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eJournal

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## Coastal Resources eFeature Article(s)

**EPA Issues New Draft Guidance Addressing Sediment Remediation at Hazardous Waste Sites**
***Stuart R. Deans, Esq.***

In a series of guidance over the past several years, the U.S. Environmental Protection Agency (EPA) has began to address the increasingly significant issue of contaminated sediments in rivers, harbors, estuaries and coastal areas throughout the United States. Remediation of contaminated sediment sites presents a complex challenge unlike traditional remediation efforts in non-aquatic environments. The *Contaminated Sediment Remediation Guidance for Hazardous Waste Sites*, dated November 2002, is a draft document providing

technical and policy guidance for project managers and agency staff evaluating remedial alternatives, risks to human health and natural resources, transport mechanisms and evaluation of multiple and diverse sources within the watershed. The draft guidance provides detailed technical analysis and supplements the February 2002 guidance entitled *Prin Principals for Managing Contaminated Sediment Risks at Hazardous Waste Sites* ("OSWER Directive 9285.6-08"). While primarily intended as guidance for agency decisions pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), is anticipated that the guidance will also be utilized by EPA in connection with actions taken pursuant to the Clean Water Act (CWA) and Water Resources Development Act (WRDA), as well as by other federal and state agencies involved in the evaluation of contaminated aquatic sediment sites. Contaminated sediment is identified as soil, sand or other mineral or organic matter accumulating on the bottom of waterbodies and containing toxic or hazardous materials with the potential to adversely affect human health or the environment. The guidance is intended to apply across a wide variety of aquatic systems including rivers, streams, wetlands, ponds, lakes, harbors, estuaries, intertidal zones and coastal areas.

Given the nature of these aquatic environments and the potential for natural resource damages, the role of natural resource trustees is also addressed in the document. Due to the unique recreational and cultural use of certain aquatic systems, agency personnel are encouraged to involve members of the community adjacent to waterbodies in the process of developing appropriate remedial alternatives for these sites. This is consistent with requirement for active public participation in the CERCLA process.

The guidance emphasizes the importance of developing a clear and accurate conceptual site model, which fully incorporates available information on contaminant sources, transport mechanisms, exposure pathways and potential receptors associated with the area subject to remediation. A thorough understanding of the watershed, current and future intended uses of the waterbody and adjacent lands and the significant constituents of concern are identified as fundamental issues for good site characterization and selection of remedial objectives. A risk-based approach incorporating site specific data is encouraged to further develop an accurate understanding of remediation goals.

The guidance emphasizes the importance of evaluating sediment bed stability (e.g., erosion and deposition rates) and the frequency of both natural and human disturbance in evaluating alternatives for remediation at contaminated sediment sites. A combination of empirical analytical methods and numerical models for evaluating historical events and predicting future stability is recommended to develop a more complete understanding of future transport and environmental fate of contaminated sediments. Project managers are encouraged to use validated and verified models, calibrated to sites specific conditions, in accomplishing this essential preliminary site characterization task.

During the feasibility study stage of site evaluation, the guidance identifies three major clean-up methods for consideration at contaminated sediment sites. These methods include

(1) dredging and excavation, (2) in situ capping, and (3) monitored natural recovery (MNR). Any final remedy must comply with the requirements of the National Contingency Plan as well as applicable or relevant and appropriate requirements (ARARs). The guidance notes that, given the complex nature of contaminated sediment sites, a combination of remedial methods is usually the most cost effective approach. Institutional controls including fish consumption advisories, commercial fishing bans and waterway use restrictions are often used, in combination with various remedial alternatives, to reduce risks associated with contaminated sediment sites. Innovative pilot programs for in situ treatment in the form of reactive caps or sediment additives are also under evaluation and may be considered as part of future remedial alternatives.

The choice of a specific remedial alternative, or a combination of remedial alternatives, is dependent upon multiple factors and careful consideration of the impacts associated with each alternative on human health and ecological systems, as well as the impacts of the selected alternatives on opportunities for reuse and redevelopment of the site and adjacent upland areas. The guidance also indicates that the selection of remedial options must include an analysis of the uncertainties associated with the predicted effectiveness of various alternatives and the timeframes for achieving remedial goals. Long term monitoring to evaluate the physical, chemical and biological effectiveness of remedial options will be required. A monitoring program is also critical to evaluate health and environmental risks and exposure pathways both during and following the completion of remedial activities.

