years, pollution exclusion clauses have become increasingly prevalent. "It is hornbook law that the insured must demonstrate that the claimed loss is comprehended by the policy's general coverage provisions. . . . If the insured shoulders this burden, then the insurer must come forth with proof that a policy exclusion applies."[51] These clauses exempt the insurer from paying on any claim derived from pollution, contamination, or irritants regardless of intent.[52]

Fireman's Fund, the insurance carrier for both LOG and the city of Lindsay,[53] had standard pollution exclusion clauses written in its policies. Although Fireman's Fund has refused to pay for any judgments obtained against its insureds, the insurance carrier has paid attorneys fees pursuant to its duty to defend.[54]

Most industry experts agree that insurance is not, and never will be, a solution to the problem of environmental damages.[55] The costs are simply too high. Insurance companies do not have the resources to pay for judgments that result from victorious plaintiff landowners. This inability is exacerbated by the increasing amount of problems caused by disposal techniques previously considered acceptable and safe. Courts have often disagreed. Determining whether the duty to indemnify exists has been the subject of numerous lawsuits.

California law considers insurance policies to be contracts, interpret-

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[50] City of Johnstown v. Bankers Standard Ins. Co., 877 F.2d 1146, 1149 (2d Cir. 1989).

[51] New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162, 1181 (3d Cir. 1991).

[52] A standard pollution exclusion clause excludes coverage for

> [l]iability arising out of the contamination of the environment by pollutants introduced at anytime into or upon land, the atmosphere or any underground water or water table or aquifer. This exclusion applies whether or not the contamination is introduced into the environment intentionally or accidentally or gradually or suddenly and whether or not the covered party or any other person or organization is responsible for the contamination.

Fireman's Fund Comprehensive Gen. Liab. Policy (1993).

[53] Interview with Hager, *supra* note 15.

[54] Interview with Hager, *supra* note 15.

[55] Interview with Hager, *supra* note 15; interviews with Terry Roberts, Risk Manager for Fresno County, in Clovis, Cal. (June 29, 1994) and John Rozier, attorney for LOG, in Visalia, Cal. (June 28, 1994).

ing them in accordance with basic contract principles.[56] Primarily, courts are expected to give the language of the policy its clear and plain meaning.[57] Policies should also be construed in light of what a reasonable person's expectations of coverage would be.[58] Determining the reasonableness of an insured's expectation of coverage is a question of law.[59]

When ambiguity does exist, the doctrine of *contra proferentum*[60] applies. "It is fundamental that ambiguities in an insurance policy must be construed against the insurer. This is particularly so as to ambiguities found in an exclusionary clause."[61]

The majority of courts interpreting the pollution exclusion provision have concluded that it is ambiguous.[62] Additionally, a few courts, despite a determination that the pollution exclusion clause was clearly written, have found it to be violative of public policy in general. "Although the language is clear, the exclusion, if applied literally, leads to absurd consequences and is at odds with the policy's nature."[63]

A minority of courts find the pollution exclusion clause perfectly clear, and rule that coverage does not extend to the insured.[64] With these courts finding the clause unambiguous, and others finding it ambiguous, insurance companies and their insureds are on uncertain ground. This uncertainty appears most obviously in the increased

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[56] Boyer v. United States Fidelity & Guar. Co., 206 Cal. 273, 276 (1929); Sullivan v. Union Oil Co. of Cal., 16 Cal. 2d 229, 237 (1940); Walters v. Marler, 83 Cal. App. 3d 1, 22 (1978).

[57] Allstate Ins. Co. v. Thompson, 206 Cal. App. 3d 933, 938 (1988).

[58] Crane v. State Farm Fire & Casualty Co., 5 Cal. 3d 112, 115 (1971).

[59] Hallmark Ins. Co. v. Superior Court, 201 Cal. App. 3d 1014, 1019 (1988).

[60] Interpreted as "against the party who proffers or puts forward a thing." This means that an ambiguous provision will be construed against the party who selected the language. BLACK'S LAW DICTIONARY 327 (6th ed 1991); United States v. Seckinger, 397 U.S. 203, 216 (1970).

