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WHAT'S INSIDE

HEATING OIL

Parents' victorious suit bars adult children from suing over heating oil spill

The adult children of a couple who had already prevailed in a lawsuit against an energy company stemming from a home heating oil spill may not proceed with their own lawsuit against the same company, Maryland's highest court has ruled.

Cochran et al. v. Griffith Energy Services Inc. et al., No. 87, Sept. Term 2011, 2012 WL 1499817 (Md. May 1, 2012).

The second suit was barred under the doctrine of *res judicata*, the Court of Appeals said, unanimously affirming the lower courts' findings that the children were in privity with their parents.

According to court documents, Robert and Suzanne Cochran sued Griffith Energy Services Inc. in 2006, seeking damages for harm allegedly resulting from a 2002 spill of fuel oil in their home's basement.

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Pennsylvania's new Oil and Gas Act requires 'uniformity' of municipal ordinances

Christopher Nestor, Walter Bunt and David Overstreet of K&L Gates analyze the extent of the preemption of municipal ordinances imposed by Pennsylvania's new Oil and Gas Law, which has already been challenged by townships in state court.

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REUTERS/Les Stone

A gas flare burns at a fracking site in rural Bradford County, Pa. A new state law, being challenged in court, would preempt most local ordinances that attempt to regulate oil and gas wells.

COMMENTARY

Shale gas boom and earthquakes shake up Ohio laws

Michael Gray of Dinsmore & Shohl discusses how the Ohio Legislature is developing regulations governing hydraulic fracturing used for shale gas exploration and addressing issues such as water consumption, disclosure of the chemicals used in the process and the underground injection of contaminated water, which has been connected to earthquakes.

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Pennsylvania's new Oil and Gas Act requires 'uniformity' of municipal ordinances

Lawsuit says Act 13 unconstitutional

By Christopher R. Nestor, Esq., Walter A. Bunt Jr., Esq., and David R. Overstreet, Esq.
K&L Gates

On Feb. 14, Pennsylvania Gov. Tom Corbett signed into law Act 13 of 2012, a broad reform of the key environmental protection regime that governs oil and natural gas operations.[1] Act 13, which was the product of years of debate and months of intense negotiation, is the first comprehensive rewrite of the state's Oil and Gas Act since 1984.

Among other things, Act 13 requires "uniformity" with respect to local municipal ordinances relating to oil and gas operations and further clarifies the scope of preemption under the Oil and Gas Act. This article discusses the uniformity reforms, and related provisions, in Act 13.

PREEMPTION UNDER ORIGINAL OIL AND GAS ACT

Section 602 of Pennsylvania's former Oil and Gas Act[2] preempted local ordinances that attempted to regulate oil and gas wells *except* for ordinances adopted pursuant to the Pennsylvania Municipalities Planning Code or Flood Plain Management Act. Even ordinances adopted pursuant to the MPC or FPMA had significant limitations.

An ordinance adopted pursuant to the MPC or FPMA was preempted if:

- The ordinance "contain[s] provisions ... that accomplish the same *purposes as set forth in*" the Oil and Gas Act; or
- The ordinance "contain[s] provisions which impose conditions, requirements or limitations on the same *features* of oil and gas well operations *regulated by*" the Oil and Gas Act.[3]

The Pennsylvania Supreme Court, in a series of cases decided in 2009, concluded that municipal ordinances are preempted by Section 602 of the Oil and Gas Act when they comprehensively regulate oil and gas development, when they have the same "purposes" as the act, or when they impose conditions, requirements or operations on the same "features" of oil and gas operations as does the Oil and Gas Act.[4]

While these cases provided some guidance to industry and municipalities regarding the scope of preemption under Section 602 of the Oil and Gas Act, the decisions also left many questions unanswered. Since 2009, municipalities across Pennsylvania have adopted inconsistent and varying "zoning" ordinances directed specifically at oil and gas development, many of which are overtly hostile to such development. Those ordinances, in turn, have spawned additional litigation over the scope and effect of Section 602 and, in some cases, have impeded oil and gas development in certain municipalities in the state.

ACT 13 AND LOCAL ORDINANCES

Chapter 33 of Act 13 contains extensive revisions to the municipal ordinance provisions of the Oil and Gas Act. Notably, the legislation requires municipalities to allow drilling in *all* zoning districts, with one exception: Municipalities can preclude siting of a gas well in a residential zone if a well site cannot be placed so that the wellhead is at least 500 feet from any existing building.

The legislation also makes the Pennsylvania Public Utility Commission the arbiter of whether a local zoning ordinance is "reasonable." Prior iterations of the legislation had the state attorney general's office in that role.

Chapter 33 governs the enactment by "local governments" (a county, city, borough, incorporated town or township) of "local ordinances" (an ordinance or other enactment, including a provision of a home

Rigging on natural gas well in Springville Township, Pa. WESTLAW JOURNAL/Staff

rule charter, adopted by a local government that regulates oil and gas operations).[5]

For purposes of Chapter 33, "oil and gas operations" are defined as:

(1) Well location assessment, including seismic operations, well site preparation, construction, drilling, hydraulic fracturing and site restoration associated with an oil or gas well of any depth.

(2) Water and other fluid storage or impoundment areas used exclusively for oil and gas operations.

(3) Construction, installation, use, maintenance and repair of oil and gas pipelines, natural gas compressor stations, and natural gas processing plants or facilities performing equivalent functions.

(4) Construction, installation, use, maintenance and repair of all equipment directly associated with activities specified in paragraphs (1), (2) and (3), to the extent that: (i) the equipment is necessarily located at or immediately adjacent to a well site, impoundment area, oil and gas pipeline, natural gas compressor station or natural gas processing plant; and (ii) the activities are authorized and permitted under the authority of a federal or commonwealth agency.[6]

Section 3303 of Act 13 adds an additional, and broad, preemption provision with respect to oil and gas operations regulated by environmental laws:

> Notwithstanding any other law to the contrary, environmental acts are of statewide concern and, to the extent that they regulate oil and gas operations, occupy the entire field of regulation, to the exclusion of all local ordinances. The commonwealth by this section, preempts and supersedes the local regulation of oil and gas operations regulated by the environmental acts, as provided in this chapter.[9]

Section 3301 defines "environmental acts" as "[a]ll statutes enacted by the commonwealth relating to the protection of the environment or the protection of public health, safety and welfare, that are administered and enforced by the department [Pennsylvania Department of Environmental Protection] or by another commonwealth agency, including an independent agency, and all federal statutes relating to the protection of the environment, to the extent those statutes regulate oil and gas operations."

In addition to both preserving and expanding the scope of preemption of local ordinances purporting to regulate oil and gas operations, Act 13 mandates uniformity among municipal ordinances regulating such activities. Building upon, and consistent with, Section 603(i) of the Municipalities Planning Code,[10] Section 3304 of Act 13[11] requires that all local ordinances regulating oil and gas operations allow for the "reasonable development" of oil and gas resources.

Act 13, which was the product of years of debate and months of intense negotiation, is the first comprehensive rewrite of Pennsylvania's Oil and Gas Act since 1984.

