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WHAT'S INSIDE

LOGGING

Environmentalists seek to stop speedy decision to log Idaho forest

By Conor O'Brien

An environmental group appealing a federal court's decision to uphold two logging projects in the Idaho Panhandle National Forest is asking the court to enjoin the projects while its appeal is pending.

Alliance for the Wild Rockies v. Farnsworth et al., No. 16-cv-433, brief filed (D. Idaho May 11, 2017).

U.S. District Judge B. Lynn Winmill of the District of Idaho denied the Alliance for the Wild Rockies' request for a preliminary injunction, and the group notified the District Court May 5 that it is appealing the May 1 denial to the 9th Circuit U.S. Court of Appeals.

REUTERS/Eric Johnson

Green group the Alliance for the Wild Rockies asked a court to halt two logging projects underway in Idaho's Panhandle National Forest. A logging project at an Oregon forest is shown here.

In light of widespread forest fires in 2015, the U.S. Forest Service authorized the Tower Fire Salvage Project and the Grizzly Fire Salvage & Restoration Project, which comprise 3,154 acres and 14,500 acres, respectively, of scorched area in the forest, the District Court's May 1 opinion said.

The group argued that the Forest Service approved the projects without following proper procedures in violation of the National Environmental Policy Act, 42 U.S.C.A. § 4321, and sought to halt the logging.

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EXPERT ANALYSIS

Implications of Pennsylvania's ongoing battle over fracking regulation

Peter McGrath of Moore & Van Allen analyzes a lawsuit filed by the state of Pennsylvania seeking to force two townships to approve the underground injection and disposal of contaminated fracking fluids in spite of the risks.

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Implications of Pennsylvania's ongoing battle over fracking regulation

By Peter McGrath, Esq.
Moore & Van Allen

In March, the Pennsylvania Department of Environmental Protection filed a lawsuit against two townships that had banned the use of hydraulic fracturing, or "fracking," wastewater disposal injection wells.

The DEP's lawsuit is only the latest battle in a long-standing and unresolved struggle in Pennsylvania over which regulatory authorities or municipalities have the authority to regulate fracking. Similar struggles are occurring across the country as well. *Commonwealth v. Highland Twp. et al.,* No. 123 MD 2017, complaint filed (Pa. Commw Ct. Mar. 27, 2017)

Fracking is a well drilling and production technique that enhances the recovery of natural gas from certain types of tightly consolidated subsurface rock formations. Fracking depends on horizontally installed wells, which are installed by drilling a vertical hole 5,000 to 7,000 feet deep (often above the targeted natural gas reservoir) and then directing the drill bit through an arc until the drilling proceeds sideways or horizontal.

A mixture of sand, fresh water and chemical additives is then pumped into the rock formation at high pressure through the drilled hole until the rock cracks, resulting in greater gas mobility.

Fracking has long been used in oil and gas production in the United States. The technique was invented in 1947, and entered commercial use in the 1950s. Large scale fracking (projects involving injection of over 150 tons of fluid) began in Oklahoma in the 1960s.

Controversy over fracking has intensified in recent years due to its use in the Marcellus Shale formation in the Northeast and mid-Atlantic United States, which requires well installations closer to populated centers.

Since the 1970s, fracking has routinely been used in Oklahoma, Kansas and Texas, in areas farther from population centers. Even so, fracking has become more controversial in those areas because of concerns over the effects of reinjected fracking fluid.

> The Pennsylvania Supreme Court held that the Environmental Rights Amendment prohibits the state Legislature from mandating statewide rules on fracking or disallowing local regulation of fracking.

Various states have adopted a variety of means to regulate fracking as it has become more common in the eastern United States. The battle in Pennsylvania was joined in earnest on Valentine's Day, Feb. 14, 2012, when Pennsylvania's Act 13, 58 Pa. Cons. Stat. Ann. § 2301 (2012), was signed into law by Republican Gov. Thomas Corbett.

Act 13 repealed parts of the existing Pennsylvania Oil and Gas Act and added new provisions that, among other things, prohibited local regulation of oil and gas operations, including via environmental legislation, and required statewide uniformity among local zoning ordinances with respect to the development of oil and gas resources.

Act 13 also established a fee schedule for producers in the fracking industry and provided for the collection and distribution of those fees.