As the federal and state programs begin to address an increasing number of aquatic sites involving contaminated sediments, the draft guidance and cumulative experience associated with sites undergoing remediation will play a significant role in clarifying the availability of remedial alternatives and the balance between effective long term remedies and cost effective solutions to these complex sites. EPA has extended the opportunity for public comment on the draft guidance document until April 2, 2003. Click here to review the guidance document.

*Stuart R. Deans is an attorney with the LandLaw Section and a member of the Coastal Resources Management Center.* Please email Stuart Deans if you have any questions on this article.

**In Over Their Heads: Coastal Commission Violates Doctrine of Separation of Powers**
***Michael M. Berger, Esq. of Berger & Norton, Los Angeles, California***

*Editor's Note: This month's feature article is a reprint of an editorial by Attorney Michael Berger on a recent court case concerning the jurisdiction of the California Coastal Commission. This editorial first appeared in the Los Angeles Daily Journal on January 13, 2003, which granted Robinson & Cole LLP permission to reprint Mr. Berger's editorial. These views expressed by Mr. Berger are his own and do not necessarily represent the views of Robinson & Cole LLP.*

The separation of powers doctrine is something with which most people have a glancing

contact in high-school civics classes and then forget. We had better drag out those memories; the concept is alive and well and about to have a significant effect on land-use regulation along California's thousand-mile coastline. See*Marine Forests Society v. California Coastal Comm'n*, 2002 Cal. App.LEXIS 5245 (Dec. 30, 2002).

Briefly put, the doctrine says that our system of government consists of three parts – executive, legislative and judicial. Each has its own job to perform, and each must refrain from trying to usurp the job of the others. California Constitution Article III, Section 3. The Legislature makes the laws, the executive carries out the laws and the judiciary enforces the laws. Except along our coast. While local cities and counties have the primary responsibility for regulating land use, California has an overriding state agency for the coastal region: the California Coastal Commission. Created by the Legislature a quarter-century ago to replace a group of similar commissions created by an initiative, the Coastal Commission has been an unusual entity, partaking of the powers of each branch of government.

The commission makes rules and regulations, enforces its rules through the imposition of fines and penalties and acts as a judicial panel hearing appeals from decisions made by cities and counties. It acts as a veritable Cerberus standing its three-headed guard against coastal development.

But the Court of Appeal in Sacramento has just concluded that such a beast is unknown to the state constitution and forbidden to exist. In fact, said the court, the way that the commission was created makes it an arm of the Legislature, unlawfully exercising powers of the other branches.

The commission always has been something of a strange duck. The Coastal Act says that it is part of the state's Resources Agency, that is, part of the executive branch of government. Public Resources Code Section 30300.

However, the attorney general (on behalf of the commission) stipulated in the *Marine Forests* litigation that the governor (that is, the head of the executive branch) has no control over the commission and argued in his appellate briefs that the commission was placed there "for administrative and budgetary purposes." That the commission is wholly subject to a legislative control is demonstrable as both a matter of law and a matter of fact. As a matter of law, the agency has 12 voting members, four each appointed by the governor, the speaker of the assembly and the Senate Rules Committee. Public Resources Code Section 30301. Each of the 12 serves at the whim of whomever made the appointment (Public Resources Code Section 30312) and can thus be removed at any time and for any reason.

There is also no question that the commission exercises the powers of all three branches. It makes rules and regulations (Public Resources Code Section 30333), a legislative function *(Strumsky v. San Diego County Employees Retirement Ass'n*, 11 Cal.3d 28 (1974)); it carries out the policies of the Coastal Act (Public Resources Code Section 30330), an executive function (California Constitution Article V, Section 1); and it issues cease and

desist orders (Public Resources Code Section 30809) and hears appeals (Public Resources Code Section 30602, 30603), both judicial functions *(People v. Bird*, 212 Cal. 632 (1931)).

Although an agency may exercise some incidental powers that belong to a different branch of government, the constitution prohibits more than incidental exercise. *Younger v. Superior Court*, 21 Cal.3d 102 (1978). Here, the commission's very structure mandates that its exercise of executive and judicial power be more than incidental. Indeed, such exercise has been central to its core activities.

Factually, the Legislature's control is also demonstrable, although the Court of Appeal said that such proof was not necessary. The court held that the way that the commission was constructed was sufficient to demonstrate its invalidity.