Section 3302 of Act 13 preserves and expands the former Oil and Gas Act's preemption of local ordinances, by preempting local ordinances that attempt to regulate "oil and gas operations," as defined by Act 13, except for ordinances adopted pursuant to the MPC or FPMA.[7] An ordinance adopted pursuant to the MPC or FPMA is preempted if the ordinance "contain[s] provisions ... that accomplish the same purposes as set forth in" Chapter 32 of Act 13 (relating to development) or if the ordinance "contain[s] provisions which impose conditions, requirements or limitations on the same features of oil and gas operations regulated by" Chapter 32 of Act 13.[8]

To that end, Section 3304 of Act 13 mandates that local ordinances regulating oil and gas operations:

- Must allow well and pipeline location assessment operations, including seismic operations and related activities conducted in accordance with applicable federal and state laws and regulations relating to the storage and use of explosives.
- May not impose conditions, requirements or limitations on the construction of oil and gas operations that are more stringent than those imposed on construction activities for other industrial uses within the municipality.
- May not impose conditions, requirements or limitations on the heights of structures, screening and fencing, lighting or noise relating to permanent oil and gas operations that are more stringent than those imposed on other industrial uses or other land development within the zoning district where the oil and gas operations are located.
- Must have a review period for permitted uses that does not exceed 30 days for complete submissions or that does not exceed 120 days for conditional uses.[12]
- Must authorize oil and gas operations, other than activities at impoundment areas, compressor stations and processing plants, as *a permitted use in all zoning districts*. A municipality can, however, prohibit, or permit only as a conditional use, wells or well sites located in a *residential district* if the well site cannot be placed so that the wellhead is at least 500 feet from any existing building. Additionally, in a *residential district*, the following limitations apply: (i) a well site may not be located so that the outer edge of the well pad is closer than 300 feet from an existing building; *and* (ii) oil and gas operations, other than the placement, use and repair of oil and gas pipelines, water pipelines, access roads or security facilities, may not take place within 300 feet of an existing building.
- Must authorize impoundment areas used for oil and gas operations as a permitted use in all zoning districts, subject to the limitation that the edge of any impoundment area may not be located closer than 300 feet from an existing building.
- Must authorize natural gas compressor stations as a permitted use in agricultural and industrial zoning districts and as a conditional use in all other zoning districts, *if* the natural gas compressor building meets the

following standards: (i) the building is located 750 feet or more from the nearest existing building or 200 feet from the nearest lot line, whichever is greater, unless waived by the owner of the building or adjoining lot; *and* (ii) the noise level does not exceed a noise standard of 60dbA at the nearest property line or the applicable standard imposed by federal law, whichever is less.

- Must authorize natural gas processing plants as a permitted use in an industrial zoning district and as a conditional use in agricultural zoning districts *if* the natural gas processing plant building meets the same requirements applicable to natural gas compressor buildings, above.
- May impose restrictions on vehicular access routes for overweight vehicles *only* as authorized under 75 Pa.C.S. (relating to vehicles) or the MPC.
- May not impose limits or conditions on subterranean operations or hours of operation of compressor stations and processing plants or hours of operation for the drilling of oil and gas wells or the assembly or disassembly of drilling rigs.
- May not increase the setback distances set forth in Chapter 32 of Act 13 (related to development). A municipality may, however, impose setback distances that are not regulated by or set forth in the Act so long as those setbacks are no more stringent than those for other industrial uses within the municipality.[13]

In addition to mandating the uniformity described above, Chapter 33 of Act 13 provides procedures for determining whether a municipal ordinance violates the MPC or the Oil and Gas Act. First, Act 13 allows a municipality, *prior to the enactment* of a local ordinance, to make a written request to the PUC to review the proposed ordinance and issue an opinion on whether it violates the MPC or the Oil and Gas Act.[14] The PUC has 120 days from receipt of such a request to issue its opinion, which is purely "advisory in nature and not subject to appeal."[15]

Second, an owner or operator of an oil and gas operation, or a person residing within the municipality, who is aggrieved by the enactment or enforcement of a local ordinance may request that the PUC review the ordinance and determine whether it violates the MPC or the Oil and Gas Act.[16] Participation in the PUC's review is limited to the aggrieved person and the adopting municipality.

Within 120 days of receiving a request for review, the PUC must issue an order determining whether the challenged ordinance violates the MPC or the Oil and Gas Act. The PUC's order is subject to *de novo* review by the Commonwealth Court. A petition seeking such review must be filed with the Commonwealth Court within 30 days of the date of service of the PUC's order.[17]

A small band of municipalities and individual petitioners are seeking to have Act 13 declared unconstitutional.

In addition to the PUC ordinance vetting process, Act 13 provides that any person who is aggrieved by the enactment or enforcement of a local ordinance that violates the MPC or the Oil and Gas Act may, notwithstanding any provision of 42 Pa. Stat. Chapter 85 (relating to actions against local parties), bring an action directly in the Commonwealth Court to invalidate the ordinance or enjoin its enforcement.[18] An aggrieved person may bring such an action without first obtaining review of the ordinance by the PUC.[19]

The Commonwealth Court has the power to award attorney fees and costs in connection with such an action. Specifically, if the court determines that the local government enacted or enforced a local ordinance with willful or reckless disregard of the MPC or the Oil and Gas Act, it may order the local government to pay the plaintiff reasonable attorney fees and other reasonable costs incurred by the plaintiff in connection with the action.[20]

Alternatively, if the Commonwealth Court determines that the action by the plaintiff is frivolous or was brought without substantial justification in claiming that the challenged ordinance is contrary to the MPC or the Oil and Gas Act, it may order the plaintiff to pay the local government reasonable attorney fees and costs incurred by the local government in defending against the action.[21]

As an incentive for municipalities to review their existing ordinances and legislate accordingly, Act 13 provides that if the PUC, the Commonwealth Court or Pennsylvania Supreme Court issues an order that a local ordinance violates the MPC or the Oil and Gas Act, the municipality becomes immediately ineligible to receive funds collected by the impact fee provisions of Act 13.[22] Act 13 provides for the imposition of a drilling impact fee, which may be used for local and state purposes as specified by the law. The municipality will remain ineligible to receive such funds until it repeals the challenged ordinance or the order is reversed on appeal.[23]

The provisions of Chapter 33 of Act 13 apply to the enforcement of any local ordinances existing on the effective date of Chapter 33.[24] Municipalities with existing ordinances relating to oil and gas operations are afforded 120 days from the effective date of Chapter 33 to review their ordinances and bring them into compliance with the Oil and Gas Act.[25]

Section 9 of Act 13 made the Chapter 33 provisions effective April 14, 60 days after enactment.[26]

CHALLENGE TO ACT 13

On March 29, a small band of municipalities (representing fewer than 1 percent of municipalities in Pennsylvania) and individuals filed a petition with the Commonwealth Court seeking to have Act 13 declared unconstitutional and enjoined.[27] Named respondents in the petition are the state, the PUC, the chairman of the PUC, the attorney general, the DEP and the secretary of the DEP.