[61] Linden Motor Freight Co. v. Travelers Ins. Co., 314 N.E.2d 37, 39 (N.Y. 1974). *See also* Reserve Ins. Co. v. Pisciotta, 30 Cal. 3d 800 (1982); Insurance Co. of N. Am. v. Sam Harris Constr. Co., 22 Cal. 3d 409 (1978).

[62] Pepper Indus., Inc. v. Home Ins. Co., 67 Cal. App. 3d 1012 (1977); Grand River Lime Co. v. Ohio Casualty Co., 289 N.E.2d 360 (Ohio 1972); Jackson Township Mun. Util. Auth. v. Hartford Accident & Indem. Co., 451 A.2d 990 (N.J. 1982); Buckeye Union Ins. Co. v. Liberty Solvents & Chemicals Co., 477 N.E.2d 1227 (Ohio 1984).

[63] South Central Bell Telephone Co. v. Ka-Jon Food Stores of Louisiana, Inc., 644 So. 2d 368 (La. 1994).

[64] Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984); Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374 (N.C. 1986).

amount of declaratory judgment actions initiated by either the insured or insurer to determine the scope of the policy.[65]

Another lesser known, but almost ironclad exclusion provision is the inverse condemnation exclusion clause.[66] Unlike pollution exclusion, courts almost never strike this provision down because it relates to the federal Constitution.[67] The Fifth Amendment takings clause[68] prohibits the government from taking private property without just compensation. An inverse condemnation action results when the private property owner initiates the lawsuit, asserting that the government has done something which in all respects amounts to a taking of his land without just compensation. A government entity cannot insure itself from liability if it violates the principles of this constitutional right. Inverse condemnation clauses are standard and rarely challenged.[69]

Notwithstanding the invocation of these clauses by insurance companies to preclude coverage for judgments obtained against their insureds, the issue of insurance coverage for cleanup costs for the insured's own property remains. With the emergence of federal, state, and regional cleanup mandates, property owners are seeking coverage from their insurers for the costs of cleaning up their land in accordance with these mandates.[70] Two provisions within the comprehensive general liability (CGL) policy address this type of coverage claim. The first excludes coverage for damage to property owned or occupied by the insured. The second is the basic coverage provision itself, which provides coverage for damages the insured becomes legally obligated to pay due to property damage.

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[65] Hunter, *supra* note 47, at 899 n.22.

[66] A typical inverse condemnation clause excludes coverage for

> liability arising out of or in connection with the principles of eminent domain, condemnation proceedings or inverse condemnation by whatever name regardless of whether such claims are made directly against the covered party or by virtue of any agreement entered into by or on behalf of the covered party.

Fireman's Fund Comprehensive Gen. Liab. Policy (1993).

[67] Interview with Roberts, *supra* note 55. *See also* Holtz v. Superior Court, 3 Cal. 3d 296 (1970).

[68] The Takings Clause of the Fifth Amendment of the United States Constitution provides: "nor shall private property be taken for public use, without just compensation."

[69] Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984); Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374 (N.C. 1986).

[70] Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUMBIA L. REV. 942 (1988).

Courts have been willing to find insurance coverage for cleanup costs to the insured's own property in spite of the "own property" exclusion.[71] Government statutes, most notably the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),[72] have compelled property owners to engage in expensive and comprehensive cleanup efforts on their land. Courts view this as a legal obligation covered by a comprehensive insurance policy. In *AIU Insurance Co. v. Superior Court*,[73] FMC Corporation (FMC) sought coverage from its insurer for costs incurred as a result of cleanup efforts ordered by the government. The *AIU* court considered three elements it deemed necessary to compel coverage. First, the court looked at whether FMC's cleanup costs were "legally required," within the meaning of the policy. AIU argued that cleanup efforts ordered by the state are "equitable" rather than "legal" obligations. Although the court agreed that such costs could be considered an "equitable obligation," it ultimately rejected AIU's argument, noting that California law has long since abandoned any distinction between legal and equitable actions.[74] A government mandate setting forth cleanup requirements to landowners is a legal obligation within the meaning of a CGL policy. The *AIU* court next considered whether "damages" had been incurred. This was easily satisfied because FMC had been ordered to pay damages, in the form of money, to the state.[75] Lastly, the court looked to whether the damages were incurred "because of property damage," and determined that contamination of the environment satisfied this requirement. The *AIU* court found that, notwithstanding the "own property" exclusion, insurance coverage extended to costs for cleaning up FMC's own land.[76]