But for those who doubt, read on. One of the most flagrant – and public - illustrations of the exercise of unfettered control came during a Coastal Commission hearing on Occidental Petroleum Co.'s application to drill two exploratory oil wells in Pacific Palisades. Fearing that one of his appointees was going to vote the "wrong" way, Senate President Pro Tem David Roberti fired the commissioner while the hearing was in progress and replaced him with a trusted aide. See Editorial, "Coastal Outrages," L.A. Times, July 9, 1987, Part 2.

Other illustrations exist, although those outside the commission know of them only anecdotally, when (and if) knowledge becomes public.

Another that was reported in the press dealt with a new Assembly speaker firing all four of the previous speaker's appointees wholesale because they belonged to the other political party, and he wanted his own people in those commission seats. See Max Vanzi, "New Assembly Speaker Fires 4 From Coastal Commission," L.A. Times, Dec. 7, 1996, Part A.

So what? Isn't that just politics as usual? Well maybe not, and if it is, maybe it shouldn't be. Absolute power needn't be exercised repeatedly for its potential targets to get the message: Their continuation in office depends on not displeasing those with the power to make their careers end in a heartbeat.

The U.S. Supreme Court recognized this fact of life more than a decade and a half ago. See *Bowsher v. Synar*, 478 U.S. 714 (1986). There, in an effort to balance the budget, Congress assigned the comptroller general the task of reporting to the president what spending reductions were necessary to reduce the deficit. The problem was that the comptroller general was removed by Congress. Thus, Congress had placed an employee subject to its control in the executive branch as an adviser to the president. The high court acknowledged the truism that an appointed officer needs to fear the authority that can remove him from office and, perforce, obey – or at least not displease – that authority. The "presumed desire to avoid removal" creates "subservience to another branch [of government]" and "violates the separation of powers concept," the court said. "In constitutional terms, the removal powers over the Comptroller General's office dictate that he will be subservient to Congress," the court said.

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The commission's attorneys tried hard to find one, but after sifting through a veritable dust cloud of candidates, the court rightly concluded that there is no other executive agency in California exercising the kind of powers wielded by the commission that is subject to the absolute whim of legislators.

The *Marine Forests* court adopted the Supreme Court's analysis, agreeing that the absolute power to remove two-thirds of the commission's voting members made the commission no more than an extension of the Legislature. That being said, the commission must be forbidden to do more than the Legislature could do, that is, it must be forbidden to exercise either executive or quasijudicial powers.

What needs to be done is for this legislative mole in the body of the executive branch – if it is to continue in existence at all – to cease exercising all but legislative powers. That is, it may continue to develop rules and regulations, that is, make policy for the coast. But it may not engage in activities to effectuate that policy, issue cease and desist orders or rule on appeals to enforce that policy.

Can the commission continue to exist without the extraordinary – and unconstitutional – powers that is has brandished for the past quarter-century? Of course; all other agencies do, and they seem able to perform their tasks in an orderly fashion.

Aside from enforcing the separation of powers guarantee in the constitution, such action would have the incidental benefit of giving more credence to the rights of the regulated property owners under Article I of the California Constitution and the Fifth Amendment to the U.S. Constitution.

The commission has had a history of running roughshod over the rights of those unfortunates because it has been able to combine the powers of creating, applying and enforcing policy along the coast. Separating those functions as the constitution requires will level the playing field a bit. This is not a call for coastal anarchy. Far from it. Presumably, the attorney general would police the coastline just as his office polices the execution of other laws throughout the state. It would just be done on a basis that is independent of the Coastal Commission, rather than as a servant of that body.

Speaking of independence, it seems more than passing strange that the attorney general, the lawyer for all branches of California government (not to mention the people at large) is continuing (according to press accounts) to pursue the interests of the commission (and the Legislature) in contrast to those of the other branches of state government. One could wonder at the constitutionally of that, but such musings must await a later day.

**Federal Legislation Proposed to Amend The Coastal Zone Management Act**
***Keane Callahan, Environmental Analyst***

The Coastal Zone Enhancement Reauthorization Act of 2003 (S. 218), amending the Coastal Zone Management Act (CZMA), has been proposed in the U.S. Senate to improve the management of the Nation's coastal and marine resources. In 1972, Congress responded to concerns over the increasing demands being placed on the Nation's coastal regions and resources by enacting the Coastal Zone Management Act. According to Senate testimony, although the coastal zone only comprises 10 percent of the contiguous U.S. land area, nearly 53 percent of all Americans live in these coastal regions, and more than 3,600 people are relocating there annually. This coastal edge supports approximately 361 sea ports, contains most of our largest cities, and provides habitat for a variety of plants and animals. Under the authorities in this Act, coastal States can choose to participate in the voluntary Federal Coastal Zone Management Program. States then design individual coastal zone management programs, taking their specific needs and problems into account, and then receive Federal matching funds to help carry out their program plans. State coastal zone programs manage issues ranging from public access to beaches, to protecting habitat, to coordinating permits for coastal development. As a voluntary program, the framework of the CZMA provides guidelines for State plans to address multiple environmental, societal, cultural, and economic objectives.