The petitioners' challenges to Act 13, with some exceptions, principally relate to Chapter 33. The petitioners broadly claim that Act 13 unconstitutionally disrupts municipalities' local zoning schemes and usurps their police power to legislate to protect the health, safety and welfare of their citizenry. In support, the petitioners assert a litany of state and federal constitutional challenges to Act 13, ranging from its

alleged violation of Article I, Section 1, of the Pennsylvania Constitution to its alleged unconstitutional vagueness.

The Commonwealth Court on April 11 preliminarily enjoined certain provisions of Chapter 33. That order has been appealed by all respondents to the state Supreme Court.[28] The appeals are pending. As a result of the appeals, the Commonwealth Court's injunction order has been automatically superseded.

The Commonwealth Court entered an order April 20 that set an expedited schedule for the filing of preliminary objections and dispositive motions. Those objections and motions have been filed and fully briefed by the parties, and oral argument before the Commonwealth Court, *en banc*, is scheduled for June 6. It is anticipated that appeals will be taken to the Pennsylvania Supreme Court from the Commonwealth Court's ruling when issued. WJ

NOTES

[1] *See* 58 Pa. Stat. § 2301.

[2] 58 Pa. Stat. § 601.602.

[3] *Id.* (emphasis added).

[4] *See Huntley & Huntley Inc. v. Borough Council of the Borough of Oakmont,* 964 A.2d 855 (Pa. 2009); Range Res. – Appalachia LLC v. Salem Twp., 964 A.2d 569 (Pa. 2009).

[5] 58 Pa. Stat. § 3301 (defining terms).

[6] *Id.*

[7] *See* 58 Pa. Stat. § 3302.

[8] *Id.*

[9] 58 Pa. Stat. § 3303

[10] 53 Pa. Stat. § 10603(i).

[11] 58 Pa. Stat. § 3304.

[12] As defined by Act 13, a "permitted use" is a "use which, upon submission of a written notice to and receipt of a permit issued by a zoning officer or equivalent official, is authorized to be conducted without restrictions other than those set forth in [Section 3304 of Act 13, relating to uniformity of local ordinances]." *See* 58 Pa. Stat. § 3301. In short, a "permitted use" is a use permitted by right in a zoning district, as opposed to a use permitted by a conditional use or special exception approval process. A zoning district typically provides for certain uses by right. Other uses are provided by special exception or conditional use. The uses permitted by special exception or by conditional use, while they are permissible and legitimate uses within the district, require additional scrutiny by the body granting their approval.

[13] 58 Pa. Stat. § 3304 (emphasis added).

[14] 58 Pa. Stat. § 3305(a).

[15] *Id.*

[16] *See* 58 Pa. Stat. § 3305(b).

[17] *Id.* Act 13 provides that PUC opinions and orders under the foregoing provisions are not subject to 2 Pa. Stat. Chapter 5, Subchapter A (relating to the practice and procedure of Commonwealth Agencies), 65 Pa. Stat. Chapter 7 (relating to open meetings), or 66 Pa. Stat. Chapter 3, Subchapter B (relating to investigations and hearings). *See* 58 Pa. Stat. § 3305(c). Additionally, the PUC is given broad authority to hire staff, issue orders and adopt both temporary and permanent regulations to carry out its review functions. *See* 58 Pa. Stat. § 3305(d).

[18] *See* 58 Pa. Stat. § 3306.

[19] *Id.*

[20] *See* 58 Pa. Stat. § 3307.

[21] *Id.*

[22] *See* 58 Pa. Stat. § 3308.

[23] *Id.*

[24] 58 Pa. Stat. § 3309.

[25] *Id.*

[26] *See* Act 2012-13 (H.B. 1950), P.L. 87, § 9.

[27] The case is docketed as *Robinson Township et al. v. Commonwealth et al.,* No. 284 MD 2012 (Pa. Commw. Ct.).

[28] Two separate appeals were filed by two separate groups of respondents. The appeals are docketed as *Robinson Township et al. v. Commonwealth et al.,* Nos. 37 MAP 2012 and 40 MAP 2012.

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Shale gas boom and earthquakes shake up Ohio laws

By Michael Gray, Esq.
Dinsmore & Shohl

A rare Ohio earthquake on New Year's Eve has added new fuel in the growing controversy over shale gas exploration in the state. The earthquake, which was tied to the underground injection of waste-water from the fracking process, provided a new sense of urgency to create rules that address the environmental consequences of fracking.

On May 25 Ohio Republicans, with the support of Republican Gov. John Kasich, passed an overhaul of the state's oil and gas laws that address new issues from shale gas exploration. While the 200-page bill had industry support, it also had the support of some environmentalists. The Environmental Defense Fund testified in support of the bill, applauding it for being a "more complete package" of changes than in other states.[1]

This is not the first overhaul of Ohio oil and gas laws in recent years. In 2010 the state completed the most significant revision of its oil and gas laws since they came into existence in 1965. But these new rules, coming on the cusp of the emergence of shale gas development in Ohio, failed to address many issues involved with horizontal drilling and hydraulic fracturing. As a result, a new bill, S.B. 315, which will soon be signed into law, will address many unique shale gas requirements.

The new legislation comes just as Ohio's natural gas industry is quickly achieving national prominence. Ohio's natural gas is in increasing demand because of the prevalence of "wet gas" in the state. Wet natural gas contains ethane and other useful chemicals, in addition to the standard fuel gas. Ethane can be "cracked" to form ethylene, used in the manufacture of plastics.

In what promises to be one of the largest industrial developments in the region, Shell recently decide to build a ethane-cracker plant in neighboring southwest Pennsylvania.[2] Even as natural gas prices remain low, wet gas remains a valuable commodity.

REUTERS/Donna Carson

In late May Ohio Republicans, with the support of Gov. John Kasich, shown here, passed an overhaul of the state's oil and gas laws that addresses new issues from shale gas exploration.

While S.B. 315 affects many areas of energy policy, the primary effects of the bill will be on shale gas exploration. Most notable among the bill's provisions are requirements for the disclosure of the source of water used in the fracking process, requirements for water quality sampling, changes in chemical-reporting requirements and major changes to the underground injection well program.

CHEMICAL DISCLOSURE

Ohio environmental groups have been highly critical of the perceived lack of disclosure of chemicals used in the fracking process. The fracking process works by pumping water into a well and hydraulically increasing the pressure in the well to the point that it fractures the target layer of shale. Various chemicals are added to water pumped into the well in order to control bacteria growth, reduce corrosion and improve production.[3] While the chemicals represent a small percentage of all water pumped into a well, given the large quantities of water involved in the fracking process, the amount of chemicals is significant.

S.B. 315 puts in place a "cradle to grave" or, in oil and gas terminology, a "spud to plug," chemical-reporting system. Under the old standard, well operators only had to report to the Ohio Department of Natural Resources those chemicals used in the well-stimulation process. With the new law, well operators will have report all chemicals that go into a well during any point in the life of the well. The ODNR plans to disclose chemical-reporting data from well operators on the website www.fracfocus.org.