Although most cases considering the scope of coverage for cleanup of an insured's own land were dealing with CERCLA mandates, the general willingness of courts to dismiss the "own property" exclusion pro-

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[71] Aerojet-General Corp. v. Superior Court, 211 Cal. App. 3d 216 (1989).

[72] Act of Dec. 11, 1980, Pub. L. No. 96-510, 1980 U.S.C.C.A.N. (94 Stat.) 2767 (codified in scattered sections of 42 U.S.C.).

[73] 51 Cal. 3d 807 (1990).

[74] *Id.* at 825. *See also* CAL. CIV. PROC. CODE § 30 (West 1994); Philpott v. Superior Court, 1 Cal. 2d 512, 515 (1934).

[75] CAL. CIV. CODE § 3281 (West 1994) ("Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages.").

[76] However, the court noted that such coverage does not extend to "prophylactic" costs incurred to avoid future environmental problems. Until damage occurs, there can be no coverage under a CGL policy.

vides good news to the city of Lindsay. Even if the $2.6 million judgment is borne by Lindsay alone, the cost of cleaning up the groundwater contamination, estimated at $30 million, may possibly be shared with Fireman's Fund, the city's insurer.

Because courts are so willing to find coverage, despite the presence of pollution and inverse condemnation clauses and the "own property" exclusion, insurance companies have reduced issuance of municipal insurance policies.[77] The risks are simply too great. Increasingly, cities are becoming either self-insured or have entered into pooling agreements with other cities to obtain coverage.[78]

C. Regional Water Quality Control Board

Key to the issue of liability in the LOG case was identification of the party responsible for the operation and maintenance of the wastewater disposal facility.

Although LOG was the sole contributor to the evaporative ponds,[79] the city of Lindsay was found ultimately responsible for the contamination, cleanup, and judgments won by landowners. This liability arose primarily out of the contracts that existed between LOG and the city. Also relevant was the fact that the city owned the land upon which the ponds were situated.

It is common practice for the CVRWQCB to name the current owner of land which is polluted or is determined to be the source of pollution as the party responsible for complying with applicable federal and state mandates to remediate such pollution. This practice is endorsed by the California Attorney General:

> The persons upon whom the waste discharge requirements should be imposed to correct any condition of pollution or nuisance which may result from discharges . . . are those persons who in each case are responsible for the current discharge. In general, they would be the persons who presently have legal control over the property from which the harmful material arises, and thus have the legal power either to halt the escape of the materials into the waters of the State or to render the material harmless by treatment before it leaves their property. Under this analysis, the fact that the persons who conducted the operations which originally produced or exposed the materials have left the scene does not free from accountability those permitting the existing and continuing discharge of the materials into the waters of the State.[80]

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[77] Interview with Roberts, *supra* note 55.

[78] Interview with Roberts, *supra* note 55.

[79] CVRWQCB Cleanup and Abatement Order No. 92-708, *supra* note 19.

[80] 27 Op. Att'y Gen. 182, 185 (1955), *aff'd*, 63 Op. Att'y Gen. 51, 55 (1980).

In approaching its mandate to achieve and maintain the highest water quality possible, the CVRWQCB uses three devices to effectuate clean water. These include waste discharge requirements, cease and desist orders, and cleanup and abatement orders.[81]

Waste discharge requirements (WDR) are simply permits[82] issued by the CVRWQCB which prescribe acceptable methods of disposal.[83] The CVRWQCB inspects the facility[84] and issues a WDR to the discharger pursuant to the needs and circumstances of that particular facility. WDRs can be, and usually are, modified over time.[85]

If the responsible party is not in compliance with the WDR, a cease and desist order (CDO) may be issued.[86] A CDO usually gives the recipient a certain amount of time to come into compliance, with the threat of a shut-down of the facility if the deadline is not met. In *Pacific Water Conditioning Association v. City Council of Riverside*,[87] a writ was sought to compel that area's regional water board to vacate a CDO. The court denied the writ and the appellate court affirmed. It was determined that since a CDO is merely a technique to enforce a WDR, broad discretion would be given to the water board if it issued

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[81] CAL. WATER CODE §§ 13263(a), 13301, 13304 (West 1994).