S.218 proposes to (1) create the Coastal Community Program to encourage states to better control non-point source pollution by providing states with the funding and flexibility needed to deal with their specific non-point source pollution problems as well as aiding states in developing and implementing creative initiatives to deal with other coastal related issues such as coastal development, (2) authorize $135.5 million for fiscal year 2003, $141 million for fiscal year 2005 and increases the authorization levels by $5.5 million each year through fiscal year 2008 to reach their full potential, (3) increase authorizations to the 25 National Estuarine Research Reserves, a network of reserves across the country that are operated as a cooperative federal-state partnership, to $13 million in fiscal year 2004 with an additional $1 million increase each year through fiscal year 2008, and (4) improve the funding mechanisms of the the Administrative Grant Program, which serves as the base funding mechanism for the States' coastal zone management programs. Click here for more information.

**New MOU for Long Island Sound Restoration**
***Linnea McCaffrey, Land Use Analyst***

The U.S. Environmental Protection Agency (EPA), the New York Department of Environmental Conservation (DEC) and the Connecticut Department of Environmental Protection (DEP) entered into a new cooperative agreement to help restore water quality in Long Island Sound. The agreement sets an ambitious goal: To restore the health of Long Island Sound by 2014, the 400th anniversary of Adriaen Block's exploration of Long Island Sound. Building upon the for the Long

Island Sound approved in 1994, the Long Island Sound Study Policy Committee, which consists of regional administrators from the EPA and commissioners from the Connecticut DEP and the New York DEC, approved 30 new goals.

The agreement calls for creation of a Long Island Sound Stewardship System and establishes target goals and time frames, including the following (1) by 2010, decrease the acreage closed year-round to shellfishing due to bacteria pollution by 10 percent, compared to 2000 levels, (2) by 2010, eliminate all chronic bathing beach closures in Long Island Sound due to bacteria pollution (Chronic closures are bathing areas closed at least three days a year for at least three of the past five years), (3) in 2003, nominate the Pawcatuck and Mystic Rivers in Connecticut and all Long Island Sound embayments in New York as federal No Discharge Areas where waste discharges from boats would be illegal, (4) by 2003, map areas of Long Island Sound that support eelgrass, an important habitat for key fish and shellfish species, and (5) promote research into the causes of the Sound's degradation. Under the agreement, EPA will contribute $4 million for projects to further the goals of the plan, with the money being divided equally between the two states. Click here for more information on Long Island Sound projects.

**EPA Publishes National Clean Water Strategy for Industrial Facilities**
***Tracy Gionfriddo, Environmental Analyst***

The United States Environmental Protection Agency (EPA) has published a draft plan entitled, *Strategy for National Clean Water Industrial Regulations*, which describes a process to identify existing effluent guidelines that EPA should consider revising. Effluent guidelines are technology-based national regulations that control the discharge of pollutants to surface waters and to publicly owned treatment works (POTWs). Effluent guidelines are specific to an industry such as manufacturing, agricultural, and service industries. As required by Section 304(m) of the Clean Water Act, EPA publishes an Effluent Guidelines Program Plan every other year to announce the Agency's plans to develop new effluent guidelines and revise existing ones. The EPA hopes its strategy will spur the development of innovative technologies, promote multi-media pollution prevention, and expand the use of market-based incentives to improve the quality of the nation's waters.

Two overarching goals guided the development of the draft strategy (1) reducing risk to human health and the environment and (2) assuring transparent decision-making. To accomplish the first goal, EPA identified the following four major factors for deciding if it is appropriate to revise or develop an effluent guideline (1) the extent to which an industry is discharging pollutants that pose a risk to human health or the environment, (2) whether an applicable and demonstrated technology, process change, or pollution prevention approach would substantially reduce that risk, (3) the cost, performance, and affordability of the technologies, process changes, or pollution prevention approaches, and (4) implementation and efficiency considerations such as whether a current guideline is a barrier to the use of new technologies with multi-media benefits, or whether revising an existing guideline to allow for in-plant "trading" of pollutant limits might reduce more

pollution and cost less than the current rule. EPA's second goal is "transparent decision-making." A critical part of the proposed process is interaction with stakeholders – industry, academia, States, POTWs, environmental groups, and the public. EPA hopes the strategy will give those who are interested at understanding of the process and the chance to participate in decisions about how the effluent guidelines can best meet the needs of the national clean water program. Click here to obtain a copy of the draft plan.