Critics contend that S.B. 315 does not adequately disclose the identity of all chemicals because certain trade-secret chemicals may be disclosed by the "chemical class to which the component belongs," as opposed to the precise name of the chemical.[4] Well operators must identify trade secret chemicals to medical professionals in the event that a party claims to have been sickened by an incident involving a well.[5] The medical professional, however, must use the identity of the trade secret chemical only for diagnostic purposes and preserve the confidentiality of the disclosure.[6]

PROTECTING WATER SOURCES

Unlike many other states, Ohio has a plentiful supply of fresh water. When it comes to fracking, however, water use can create controversy.[7] Each well requires between 5 million and 6 million gallons of water during its lifetime.[8] The water must come from either the Lake Erie or the Ohio River watershed. While each watershed contains massive amounts of water, the increasing trend is to monitor and control withdrawals.

A bill under consideration, H.B. 473, would create a program for the issuance of permits for the withdrawal of water from the Lake Erie basin as part of the ongoing Great Lakes Initiative. Ohio must implement the law to comply with the Great Lakes Compact, a legal agreement among the Great Lakes states and two Canadian provinces to regulate large withdrawals and take other actions to protect the Great Lakes.[9]

LIMITED DISPOSAL OPTIONS

Options for the disposal of fracking wastewater in Ohio have become increasingly limited. Currently, 98 percent of all oil and gas well brine is disposed of by underground injection.[14] The other 2 percent is spread on roads for dust and ice control.[15] Attempts to treat brine at centralized waste facilities prior to disposal at a publicly owned treatment works facility have met with considerable resistance from the Ohio Environmental Protection Agency and are not viable options.

Underground injection wells are now receiving more oversight than before the shale gas boom. Since March 2011, the Youngstown, Ohio, region has experienced 12 small earthquakes, ranging in magnitude from 2.1 to 4.0.[16] All of the earthquakes were located near the Northstar I deep injection well, which had been disposing of large quantities of brine from Pennsylvania and Ohio. Scientists believe that the injection well was operating near a previously unknown fault line that was in a state of stress, triggering the earthquakes.[17]

> While the chemicals represent a small percentage of all water pumped into a well, given the large quantities of water involved in the fracking process, the amount of chemicals is significant.

In 2011, Kasich vetoed an earlier version of the proposed law, which was criticized for not being stringent enough. While the primary aim of the compact was to prevent the draining of the Great Lakes by sending water to dryer southern states, undoubtedly H.B. 473 will affect fracking in Ohio by creating a permitting program for large withdrawals.

In addition to the requirements of H.B. 473, under S.B. 315 well operators will have to disclose the source of water used in the fracking process.[10] Operators will have to indicate whether waters come from the Lake Erie or the Ohio River watershed and estimate the amount of recycled water to be used, if any. Ohio is quickly developing the facilities needed to recycle flowback water from fracking operations.[11]

Another change to oil and gas law from S.B. 315 is the requirement for baseline water quality testing. Well operators will have to conduct multiple water tests within 1,500 feet of a proposed horizontal well.[12] For vertical wells in urban areas, water sampling will have to be conducted within 300 feet of the well.[13] If water contamination is detected in the future, this testing will allow regulators to determine to what extent groundwater was contaminated prior to any drilling activity.

S.B. 315 includes a number of changes that affect the disposal of waste in underground injection wells.[18] The bill maintains a fee of 5 cents per barrel to dispose of in-state brine and 20 cents per barrel for out-of-state brine.[19] All businesses that wish to transport brine within Ohio also will have to register with the state and maintain insurance.[20]

The original version of the bill contained a few controversial proposals that were later removed. These included the requirement that trucks hauling brine contain an electronic tracking transponder and an increase in fees for the disposal of out-of-state brine to $1 per barrel.

Underground injection has become virtually the only way to dispose of the large quantities of brine generated in the fracking process. In Warren, Ohio, the Patriot Water Plant initially received permission to pre-treat brine prior to discharging it to the local water treatment plant.[21] But the Patriot plant's treatment activities met with considerable resistance from environmental groups and the Ohio Environmental Protection Agency. The Ohio EPA refused to permit Warren's wastewater treatment plant to accept the treated brine, effectively shutting down the Patriot plant.[22]

Although, for now, underground injection is the only feasible method of disposing of large amounts of oil and gas brine, S.B. 315 does allow the director of the Ohio EPA to explore wastewater treatment and recycling of fracking wastewater through the implementation of future pilot programs.[23]

MORE NEW RULES ON THE WAY

The only certainty when it comes to the regulation of fracking in Ohio is that regulation of this emerging industry is far from over. On April 20, Richard J. Simmers, chief of oil and gas resources management at the Ohio Department of Natural Resources, identified other areas of state oil and gas law that could benefit from improved regulation. In particular, Simmers identified spill prevention, centralized impoundments and pipelines as areas ready for review.

As work continues on Ohio's lofty goal of developing the best shale gas regulatory scheme in the nation, it has become clear that regulation will be an ongoing process. WJ

NOTES

[1] Bob Downing, *Environmental group likes Ohio's revised drilling rules,* Akron Beacon J., May 4, 2012, *available at* http://www.ohio.com/blogs/drilling/ohio-utica-shale-1.291290/environmental-group-likes-ohio-s-revised-drilling-rules-1.304851.

[2] Shell Chemicals, Appalachia Petrochemical Project, *available at* http://www.shell.com/home/content/chemicals/aboutshell/our_strategy/marcellus_cracker_project/.

[3] FracFocus.org, Why Chemicals Are Used, *available at* http://fracfocus.org/chemical-use/why-chemicals-are-used.

[4] Ohio Citizen Action, Kasich's "Right-to-Know" About Chemicals Would Keep Ohioans in the Dark, *available at* http://ohiocitizen.org/?p=13388.

[5] S.B. 315, § 1509.10(H)

[6] *Id.*

[7] Spencer Hunt, *"Fracking" is thirsty work,* Columbus Dispatch, Mar. 25, 2012, *available at* http://www.dispatch.com/content/stories/local/2012/03/25/fracking-is-thirsty-work.html.

[8] Ohio Dep't of Natural Res, Water Withdrawal Regulations for Oil and Gas Drilling (Mar. 21, 2012), *available at* http://www.dnr.state.oh.us/water/pubs/fs_div/default/tabid/23941/Default.aspx.

[9] Great Lakes-St. Lawrence River Basin Water Resources Compact, Ohio Great Lakes Compact

Advisory Board, Final Recommendations to the Governor and General Assembly (Dec. 15, 2010), *available at* http://ohiodnr.com/portals/7/Compact_Advisory_Board_Final_Report_12_15_10.pdf; Great Lakes Basin Compact, *available at* http://www.glc.org/about/glbc.html.

[10] S.B. 315, § 1509.06(A)(8)(a).

[11] Bob Downing, *Chesapeake unveils system to recycle waste water from 'fracking' drill sites,* Akron Beacon J., Feb. 9, 2012, *available at* http://www.ohio.com/news/local-news/chesapeake-unveils-system-to-recycle-waste-water-from-fracking-drill-sites-1.264011.