[82] *Id.* § 13374.

[83] *Id.* § 13263(a) provides:

> The regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change therein, except discharges into a community sewer system, with relation to the conditions existing from time to time in the disposal area or receiving waters upon, or into which, the discharge is made or proposed. The requirements shall implement relevant water quality control plans, if any have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other water discharges, the need to prevent nuisance, and the provisions of Section 13241 [Section 13241 considers, in part, factors such as past, present, and probable future beneficial uses of water, economic considerations, the need for housing in the region, and the need to develop and use recycled water].

[84] *Id.* § 13267. A RWQCB has the authority to inspect property even if no proof yet exists of actual water quality violations. Joseph v. Masonite Corp., 148 Cal. App. 3d 6 (1983).

[85] CAL. WATER CODE § 13263(e) ("Upon application by any affected person, or on its own motion, the regional board may review and revise requirements. All requirements shall be reviewed periodically.").

[86] *Id.* § 13301 ("the board may issue an order to cease and desist and direct that those persons not complying with the requirements take appropriate remedial or preventive action.").

[87] 73 Cal. App. 3d 546 (1977).

such an order.

A cleanup and abatement order (CAO) can be issued at any time, regardless of whether a WDR or CDO had ever been previously been issued. Whenever a RWQCB identifies, at a facility, water pollution that it considers intolerable, it may issue a CAO immediately.[88]

Since the early 1950's, the CVRWQCB has been involved[89] with the methods employed by the city of Lindsay in its efforts to contain the discharge from LOG. Investigations conducted by the Department of Water Resources, at the request of the CVRWQCB, verified that the percolating ponds and unlined evaporative ponds used prior to 1967 were causing serious groundwater contamination.[90] A series of WDRs were issued, including one in 1967 that ordered the construction of lined evaporative ponds.[91]

Despite the use of new, lined evaporative ponds, brine water continued to leak into the groundwater through tears and holes in the liner. "Analytical results of groundwater monitoring indicate that the ponds continue to leak, and continue to degrade and significantly impair the beneficial uses of the groundwater underlying and to an unknown extent downgradient. Numerous residential and agricultural wells have been significantly impacted."[92]

The CVRWQCB considers the damage caused by the leakage very serious.[93] Contrary to popular belief, non-toxic waste, in sufficient amounts, can be just as harmful and damaging as toxic waste.[94] This is particularly true in Lindsay's case, where the contamination is affecting a "closed" groundwater basin. Since Lindsay is located in a valley, water flows down from the mountains into the underground water basin, about fifty feet from the surface,[95] and stays. Outflow of water from the basin does not occur because of the geographical make-up of the land. Contamination to this water source therefore produces dire and lasting results. Dilution of the salt already in the water is likely to

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[88] CAL. WATER CODE § 13304(a) ("Any person who has discharged or discharges waste into the waters of this state . . . shall upon order of the regional board clean up such waste or abate the effects thereof or, in the case of threatened pollution or nuisance, take other necessary remedial action.").

[89] *Staff Report, supra* note 5.

[90] Interview with Stanley W. Gilbert, Water Resource Control Engineer with the CVRWQCB, in Fresno, Cal. (July 15, 1994).

[91] *Id.*

[92] *Staff Report, supra* note 5.

[93] Interview with Gilbert, *supra* note 90.

[94] Interview with Gilbert, *supra* note 90.