Within a month after the law was enacted, a group of seven municipalities, two individuals, (in their capacity as elected local government officials and in their own right), a nonprofit environmental group and its director and a Pennsylvania licensed physician (a group the court collectively referred to as the "citizens") brought an action in the Commonwealth Court seeking to invalidate Act 13 and to have it declared it unconstitutional.

The Commonwealth Court determined Act 13 to be unconstitutional in part and enjoined the provisions that prohibited local regulation of fracking. *Robinson Twp. v. Commonwealth,* 52 A.3d 463 (Pa. Commw. Ct. 2012).

Pennsylvania appealed to the state Supreme Court, which heard argument in October 2012 and decided the case in December 2013. *Robinson Twp. v. Commonwealth,* 83 A.3d 901 (Pa. 2013).

The high court focused its analysis on Section 27 of the Pennsylvania Constitution, the Environmental Rights Amendment, Pa. Const. art. I, § 27, which provides that the people of Pennsylvania have a right to clean air, pure water and the preservation of the natural, scenic, historic and aesthetic values of the environment.

The amendment further provides that Pennsylvania's public natural resources are the common property of all the people of

Peter McGrath is a member in the Charlotte, North Carolina, office of **Moore & Van Allen**, where he has practiced environmental law for 30 years. He is a frequent author and lecturer on a range of environmental issues.

Pennsylvania, and that as trustee of these resources, the commonwealth shall conserve and maintain those resources for their benefit.

In a lengthy opinion, the Supreme Court held that the Environmental Rights Amendment prohibits the state Legislature from mandating statewide rules on fracking or disallowing local regulation of fracking. Those provisions of Act 13 were thus held unconstitutional and invalidated.

The Pennsylvania Supreme Court also found unconstitutional certain provisions in Act 13 that mandate that municipal ordinances regulating oil and gas operations must be uniform statewide, and mandate that certain drilling and ancillary activities relating to the production of natural gas be allowed in every zoning district, notwithstanding existing zoning laws.

The Supreme Court also remanded certain sections of Act 13 to the Commonwealth Court for further review. Specifically, the Supreme Court asked the lower court to examine Section 3241, which allows a corporation permitted to transport, sell or store natural gas or manufactured gas in Pennsylvania the right to appropriate an interest in real property located in a storage reservoir protected area for injection, storage and removal from storage of natural gas or manufactured gas.

On remand, the Commonwealth Court found that particular provision of Act 13 did survive constitutional scrutiny.

The group of "citizens" appealed the decision to the Pennsylvania Supreme Court and in 2016, the state high court ruled that Section 3241 is unconstitutional on its face because it gives private corporations eminent domain power to take private property for private purposes in violation of the Fifth Amendment of the U.S. Constitution and various provisions of the Pennsylvania Constitution. *Robinson Twp. v. Commonwealth,* 147 A.3d 536, 542 (Pa. 2016)

This determination by the Pennsylvania Supreme Court may be persuasive to courts in other states and may be used as a foundation to argue that other state regulations are subject to challenge on the basis that they violate the U.S. Constitution.

It was against this backdrop that two Pennsylvania townships — Highland Township and Grant Township — approved home rule charters that specifically banned the use of wells for underground injection of fracking wastewater.

Up to 60 percent of fracking fluid discharges back into the well during gas production and is pumped back to the surface. Underground injection is a common method of disposing of fracking fluid into subsurface rock formations.

Theoretically, the wastewater should remain contained in those rock formations without affecting receptors such as aquifers or surface water bodies. Waste fracking fluid is contained at the surface and then "injected" back into the well after the close of production. There is of course, a risk of subsurface contamination by chemicals contained in the waste fluid.

> Increased seismic activity has been linked to use of underground injection.

In some areas, increased seismic activity has been linked to use of underground injection. A 2015 U.S. Geologic Survey linked disposal of wastewater into deep wells with increased earthquake risk in 17 "hot spots," across an area spanning New Mexico to Alabama.[1] No hot spots, however, were located in Pennsylvania.

A private study in 2014 linked deep well injection with actual increases in seismic activity, as opposed to the USGS study which just indicated areas at increased risk of activity.[2]

Arkansas banned injection across practically the entire state after a large scale injection in 2010 caused a dramatic increase in minor earthquakes. The earthquakes ceased when the injection ceased.[3]

Clearly, wastewater injection was controversial in 2015 and 2016. After a lengthy review process, the Pennsylvania DEP announced in March that it had approved permits for disposal wells in those townships that would allow Seneca Resources Corp. and Pennsylvania General Energy Co. to dispose of wastewater from oil and gas production including fracking wastewater by pumping the water into deep injection wells that had previously produced natural gas.