[12] S.B. 315, § 1509.06(A)(8)(c).

[13] S.B. 315, § 1509.06(A)(8)(b).

[14] Proponent Testimony in Support of Senate Bill 315: Hearing before the Ohio S. Energy & Pub. Util. Comm. (Mar. 28, 2012) (statement of James Zehringer, Director, Ohio Dep't of Natural Res.), *available at* http://www.dnr.state.oh.us/Portals/11/oil/pdf/SB%20315%20Proponent%20Testimony%20of%20Director%20Zehringer_FINAL.pdf.

[15] *Id.*

[16] Ohio Dep't of Natural Res., Preliminary Report on the Northstar 1 Class II Injection Well and the Seismic Events in the Youngstown, Ohio, Area (March 2012), *available at* http://ohiodnr.com/downloads/northstar/UICReport.pdf.

[17] *Id.*

[18] *See* http://www.dnr.state.oh.us/tabid/23947/Default.aspx

[19] S.B. 315, § 1509.22(H)(4).

[20] S.B. 315, § 1509.222(A)(1).

[21] Joe Giesy, *Patriot Water Treatment Ceases Operations Sunday,* Bus. J., Mar. 30, 2012, *available at* http://businessjournaldaily.com/company-news/patriot-water-treatment-ceases-operations-sunday-2012-3-30.

[22] *Id.*

[23] S.B. 315, § 737.10(A).

Michael Gray is an environmental attorney in the Cincinnati office of **Dinsmore & Shohl**. He is an Iraq war veteran and former Air Force officer.

Heating oil

CONTINUED FROM PAGE 1

Although the trial court dismissed a claim alleging Griffith fraudulently concealed high benzene levels found in the home in 2006, the Cochrans won a monetary jury award on their claims for negligence and breach of contract.

Their children, Robert Cochran Jr. and Elizabeth Ingoe, were in college at the time of the spill and were not parties to the suit. Griffith, however, deposed Robert Jr. during discovery and Ingoe testified at the trial.

The children sued Griffith in 2009, alleging fraud and negligent supervision with respect to the contamination levels found at their parents' home in 2006, according to the high court's opinion.

The Washington County Circuit Court granted Griffith's motion to dismiss, ruling that the children's claims were barred by *res judicata*.

Maryland's intermediate appellate court, the Court of Special Appeals, affirmed, and the Court of Appeals granted review.

Robert Jr. and Ingoe argued they were not in privity with their parents because they were not parties in the prior suit. In addition, they contended that the lower courts therefore should not have applied *res judicata*, according to the high court's opinion.

Before a court can apply *res judicata*, it must determine whether the parties in the second litigation are the same as, or in privity with, the parties in the first litigation.

But the Court of Appeals said its research uncovered numerous cases holding that nonparties to a prior lawsuit were in privity with a party for *res judicata* purposes under circumstances similar to those in this case.

Judge Sally D. Adkins, writing for the court, said one reason to find privity in this case is that the Cochrans' children knew about the earlier action but made no effort to intervene.

She pointed to "a well-established principle of law" that a nonparty who has full knowledge of pending litigation and who is entitled to intervene but does not do so will be bound by a judgment in that litigation.

Other factors the court deemed important in this case were the family relationship itself, the fact that both cases involved the same residence, and the fact that the same attorney represented the children and their parents in the two lawsuits.

> The children's claims are "inextricably intertwined with the claims adjudicated in the first suit," the state high court said.

These factors all indicated that the children's interests were adequately represented in the prior action, thus justifying binding Robert Jr. and Ingoe to the earlier lawsuit, the court said.

Indeed, the court said, the children's claims in this case were based on alleged misrepresentations made solely to their parents; there was no allegation of any fraudulent statements to the children themselves.

The children's claims "are thus inextricably intertwined with the claims adjudicated in the first suit," Judge Atkins wrote.

Consequently, the Court of Appeals concluded that since the children were in privity with their parents, their claims were barred by *res judicata*. WJ

Related Court Document:
Opinion: 2012 WL 1499817

See Document Section A (P. 19) for the opinion.

BP, EPA reach deal on Canada crude at U.S. refinery

HOUSTON, May 23 (Reuters) – BP Plc said it will spend $400 million to install pollution controls at its giant Whiting, Ind., refinery, to allow it to process heavy crude oil from Canada, in a deal with U.S. and state regulators.

The consent decree reached with the U.S. Justice Department and Environmental Protection Agency also requires London-based BP to pay $8 million to resolve prior alleged clean-air violations at its 405,000-barrels-per-day plant, the sixth-largest U.S. refinery.

The deal, announced by the government and confirmed by BP, ends years of opposition that might have left BP unable to use $4 billion worth of new processing units being installed at Whiting that will allow it to run Canadian tar sands crude as early as 2013. BP has set plans to use Canadian crudes for more than 85 percent of the refinery's daily needs.

As part of the settlement, BP will install an estimated $400 million of pollution-control equipment at the refinery while finishing a crude slate expansion project.

To boost profits, U.S. Midwest refiners are looking to retrofit plants to process plentiful supplies of Canadian heavy oil, which is cheaper but also has a higher content of pollutants that cause acid rain, smog and haze.

As part of the settlement, BP will install an estimated $400 million of pollution-control equipment at the refinery while finishing a crude slate expansion project.

"We look forward to completion of the modernization project, which will improve the refinery's efficiency and competitiveness while continuing to reduce emissions," Whiting refinery manager Nick Spencer said in a statement.

The agreement between BP and the EPA will set a precedent for refiners seeking to upgrade their refineries to run tar sands crude in the future, environmental groups said.

"Generally, pollution control is supposed to be based on the best available technology, so this will be a benchmark," said Eric Schaeffer of the Environmental Integrity Project, a former enforcement official at the EPA.

The EPA has sought to reduce emissions at refineries, particularly from flaring devices that burn off unneeded petroleum supplies. In April the EPA reached a deal with Marathon Petroleum Corp. to curtail flaring at its six U.S. refineries.

An energy industry analyst said the EPA's agreement with BP may not affect many other U.S. refineries because the Whiting crude slate changeover project is one of the last major projects currently scheduled.

"I don't know of many more projects out there," said David Hackett, president of Stillwater Associates. "BP is on the back end of those projects."

Essentially the conversion of the Whiting refinery to run Canadian crude is switching the refinery from light, sweet crude to heavy, sour crude, which many Gulf Coast refineries have already done to Latin American crude grades.

