

# E – OUTLOOK

ENVIRONMENTAL HOT TOPICS AND LEGAL UPDATES

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**For further information about insurer liability under Oregon law, make sure to attend the upcoming FREE CLE on October 16, 2013 from 12:00 - 1:00 pm at Miller Nash LLP, or by telephone. For information and to RSVP, contact Anzie Nelson at [Anzie.Nelson@portofportland.com](mailto:Anzie.Nelson@portofportland.com).**

## *Anderson Brothers, Inc. v. St. Paul Fire and Marine Insurance Company*

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You learned in Insurance 101 that a liability insurer's obligation to defend is only triggered if there has been a "suit." But what is a "suit," particularly in an area now dominated by regulatory enforcement, like environmental law? Modern insurance policies explicitly define the term "suit," but older policies – the kind that are usually relied on in "long-tail" claims, like Superfund claims – do not. Does a letter from the U.S. Environmental Protection Agency ("EPA") under Section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), requesting information from a landowner within a Superfund site, constitute a "suit"? That issue is at the heart of several cases now pending in Oregon's federal courts. On August 30, 2013, the Ninth Circuit Court of Appeals ruled in the first of those cases to reach the appellate level. The Ninth Circuit agreed with U.S. District Judge Michael Mosman that a Section 104(e) letter – or a General Notice Letter ("GNL") – constitutes a "suit," and under most general liability policies will require that the insurance company defend. See *Anderson Bros. v. St. Paul Fire & Marine Ins. Co.*, No. 3:11-cv-00137-MO (9th Cir Aug. 30, 2013).

The *Anderson Brothers* decision did not happen in a vacuum. In three cases in Oregon arising out of the Portland Harbor Superfund Site, three different judges have required

insurers to provide a defense to a Section 104(e) letter. Those decisions were the first in the nation to substantively address the impact of a 104(e) letter. Why is Oregon making new law? In part, this has become a hot-button issue because of the way that the EPA has prosecuted the Site, sometimes using 104(e) letters in lieu of a GNL. But more importantly, Oregon is leading on this issue because of its unique environmental insurance claims statute, the Oregon Environmental Cleanup Assistance Act ("OECAA"). The OECAA provides a "rule of construction" for the term "suit" if that term is not defined in the policy. The rule of construction in the statute requires that courts use a broad definition for the term.

The Ninth Circuit affirmed Judge Mosman's finding that a 104(e) letter is a "suit" under the OECAA standard. It rejected arguments from the insurance industry that pre-OECAA case law had limited "suit" to more formal, and more clearly adversarial, communications from DEQ, EPA, or other similar agencies, and that the OECAA's definition of "suit" (which had never been applied in court before) could not expand beyond that case law. The court recognized the coercive nature of EPA's enforcement authority under CERCLA and that the EPA's information request to Anderson was an "intrusive questionnaire the answers to which exposed [the policyholder] to extensive liability—plainly an end obtained through legal process." The Court also rejected the insurance company's argument that the OECAA's rule of construction is unconstitutional as an impairment of contract.

This decision, and other trial-court-level coverage decisions in other pending cases, may have a significant impact on those involved at the Portland Harbor Superfund Site, and other contaminated sites. Because of the way EPA has used 104(e) letters at this Site, hundreds of thousands of dollars were spent by many entities prior to receipt of a GNL. In addition, the court's approach to how the OECAA intersects with the case law bolstered the potential usefulness of that statute generally. Finally, the court's rejection of the constitutional challenge may have prefigured coming fights over the constitutionality of other portions of the OECAA, including portions that were amended by the Legislature in the last session.

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