[95] CVRWQCB Cease and Desist Order No. 91-151 (June 28, 1991).

take decades.[96]

Water quality is measured, in part, by the amount of total dissolved solids (TDS) per liter of water.[97] Five hundred milliliters of TDS is considered average; 1,000 milliliters is considered the uppermost acceptable limit.[98] Testing of the wells surrounding Lindsay's evaporative ponds indicate that the TDS in Lindsay water is about 10,000 milliliters per liter of water.[99] Sea water, as a point of comparison, has a 35,000-milliliter reading for TDS.[100]

Liability for the contamination and cleanup rests primarily with the city of Lindsay, according to the CVRWQCB.[101] Although the CVRWQCB recognizes that LOG had taken an active role in the operation of the ponds and the methods implemented for disposal of its wastewater, it is looking toward the city of Lindsay for answers and action. "The city of Lindsay is and has been in prolonged and substantial violation of numerous sections of Order No. 87-054."[102] The bankruptcy of LOG places the city of Lindsay in the position of the lone responsible party for damages incurred and future cleanup efforts.

This position further underscores the theory that municipalities should generally steer clear of contracting to dispose of a third party's industrial wastewater. Such contracts leave the municipality in a vulnerable position with state and regional agencies. The costs of state mandated cleanups are too great to justify any financial rewards these types of contracts may reap.

IV. The Future

Allegations of contamination have mushroomed over the past several years. Multimillion dollar lawsuits and cleanup mandates have become almost commonplace.

In Phoenix, Arizona, for example, a $1 billion class action suit was filed against Motorola, Inc. for allegedly contaminating groundwater near its production plant. The sixty plaintiffs named in the complaint have asserted personal injury and property damage resulted from Motorola's alleged misconduct. Studies have revealed a plume of groundwater contamination extending approximately three miles from the

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[96] Interview with Gilbert, *supra* note 90.

[97] Cal. Water Code § 13304 (West 1994).

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Staff Report, supra* note 5.

plant. Motorola, the area's second-largest employer, is thus far solely liable for cleanup costs.

Another example of potential liability for groundwater contamination can be found in Madera, California. Tri-Valley Growers, owners of the "Oberti Olive" label, processes olives while nearby landowners cope with an increasingly contaminated water supply.

As in Lindsay, many Madera residents are dependent on the jobs made available by the olive processor. In December 1993, Tri-Valley temporarily closed its doors, laying off two hundred and fifty workers, due to surplus product and overflowing evaporative ponds.[103]

Previously, the CVRWQCB had ordered Tri-Valley to stop dumping its wastewater by December 1993. The CVRWQCB later buckled when Tri-Valley, Madera's third largest employer, hinted that if the order was not lifted, it would shut the plant down permanently. The order was revised to set December 1996 as the deadline for ceasing to use the 164 acres of evaporative ponds for disposal of wastewater. Nearby landowners are furious with the revised order.

Tri-Valley has asserted that it is researching better ways to process its olives, possibly without the use of salt at all. Traditionally, salt is used to separate the pitted olives from the unpitted.[104]

With nearby landowners disgruntled over the quality of their water supply, the involvement of the CVRWQCB, and jobs at stake, the problems at Tri-Valley look disturbingly familiar. The final outcome of cases on appeal or still pending in the LOG situation could have great impact upon what happens in Madera. One attorney involved with Lindsay sees the Tri-Valley problem as "the same nightmare [as Lindsay] five years behind."[105]

The CVRWQCB sees some crucial differences between LOG and Tri-Valley.[106] Most notable is that Tri-Valley is making an effort to provide clean water to landowners. The company has, at its own expense, drilled new wells for landowners complaining of salty water so that fresh water would be available. Furthermore, Tri-Valley has replaced many of the ponds, and insured that each one is in compliance with state requirements.

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[103] Mark Grossi, *Olive Cannery Allowed to Reopen*, FRESNO BEE, June 25, 1994, at A1.

[104] *Id.*

[105] Interview with Hager, *supra* note 15.

[106] *Waste Discharge Requirements*, CVRWQCB Res. No. 51-32, *supra*, note 14.

V. RECOMMENDATIONS

Without insurance or state funding to aid in cleanup efforts (at this point), and with LOG not only bankrupt but not named as a liable party, the small town of Lindsay is left fully responsible for cleaning up the contamination and paying the judgments. Could this liability have been avoided? Possibly.