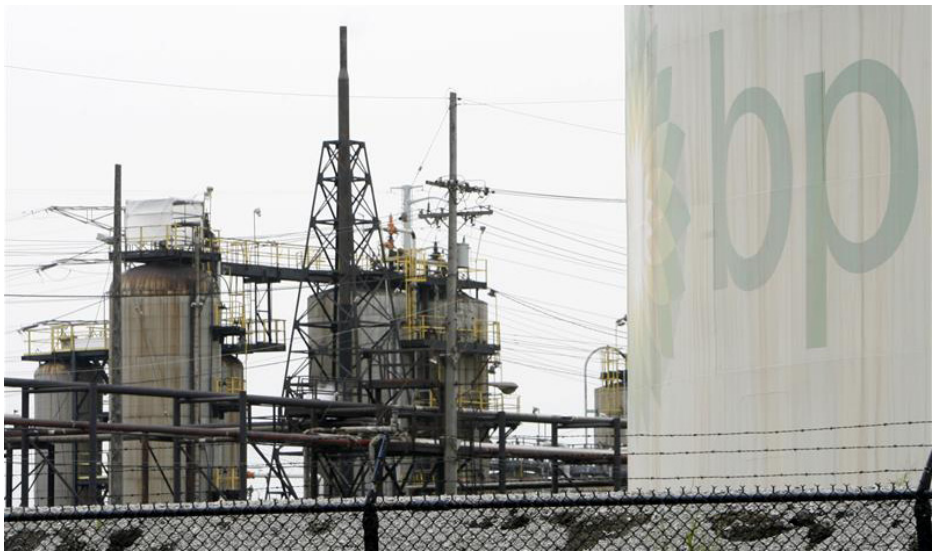
In a statement released May 23, the Natural Resources Defense Council, which participated in opposition to BP's crude slate expansion, said the new pollution equipment will cut emissions from the Whiting refinery's flare system by 90 percent.

Canadian tar sands crude has become highly desired as a feedstock for refiners because it is cheaper than other crude oil grades. It is easier to obtain for U.S. Midwest refiners because of its source in Alberta.

Iain Conn, global head of BP's refining and marketing, said in March that the company had decided to make the investment in the Whiting refinery and put refineries in California and Texas up for sale because of the appeal of Canadian crude.

"We are moving to a Northern Tier refining strategy," Conn said.

BP currently processes between 70,000 and 80,000 barrels per day (bpd) Canadian crude at the Whiting refinery. After the project is



REUTERS/John Gress

BP will pay $8 million to resolve prior alleged clean-air violations at its oil refinery in Whiting, Ind., shown here, the sixth-largest U.S. refinery.

complete, the refinery will be able to run up to 350,000 bpd in tar sands crude.

Tar sands crude has drawn opposition from environmental groups because it has high levels of heavy metals, is corrosive and may produce higher levels of air pollutants. The mining of tar sands crude, which is cut from pits in Alberta, and then refined into a liquid, is also said to produce high levels of greenhouse gases.

Opposition to use of tar sands crude has temporarily halted TransCanada's Keystone XL pipeline project to bring the oil to refineries on the U.S. Gulf Coast.

Opposition to the Whiting refinery's changeover to tar sands crude began shortly after BP announced plans to begin the $4-billion project in 2007. Local groups and politicians from President Obama's home state of Illinois questioned BP's initial assumptions of pollution from use of tar sands crude.

After Obama took office in 2009, EPA put a hold on a permit Indiana had issued to BP for the project, setting the stage for the May 23 settlement. WJ

(Reporting by Erwin Seba in Houston and Timothy Gardner in Washington; editing by John Wallace, Chris Baltimore and Dale Hudson)

CERCLA

CERCLA defendants can assert third-party contribution claims

Two oil refinery operators sued for CERCLA cleanup costs by a neighboring property owner can maintain their own contribution claims against two other companies, an Oklahoma federal judge has ruled.

Tronox Worldwide LLC v. Atlantic Richfield Co. et al., No. CIV-07-1017, 2012 WL 1493733 (W.D. Okla. Apr. 27, 2012).

It is premature to dismiss the contribution claims because the refinery operators are potentially exposed to liability for the plaintiff's entire cleanup costs, not just their "fair share," U.S. District Judge Joe Heaton of the Western District of Oklahoma said. He denied the third-party defendants' motion for judgment on the pleadings.

> "Defendants are potentially exposed to liability for *all* the response costs incurred by Tronox, irrespective of their own 'fair share,'" the judge said.

Defendants in CERCLA contribution suits can pursue contribution claims against another potentially liable party only if they are exposed to liability exceeding their equitable portion of cleanup costs, the judge's order says.

According to the order, Tronox Worldwide LLC filed the lawsuit after spending $1.5 million in cleanup costs to comply with a consent order issued by the Oklahoma Department of Health.

Tronox named as defendants Atlantic Richfield Co. and ARCO Environmental Remediation LLC, claiming a refinery operated by the defendants released hydrocarbons and other pollutants that allegedly contaminated Tronox's adjoining property.

Tronox asserted that the defendants were liable under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, for some or all of its cleanup costs, according to the order.

Atlantic and ARCO, in turn, filed a third-party complaint seeking contribution from Union Oil Company of California and Lario Oil & Gas Co., saying the two third-party defendants caused at least some of the alleged contamination.

Union Oil and Lario moved for judgment on the pleadings, saying Atlantic and ARCO were not exposed to liability beyond their portion of the cleanup costs and therefore they failed to state a claim for contribution.

Judge Heaton acknowledged that courts have precluded contribution defendants from asserting their own contribution claims against another party when they themselves cannot be liable to the plaintiff for more than their fair share of the cleanup costs.

But Tronox's complaint includes a claim under CERCLA Section 107(a) seeking to hold Atlantic and ARCO jointly and severally liable for the entire cleanup, the judge pointed out.

"Stated another way, defendants are potentially exposed to liability for *all* the response costs incurred by Tronox, irrespective of their own 'fair share' of those costs," the judge said.

Thus, it cannot be said at this stage of the litigation that a third-party contribution claim is unavailable, he concluded. WJ

Attorneys:
Defendants/third-party plaintiffs: A. Scott McDaniel, McDaniel Longwell Acord PLLC, Tulsa, Okla.

Third-party defendants: Ronald N. Ricketts, GableGotwals, Tulsa

Related Court Document:
Order: 2012 WL 1493733

The plaintiffs challenged the South Florida Water Management District's practice of pumping contaminated canal water into Lake Okeechobee, shown here.

ATTORNEY FEES

Indian tribe denied attorney fees in Clean Water Act case

A Florida Indian tribe cannot recover attorney fees in a Clean Water Act suit because its trial victory was nullified on appeal, the 11th U.S. Circuit Court of Appeals has ruled.

Friends of the Everglades et al. v. South Florida Water Management District et al., No. 11-15053, 2012 WL 1468484 (11th Cir. Apr. 30, 2012).

The panel said the Miccosukee Tribe of Indians of Florida was not a "prevailing party" for purposes of the statute's attorney-fee provision.

The ruling stems from a lawsuit brought in the U.S. District Court for the Southern District of Florida by two environmental groups, Friends of the Everglades and Fishermen Against the Destruction of Environment, against the South Florida Water Management District.

According to the 11th Circuit's opinion, the groups filed the action under the Clean Water Act, 33 U.S.C. § 1311, challenging the water district's practice of pumping contaminated canal water into Lake Okeechobee.

The CWA prohibits the "discharge of any pollutant" without a federal permit.

The Miccosukee Tribe of Indians of Florida joined the suit on the side of the environmental groups.