Certain of the permitted wells were located in Highland and Grant townships. After issuing the permits, the DEP filed its lawsuit in March seeking to invalidate the home charters those townships had enacted to ban the wells.

The DEP appears to be on the wrong side of the Pennsylvania Supreme Court's Robinson County decisions, which appear to allow local regulation of oil and gas activities (including fracking) and prohibit the commonwealth or state Legislature from establishing any statewide policy.

Observers must assume that this matter will again wind up before the state Supreme Court.

The history of this issue demonstrates the political and practical difficulty of fracking regulation. Due to this difficulty, the federal government has essentially shied away from implementing any national fracking regulation.

During the George W. Bush administration, the only substantive federal fracking regulation prohibited states from requiring oil and gas producers to disclose the constituents of their fracking fluids, ostensibly on the grounds that the constituents were trade secrets or otherwise confidential business information.

The Obama administration reversed that policy, and required producers to disclose the identity of the chemicals in fracking fluid. The Obama administration also imposed fairly stringent regulation on fracking operations on federal or tribal lands, intending to protect groundwater quality in those areas. Otherwise, the Obama administration generally left regulation to the state and local level.

Most states that have addressed this issue have, in fact, established statewide standards for oil and gas production.

In North Carolina, for example, the Legislature enacted legislation creating a study commission to analyze the effects of fracking and potential fracking in the state and make recommendations to the Legislature for appropriate legislation regulating fracking activities.

The study commission was composed of industry and real estate professionals, academic experts and environmentalists, and returned a lengthy list of recommendations. Those recommendations were, in practically all respects, incorporated into legislation or regulation by the legislature and the North Carolina Department of Environmental

Quality, which resulted in statewide oil and gas production standards.

At the other end of the spectrum, New York banned fracking statewide by gubernatorial action.

While North Carolina's approach seems ultimately more democratic and more responsive to the concerns of industry, experts and citizenry, it nonetheless results in statewide regulation and removes local authority over gas activity.

Fracking wells are independently operated, so it appears that there is no compelling reason why a local ordinance or local regulation of fracking would be unduly burdensome to producers. This is because wells in one part of a state are operated independently from wells in another part of a state.

Different standards could be enacted at each well site, and such different operating standards would not necessarily result in losses of efficiency or economies of scale.

Local regulation would also follow subsidiarity theory. Subsidiarity is a theory of organizations that holds that decisions should be made, and decision-making authority should rest with the smallest, lowest, least-centralized or most localized authority feasible.

According to the Oxford English Dictionary, the name of the theory derives from the tenet that central authority should be subsidiary to local authority; perhaps decentralization would be another apt name.

The argument over the proper reach of decentralization will not be resolved here, and is ongoing with respect to many issues currently in American public life. The Pennsylvania Supreme Court will ultimately resolve the question with respect to the locus of fracking regulation in the commonwealth (to the extent it has not already). WJ

NOTES

[1] Mark D. Petersen et al., *Incorporating Induced Seismicity in the 2014 United States National Seismic Hazard Model — Results of 2014 Workshop and Sensitivity Studies:* U.S. Geological Survey Open-File Report 2015-1070, https://pubs.usgs.gov/of/2015/1070/.

[2] Matthew Weingarten et al., *High-rate Injection is Associated with the Increase in U.S. Mid-Continent Seismicity, Science*, June 19, 2015, Vol. 348, Issue 6241, pp. 1336-1340.

[3] *See* Richard Perez-Pena, *U.S. Maps Pinpoint Earthquakes Linked to Quest for Oil and Gas, N.Y. Times,* Apr. 23, 2015.

Idaho forests

CONTINUED FROM PAGE 1

The group says the District Court should issue an injunction pending its appeal to the 9th Circuit to maintain the status quo until the appeal is considered. Noting that both logging projects are underway, an injunction is needed to avoid irreparable harm, the group says. The plaintiff also raised "serious questions" on the merits of the case, it says.

EXPEDITED APPROVAL

The Forest Service on May 13, 2016, issued a so-called emergency situation determination, which allows the agency to immediately proceed with a project that is necessary to relieve threats to human safety or to avoid an economic loss that would jeopardize the agency's ability to protect resources, Judge Winmill's opinion said.