Cities need to look out for themselves. This is difficult to do when, as in Lindsay's case, the city is very small and dependent on one industry. Possibly the answer would be the hiring of a risk manager—an employee whose job it is to carefully consider the city's best interests and steer it away from potential liability. Although some may consider this an expense unable to be borne by small towns, it is well worth looking into. Potential problems in the future, a long-term consideration, may be avoided by the hiring of a risk manager.

It is the opinion of this author that municipalities, small ones in particular, should not contract to dispose of a third party's industrial waste. For reasons established in this Comment, municipalities are not well positioned to undertake the risk of liability should contamination occur. Costs are astronomical, and can inflict damage beyond what is recoverable. The case-study of Lindsay provides an excellent warning. Perhaps if the city of Lindsay had not contracted to accept LOG's wastewater, the jury would have found LOG partially liable for the damages incurred. Although the contract approach was no doubt a money-maker during the life of LOG, the aftermath of those contracts is a staggering bill for which the city is solely responsible.

Strict enforcement of water regulations is highly recommended. Fresh ideas for enforcement may help attain our state's goal for high water quality. The San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) has created several new and innovative ideas to reduce air pollution.[107] Some of their ideas may work when applied to water regulation. For example, the SJVUAPCD regularly invites companies engaged in production that necessarily emits air pollution to seminars to educate them on new ways to lessen emissions of air pollutants. Moreover, a Compliance Assistance Program teaches businesses how to comply with state air regulations. The SJVUAPCD is also working with other responsible agencies involved with land use to reduce air pollution. This has resulted in an increased awareness of the need to comply with air quality mandates. Admittedly, many of the

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[107] Interview with David Crow, Executive Director of the SJVUAPCD, in Fresno, Cal. (July 11, 1994).

SJVUAPCD's methods of operation are inapplicable to water regulation. But some of these ideas may help generate new approaches to achieve compliance with water quality objectives.

Federal or state relief programs designed to fund serious and damaging, albeit nontoxic, contamination sites, are a possibility. However, this recommendation is unlikely to render much assistance. First, with the millions of dollars expended for Superfund and CERCLA projects (i.e. hazardous waste sites), little funding is available for cleaning up contamination caused by excess amounts of natural or nonhazardous products. Secondly, the implementation of these types of programs lessens the incentive to self-police disposal methods. Cities will be less motivated to adhere to state regulations for proper waste disposal if they know a program exists to fund the results of their lack of compliance.

CONCLUSION

In the case study involving Lindsay, it is easy to note in hindsight that the state should have done more, the CVRWQCB should have taken a more aggressive stance, and the city of Lindsay should not have been so naive. But a major balancing factor must be considered: jobs and the economy. No one wants to shut down a plant that employs a substantial percentage of a town's inhabitants.[108] Clearly, municipalities are engaged in a delicate balancing act. They must, on the one hand, welcome industry into their areas because jobs are needed and a thriving city depends on an employed populace. At the same time, municipalities must discourage industry that invites environmental problems from locating in their areas because future damages could be devastating and far reaching.

However one chooses to look at the situation in Lindsay, the fact remains that a multi-million dollar cleanup awaits. Society, insurance companies, and corporate America can no longer afford these astronomical cleanup bills. "[W]ater pollution costs money. It costs the individual, the businessman, the community, the Nation. No one escapes the economic loss brought about by the pollution of our most valuable resource."[109] Here, the city of Lindsay will pay, possibly at the expense

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[108] Arax, *supra* note 13 ("Here was this city protecting a polluter. Do you shut down the polluter, the biggest employer in town? Do you force the city with a budget of [$1 million] into a $30 million cleanup?" (quoting spokesperson from the CVRWQCB)).

[109] STAFF OF SENATE COMM. ON PUBLIC WORKS, 88TH CONG., 1ST SESS., A STUDY OF POLLUTION—WATER 21 (Comm. Print June 1963).

of its very existence. What will happen in Madera, or hundreds of other towns just like it?

CONSTANCE E. ROBERTS