> The lawsuit led the EPA to promulgate regulations contrary to the tribe's position, the 11th Circuit said.

Following a two-month trial, the District Court ruled in the plaintiffs' favor by issuing an injunction forcing the water district to apply for a federal permit for its pumping operations.

On appeal, however, the 11th Circuit overturned the order, concluding that the water district did not violate the CWA. *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009).

The panel relied on an Environmental Protection Agency regulation adopted after the District Court's decision that says "water transfers" are not subject to federal permitting requirements.

While the appeal was pending, the Miccosukee Tribe filed a motion in the District Court seeking to recover the $1.4 million in attorney fees it had incurred in the case.

The lower court denied the motion, concluding the tribe was not the prevailing party and thus not entitled to fees under the CWA.

The tribe appealed to the 11th Circuit, which affirmed the fee denial in a recent ruling.

The panel explained that Section 1365(d) of the Clean Water Act authorizes an attorney-fee award to a "prevailing or substantially prevailing party," provided that the court determines the award is "appropriate."

Congress' intent in enacting this provision was to allow courts to award fees to plaintiffs whose suit has a "positive catalytic effect," the panel said.

The tribe did not prevail or substantially prevail in this case because, in the end, it did not obtain an injunction or any other relief it had sought, the panel said.

The lawsuit instead led the EPA to promulgate regulations contrary to the tribe's position, the panel said.

"We do not think this renders the tribe a 'substantially prevailing' party, nor is this what was intended by the idea that a lawsuit has a positive catalytic effect," it said. WJ

Attorneys:
Plaintiff: Bernardo Roman III, Miami

Defendant: James E. Nutt, South Florida Water Management District, West Palm Beach, Fla.

Related Court Document:
Opinion: 2012 WL 1468484

Nebraska residents challenge Keystone pipeline law

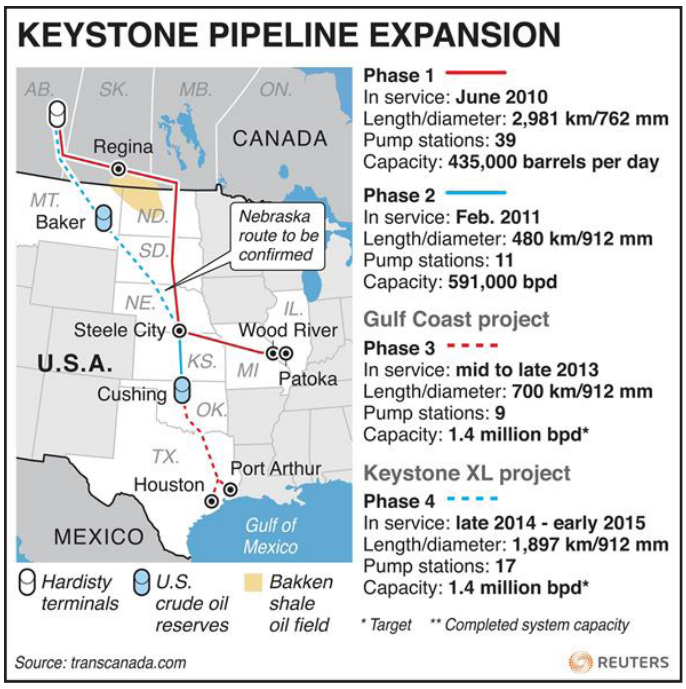
OMAHA, Neb., May 23 (Reuters) – Three Nebraska landowners are challenging a state law aimed at speeding up approval of a new route for TransCanada's proposed Keystone XL oil pipeline from Canada to Texas around environmentally sensitive areas of the state.

The Nebraska law approved in April aims to speed the pipeline process by giving the decision on the route to the state environmental quality department, with final approval by Gov. Dave Heineman.

The law "largely eviscerated" actions the Legislature took in a special session last year, violating the state constitution by stripping the authority over pipeline decisions from a state public service commission, the lawsuit said.

Under the April law, the commission would only review a pipeline proposal if the governor rejects the environmental quality department decision.

Landowners Randy Thompson, Susan Luebbe and Susan Dunavan filed the lawsuit in a Nebraska district court and asked the Nebraska Supreme Court to take the case directly. It named Heineman, the state treasurer and environmental quality department director as defendants, but not TransCanada.



TransCanada declined to comment on the lawsuit between the private landowners and Nebraska, but is committed to the Keystone XL project, spokesperson Grady Semmens said.

> The lawsuit asks the courts to overturn the law and enter a permanent injunction, but does not ask for the law to be enjoined temporarily while the case is considered.

"We continue to work collaboratively with the Nebraska Department of Environmental Quality on defining a new route for Keystone XL that avoids the Sandhills," Semmens said in a statement.

The lawsuit asks the courts to overturn the law and enter a permanent injunction, but does not ask for the law to be enjoined temporarily while the case is considered.

David Domina, an attorney representing the landowners, said it could take 10 months for a decision if the state Supreme Court takes the case directly, or a year longer than that if the case is heard first in the Lancaster County District Court.

Thompson said he had been in discussion with TransCanada about the pipeline proposals since late 2007.

"The main source of my frustration has come from the actions of our elected officials, not only in Nebraska, but in the nation," Thompson said in a telephone briefing May 23.

Earlier proposals would have routed the pipeline through the sensitive Sandhills region of Nebraska and drew concerns about the safety of the Ogallala aquifer, a major source of fresh water for drinking and farmland.

President Obama rejected a proposed route earlier this year, drawing criticism from Republicans and effectively delaying a decision until after the November election.

TransCanada has been negotiating a new route with Nebraska and has submitted a new application for the northern part of the pipeline to the U.S. State Department, which reviews the application because it crosses an international border. WJ

Paper mill might face punitive damages in river pollution suit

A purported class of people and businesses allegedly harmed by a massive discharge of paper mill waste into a Louisiana river may proceed with a suit seeking punitive damages despite the state's general ban against such recovery, a federal judge has ruled.

Evans et al. v. Tin Inc., Nos. 11–2067, 11–2068, 11–2069, 11–2182, 11–2348, 11–2351, 11–2417, 11–2949, 11–2985, 11–2987, 11–3018, 11–3021, 11–3048, 11–3049, 12–18 and 11–3050, 2012 WL 1499225 (E.D. La. Apr. 27, 2012).

U.S. District Judge Lance M. Africk of the Eastern District of Louisiana said the plaintiffs have sufficiently pleaded that an exception to the general ban applies because corporate decisions that allegedly caused the spill were made in Texas, a state that allows for the recovery of punitive damages.

The lawsuit stems from the Aug. 9, 2011, discharge of pollution into the Pearl River from Tin Inc.'s paper mill and waste treatment facility in Bogalusa, La. The river covers parts of Louisiana and Mississippi.

A proposed class of residents, property owners, businesses and fishermen allege the contamination killed 7 million fish and other wildlife.

The discharge permanently altered the natural balance of the Pearl River, the suit says, and caused serious injuries to individuals.

The plaintiffs seek not only compensatory damages, but also punitive damages under general maritime or Texas law.