The Forest Service found that the projects would remove about 1 million burned trees that could suddenly collapse and therefore posed a significant threat to the public and those working on reforestation projects, according to the opinion.

The agency also found that delaying the projects could cause a $3 million loss in the burnt timber's value, which would jeopardize reforestation efforts, the judge said.

The Forest Service issued the emergency situation determination after the agency sent "scoping letters" in January 2016 to over 500 interested parties describing the fires' effects and the reasons the agency wanted to expedite the salvage-logging projects, the opinion said.

After meeting with and addressing the concerns of certain parties, the agency issued the emergency situation determination and finalized decision notices, findings of no significant impact and environmental assessments for the projects, Judge Winmill said.

ALLEGED NEPA VIOLATIONS

The environmental group alleged the Forest Service violated the National Environmental Policy Act because the agency failed to allow a period for the public to comment on the environmental assessments, the opinion said.

But NEPA does not require that the public be given the opportunity to comment on every draft environmental assessment, according to the opinion.

Judge Winmill said that under the circumstances the agency faced, it fulfilled its obligations to notify the public about the projects by sending the scoping letters to the interested parties and addressing their concerns.

The group also argued that the agency violated NEPA by failing to prepare an environmental impact statement.

The judge responded that the court will not overrule an agency's decision not to prepare an EIS if the agency has taken a "hard look" at the consequences of its proposed action.

Judge Winmill said the environmental assessments contained lengthy discussions of the project's impacts and the agency adequately considered the costs, noting that only 12 to 13 percent of the burned acreage would be logged. WJ

Attorneys:
Plaintiffs: Rebecca K. Smith, Public Interest Defense Center, Missoula, MT

Related Filing:
Plaintiff's brief: 2017 WL 2056572

See Document Section A (P. 21) for the brief.

Judge tosses suit challenging Interior's review of offshore drilling regulations

By Michael Nordskog

The Center for Biological Diversity has lost its challenge to the U.S. Interior Department's handling of a review of offshore oil and gas drilling regulations recommended by an independent commission in the wake of the Deepwater Horizon disaster.

Center for Biological Diversity v. Zinke et al., No. 16-cv-738, 2017 WL 1755947 (D.D.C. May 4, 2017).

U.S. District Judge Ketanji Brown Jackson of the District of Columbia dismissed the suit, saying the plaintiff had failed to identify a mandatory duty regarding a discrete agency action that would justify court review under the Administrative Procedure Act.

"Courts do not, and cannot, police agency deliberations as a general matter," Judge Jackson said in a memorandum opinion explaining her March order dismissing the suit.

DEEPWATER HORIZON AFTERMATH

Following the April 2010 Deepwater Horizon oil rig explosion in the Gulf of Mexico that killed 11 workers and spilled oil over a 1,000-mile shoreline, President Barack Obama established an independent commission to review the disaster, according to Judge Jackson's opinion.

In addition, the Council on Environmental Quality reviewed the Interior Department's regulatory procedures for development of offshore oil and gas exploration, the opinion said.

The CEQ is a three-member group appointed by the president that appraises federal government programs and activities to ensure compliance with environmental values. Congress created the council with passage of the National Environmental Policy Act, 42 U.S.C.A. § 4342.

The commission and CEQ recommended major changes to the department's implementation of NEPA, including its practice of bypassing project-specific review of offshore exploration and drilling proposals through provisions known as "categorical exclusions," Judge Jackson said.

Heeding the recommendation, Interior initiated its own review of its existing NEPA procedures in October 2010, according to the opinion.

SUIT TO COMPEL AGENCY ACTION

In April 2016 the Center for Biological Diversity filed suit against Interior, seeking to compel completion of the review and an announcement of whether the department found revisions to its NEPA policies necessary.

CBD sought relief under the APA, 5 U.S.C.A. § 706(1), which authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed."

The plaintiff also said Interior had failed to complete a legally required review of its categorical exclusions in violation of 40 C.F.R. § 1507.3(a), which requires agencies to adopt procedures for implementing regulations.

Interior filed a motion to dismiss, saying the complaint failed to state a claim for relief because it identified neither a mandatory duty nor a discrete action as required under the APA.

NO MANDATE TO REVIEW AND PUBLICIZE

Judge Jackson rejected the plaintiff's argument that Interior could be compelled to complete its review of NEPA procedures, issue its revisions and publish them in the Federal Register within a specific timeline under Section 1507.3(a).

