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Client Alert

Lawsuit Dismissed by Federal Court Regarding Transporting of Wastewater By U.S. Army From Indiana To Texas

By: Peter Racher

A federal court in Indianapolis has dismissed a lawsuit to stop the U.S. Army's process of handling and incinerating wastewater generated from the destruction of the VX nerve agent formerly stored at a chemical depot near Newport, Indiana.

Plews Shadley Racher & Braun LLP represented one of the defendants, Veolia ES Technical Solutions LLC, in the litigation.

"We are very pleased with the decision," said Peter Racher of Plews Shadley Racher & Braun LLP. "This case came down to whether an irrational fear, unsupported by any reliable scientific evidence, is sufficient to stop the process of transporting and incinerating hydrolysate."

The 76-page decision on September 22 by Chief U.S. District Judge Larry J. McKinney brings to a close a 17-month-old lawsuit brought by the Sierra Club and other groups and individuals from Texas and Indiana.

"Every environmental and public health official who provided evidence in this case testified that it was in the national interest to complete the process of incinerating the hydrolysate, so that the VX nerve agent stockpiled in Newport could be finally destroyed," Racher added. "The court's judgment vindicates Veolia's position that it had taken every reasonable measure to ship and incinerate these materials in a safe manner, with no adverse impact on human health or the environment."

The lawsuit had been filed against the Army and Veolia, the company selected by the government to transport and incinerate caustic VX hydrolysate. Hydrolysate is the wastewater created when VX is neutralized through chemical hydrolysis. Plaintiffs in the case did not object to the Army's process of neutralizing VX, which was conducted in Indiana at a special Army facility constructed near the former chemical weapons depot. Plaintiffs did object, however, to having hydrolysate transported by truck in specially protected 4,000-gallon steel containers, known as "ISO" containers, from Indiana to the Veolia commercial hazardous waste incinerator near Port Arthur, Texas.

Judge McKinney held that the plaintiffs had provided "no evidence of a material issue of fact that Defendants' production, storage, transport and incineration of [hydrolysate] create an imminent and substantial endangerment to the environment."



Plaintiffs had alleged that VX and another nerve agent breakdown product, EA2192, existed in hydrolysate at dangerous concentrations, despite Army testing demonstrating otherwise. Plaintiffs also alleged that VX could potentially spontaneously re-formulate in hydrolysate before the ISO shipments reached the incinerator. Judge McKinney held that “there is no evidence that anyone with scientific expertise thinks or has data to show that cleared [hydrolysate] has concentrations of VX or EA2192 that exceed their respective method detection limits....Furthermore, despite the theoretical possibility that VX could be reformed under certain circumstances, there is no evidence that it reforms spontaneously in the ISO containers or during transport of the ISO containers to Veolia.”

For many years, the Army stored more than 1,200 tons of VX at the Newport Chemical Facility. The 9/11 terrorist attacks prompted the government to accelerate the destruction of the VX and certain other chemical munitions stockpiles, all of which were in the process of being destroyed pursuant to international treaty obligations. Under supervision of the Indiana Department of Environmental Management, the Army began neutralization operations at the Newport chemical weapons facility in 2005 and completed the process of neutralizing all the VX on August 8, 2008. The process involved mixing VX with heated sodium hydroxide and water in a reactor. The resulting wastewater, hydrolysate, is highly caustic, like household bleach.

The Army chose incineration at the state-of-the-art Veolia facility because of the extremely high destruction and removal efficiency achieved by the facility. More than 99.9999 percent of hazardous waste streams are destroyed in the incinerator. In fact, Judge McKinney held, because of the chemical properties of VX and hydrolysate, they are easily destroyed in an incinerator. Judge McKinney cited the testimony of Dr. Richard Magee, a world renowned expert on chemical weapons and incineration, that the Veolia facility destroys and removes 99.9999999% of materials like VX or hydrolysate. The Veolia incinerator is operated under the supervision of the Environmental Protection Agency and the Texas Commission on Environmental Quality and is subject to strict Clean Air Act and RCRA permit requirements.

Plaintiffs in the case had alleged that the Army had failed to provide sufficient citizen input as required under the National Environmental Policy Act and failed to take environmental impacts sufficiently into account in its decision-making process leading to the decision to transport hydrolysate to the Veolia facility. Judge McKinney, after carefully canvassing the administrative record leading up to the Army’s decision, concluded that the Army’s process had been sound and complied with NEPA.

Plaintiffs also had alleged that the process of trucking hydrolysate along an eight-state transportation route and incinerating the hydrolysate at the Veolia facility violated various provisions of the federal Resource Conservation and Recovery Act. Judge McKinney concluded that the plaintiffs, despite having had more than a year to prove their claims, had no evidence to support the allegations sufficient to justify having a jury trial.

Last year, Judge McKinney held three days of hearings in response to the plaintiffs’ request for a preliminary injunction to immediately stop the process of transporting and incinerating hydrolysate. Judge McKinney, in a 50-page opinion issued in August 2007, denied the plaintiffs’ request for a preliminary injunction. Judge McKinney’s order issued on September 22 now concludes the lawsuit.



In addition to Racher, the attorneys who represented Veolia in the case included George Plews, Sue Shadley, and Gregory Gotwald.