The plaintiffs support their demand for punitive damages by alleging the contamination resulted from profit-driven decisions made by Tin officials in Austin, Texas, where the company is based. The decisions demonstrate willful misconduct and a reckless disregard for public safety, the lawsuit says.

According to Judge Africk's order, Tin filed a motion to dismiss the punitive damages claim, arguing such recovery is not available under general maritime law because that is not the substantive law in the case.

The lawsuit stems from the discharge of pollution into the Pearl River from Tin Inc.'s paper mill and waste treatment facility in Bogalusa, La. Pearl River Swamp is shown here.

The company also asserted that Louisiana law, which controls the case, does not permit the recovery of punitive damages.

Judge Africk agreed that maritime law does not apply.

"Despite the potential impact on maritime commerce, the general character of the activity giving rise to the incident in this case was neither maritime in nature nor substantially related to any traditional maritime activities," the judge said.

He noted that the plaintiffs have not alleged that Tin's land-based industrial activities involved navigation, safety aboard vessels or other more traditional maritime activities.

The judge ruled, however, that punitive damages are recoverable under an exception to Louisiana's ban.

La. Civ. Code art. 3546 allows for punitive damages where the law of another state authorizes the damages and that other state is the place where the injurious conduct occurred, the place where the injury resulted or the domicile of the defendant, the order said.

Judge Africk agreed with the plaintiffs that Texas law should be considered as a basis for punitive damages because the complaint adequately alleges that the pollution discharge resulted from corporate-level decisions made by defendants domiciled in Texas.

Tin had argued that the alleged tortious conduct occurred only at the paper mill in Louisiana.

> "Plaintiffs have sufficiently alleged that corporate-level decisions occurring in Texas outweighed any tortious activity that occurred locally," the judge said.

The judge concluded, however, that the plaintiffs "have sufficiently alleged that corporate-level decisions occurring in Texas outweighed any tortious activity that occurred locally."

Since the injurious conduct occurred in Texas, which permits punitives damages, Judge Africk held that the plaintiffs sufficiently alleged, for pleading-stage purposes, that punitive damages are permitted under the exception to Louisiana's general ban. WJ

Attorneys:
Plaintiffs: Tommy Wood Thornhill, Thornhill Law Firm, Slidell, La.

Defendant: Edward B. Dittmer II, Talley Anthony Hughes & Knight, Mandeville, La.

Related Court Document:
Order: 2012 WL 1499225

See Document Section B (P. 27) for the order.

Missouri federal court finds for insurer in lead pollution suit

A pollution exclusion in general liability policies included lead contamination, even though the metal was not specifically listed as a pollutant, a Missouri federal judge has ruled.

Doe Run Resources Corp. v. Lexington Insurance Co., No. 4:10 CV 01897, 2012 WL 1389789 (E.D. Mo. Apr. 23, 2012).

The policies at issue "plainly and unambiguously excluded pollution claims," which the underlying action asserted, U.S. District Judge Audrey G. Fleissig of the Eastern District of Missouri said in a written opinion.

The judge granted summary judgment for defendant Lexington Insurance Co. in a suit brought by Doe Run Resources Corp. seeking a declaration the insurer owed defense coverage in a separate property damage suit.

Doe Run is a mining, milling and lead smelting company, according to the opinion.

A neighbor of one of its lead and zinc mines in Missouri sued Doe Run, alleging high concentrations of lead from the defendant's operations contaminated the plaintiff's property.

Doe Run sought coverage from Lexington under its liability policies with the insurer. The mining company said it had incurred about $2.7 million in attorney fees and costs in the property damage suit.

Lexington denied coverage, based on pollution exclusions in the policies, the opinion said.

While the policies covered claims for property damage, they excluded coverage for contamination caused by certain elements. Among these were "smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, pollutants or contaminants."

Doe Run argued, however, that lead is not a pollutant but a "commercially valuable material."

The company said the materials identified in the policy, unless specifically defined as pollutants, cannot be considered such, according to the opinion.

Lexington said lead should be considered a pollutant within the context of the complaint in the underlying suit, where the lead is not a valuable finished product but an intermediate concentrated material abandoned by the smelter on a landowner's property.

Judge Fleissig agreed. She said the allegations in the property damage suit "all fit squarely within the language of the pollution exclusions in the policies."

The absence of a lead-specific exclusion does not undermine the exclusion of such coverage, the judge added. WJ

Related Court Document:
Opinion: 2012 WL 1389789

See Document Section C (P. 36) for the order.

ATLANTA SEEKS TO EXTEND SEWER WORK TO 2027

The city of Atlanta has reached an agreement with the federal government and the state of Georgia to modify a 1999 consent decree requiring the city to eliminate sewer overflows in surrounding waterways, according to a May 7 statement from Mayor Kasim Reed. One of the key changes pushes the completion date from July 1, 2014, to July 1, 2027, the statement said. The mayor's office said the city has spent more than $1.5 billion on required improvement projects under the consent decree and anticipates spending an additional $445 million to complete the work. The time extension will reduce the financial burden on Atlanta, which already has the highest water and wastewater rates in the U.S., the mayor said. The proposed settlement still has to be approved by all parties and the Atlanta City Council before it can be filed with the U.S. District Court for the Northern District of Georgia, the statement said.

DOJ, OHIO SETTLE ALLEGED RIVER POLLUTION CLAIMS WITH 18 PARTIES

The U.S. Department of Justice and the Ohio attorney general have filed a proposed consent decree, valued at $5.5 million, settling claims that numerous industrial facilities released hazardous substances into the Ashtabula River in northeastern Ohio, according to a DOJ statement issued May 3. PCBs, polycyclic aromatic hydrocarbons, chlorinated solvents and low-level radioactive materials, among others, were discharged into the river since the 1940s, according to a complaint filed in the U.S. District Court for the Northern District of Ohio. The 18 companies involved in the settlement denied liability, the proposed consent decree said. Those parties previously paid $23 million to remove contaminated sediment from the river, the DOJ said. The current settlement focuses on enhancing and protecting river habitats, the agency said. The consent decree is still subject to court approval and a 30-day public comment period, according to the statement.

United States et al. v. Cabot Corp. et al., No. 1:12-cv-01097, proposed consent decree filed (N.D. Ohio May 3, 2012.)

Related Court Document:
Complaint: 2012 WL 1553592

EPA ADDS 3 WEST COAST SITES TO SUPERFUND LIST

The Environmental Protection Agency has added three new locations to the National Priorities List of Superfund sites, according to a May 9 statement. Two of the sites are in South Gate, Calif.: Jervis B. Webb Co., a former metal fabrication facility, and adhesive manufacturer Southern Avenue Industrial Area. The third site, Bremerton Glassworks, is a former glassworks facility in Bremerton, Wash. The EPA said volatile organic compounds, trichloroethylene, benzene, heavy metals and other contaminants were found at the sites. The agency said 359 sites of the 1,664 listed on the Superfund list since 1983 have been cleaned. To see Federal Registry notices and supporting documents for the sites go to http://www.epa.gov/superfund/sites/npl/current.htm.

CASE AND DOCUMENT INDEX