**Connecticut General Assembly Considering New Legislation to Amend Structures and Dredging Statutes and Provide Funding for Dregding**
***Keane Callahan, Environmental Analyst***

The Connecticut General Assembly is considering a number of bills to amend the state's existing structures and dredging statute and provide funding to protect estuaries and coastal waters. Proposed House Bill H.B. No. 6055 (An Act Concerning Public Hearings on the Erection of Structures and Dredging in Tidal Waters) seeks to amend Section 22a-361 of the Connecticut General Statutes to require the Connecticut Department of Environmental Protection (DEP), Office of Long Island Sound Programs to hold public hearings and require greater public input on coastal development projects proposing to erect structures or dredge within tidal and coastal waters. Currently, state statutes do not require the DEP to hold public hearings on structures and dredging permit applications.

House Bill H.B. No. 6069 (An Act Concerning Residential Docks in the Gateway Region of the Connecticut River) proposes to amend Section 477a of the Connecticut General Statutes to require the DEP to establish regulations concerning the construction of residential docks within the Lower Connecticut River Conservation Zone, which encompasses Connecticut River towns from Middletown south to Old Saybrook, Connecticut. The purpose of the legislation is to establish fair, objective criteria concerning the review, granting or denial of permits for residential docks proposed within the Connecticut River.

Finally, the General Assembly also proposed House Bill H.B. No. 6056 (An Act Concerning the Protection of Connecticut Estuaries) to provide state funding to dredge excess silt and sediment from estuaries, streams and rivers. The purpose of the bill is protect the aesthetic and environmental quality of Connecticut waterways. Click here to access more information about these bills.

**United States Coast Guard Proposes Changes to Requirements for Oil-Spill Removal Equipment and Spill Tracking for Vessels and Marine Transportation-Related Facilities**
***Chris Foster, Esq.and Earl W. Phillips, Jr., Esq.***

The Coast Guard is proposing changes to its requirements for vessel response plans and marine transportation-related facility response plans. The changes will require additional minimum available spill response dispersants, offsets for "in-situ burning" and new aerial tracking requirements. The comment period on this proposed rule has been extended until April 9, 2003. Pursuant to its authority under the Oil Pollution Act of 1990 (a response to

the Exxon Valdez disaster), the Coast Guard is proposing the following changes regarding dispersants, in-situ burning and oil spill aerial tracking.

Planholders would be required to have advance arrangements to utilize dispersants and will be required to be able to commence application within 7 hours of incident specific dispersant approval. The new rule would eliminate a credit provision for dispersants that allowed an offset for the use of dispersants against the required mechanical recovery capability. The Coast Guard's rationale for this change is that dispersants which are more effective in heavy seas, and mechanical recovery, which is more effective in calm seas are preferred in different weather conditions. Two levels of dispersants are being considered: one for the Gulf of Mexico and one for the rest of the United States. At least 50% of the dispersant delivery capability must be deliverable by use of a fixed wing aircraft. Planholders will have eight months after the final rule is published to come into compliance.

In-situ burning equipment would not be required under the new rule. However, credit for in-situ burning capability against mechanical equipment requirements would be allowed for certain cargoes in certain circumstances.

Finally, planholders would be required to have the ability to conduct visual monitoring of a spill by aircraft. The rule would require either a contract or other approved means by which suitable aircraft and trained personnel can monitor a spill up to 50 nautical miles from shore. The aircraft would need to be capable of sustained operations for three 10 hour periods during the first 72 hours following the spill. The aircraft would be required to arrive at the discharge site within 3 hours from discovery of the spill. Observation personnel must be separate from aircraft operations personnel and must be able to maintain continuous communications with ground level command and control personnel, and must be trained in protocols for spill reporting and assessment as provided in the American Society of Testing Materials standard for reporting visual observations of oil on water and other relevant guides.

For the proposed rule and recent public comments click here and go to "Simple Search" to search for docket number 8661.

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