That section requires agencies to "continue to review their policies and procedures and in consultation with [CEQ] to revise them as necessary to ensure full compliance with the purposes and provisions of [NEPA]."

The judge said this duty is "continuous" and does not impose deadlines for decision-making.

"Nowhere does Section 1507.3(a) require that an agency's review of its NEPA procedures must come to a finite conclusion that entails a decision regarding whether or not revisions are necessary," Judge Jackson said.

Nor does the regulation require an agency to publicize its decision on revising NEPA procedures, she said.

Section 1507.3(a) only requires agencies to make revisions they deem necessary, she said, finding no mandatory duty that could be enforced under Section 706(1) of the APA.

NO 'DISCRETE' DUTY

In addition, Judge Jackson said Section 706(1) only authorizes courts to compel "circumscribed, discrete agency actions," quoting *Norton v. Southern Utah Wilderness Alliance,* 542 U.S. 55 (2004).

The regulatory language the plaintiff seeks to enforce prescribes an agency's "general mode of operations" as opposed to a discrete action, the judge said.

"Section 1507.3(a) actually reflects nothing more than a subset of the omnipresent duty to ensure that agency procedures accord with all applicable statutes, which every agency has under all circumstances," she said. WJ

Attorneys:
Plaintiff: Kristen M. and Catherine W. Kilduff, Center for Biological Diversity, Washington, DC

Defendants: William E. Gerard and Joanna K. Brinkman, Justice Department, Washington, DC

Related Filings:
Opinion: 2017 WL 1755947
Opposition to motion to dismiss: 2016 WL 7157058
Motion to dismiss: 2016 WL 7157057

See Document Section B (P. 31) for the opinion.

Employee's malice won't kill environmental whistleblower suit, judge says

By Shari Pirone

Whether an employee intended to harm his employer when he reported an environmental violation is not a relevant question in a state whistleblower claim, the Louisiana Supreme Court has ruled.

Borcik v. Crosby Tugs LLC, No. 2016-CQ-1372, 2017 WL 1716226 (La. May 3, 2017).

Former Crosby Tugs LLC employee Eric Borcik needed only an honest and reasonable belief that his employer committed the violation for his complaint to be filed in "good faith," the high court said.

The 5th U.S. Circuit Court of Appeals had posed a certified question asking the Louisiana Supreme Court to define when a violation of Louisiana's environmental laws is reported in good faith. *Borcik v. Crosby Tugs LLC,* 656 Fed. Appx. 681 (5th Cir. 2016).

Requiring whistleblowers to have no malice toward their employers would cause a "chilling effect on reporting violations — exactly the problem the whistleblower statute was designed to ameliorate," Justice Scott J. Crichton wrote for the high court.

RETALIATORY-TERMINATION SUIT

Borcik said that as a deckhand for Crosby, he was ordered to dump waste oil into navigable waters and to "otherwise violate" environmental laws.

He said he followed the orders for three years before meeting with Crosby's chief administrative officer to report concerns and his fear of retaliation.

Borcik was subsequently transferred to another boat and then fired, according to the opinion.

Borcik filed suit in 2013, claiming his firing was in retaliation for his comments to the officer and in violation of the Louisiana Environmental Whistleblower Act, La. Rev. Stat. Ann. § 30:2027.

Crosby said Borcik was fired for insubordination.

'GOOD FAITH' DISPUTE

The Environmental Whistleblower Act requires businesses not to act in a retaliatory manner against an employee who in good faith discloses to a supervisor an employer's practice that the employee reasonably believes violates environmental law, according to the opinion.

At trial, the parties agreed the jury should be instructed that the statute requires the employee's reporting to have been made in good faith and with a reasonable belief that the employer's practice was in violation of an environmental law.

The parties could not agree on a definition of "good faith."

Crosby wanted the jury to be told it meant the plaintiff had no intent to harm the employer in reporting the environmental violation. Borcik said it meant the plaintiff had an honest belief that an environmental violation had occurred, according to the opinion.

The U.S. District Court for the Eastern District of Louisiana combined their proposed instructions and told the jury that good faith meant the plaintiff had an honest belief the violation occurred and did not report the violation to harm the employer or another employee.

Borcik objected to the instruction but was overruled.

Crosby said in its closing argument that Borcik wanted to get the captain in trouble and that if the jurors agreed, they had to dismiss the case.

The jury found Borcik reasonably believed a violation occurred, but that he did not make his report in good faith.

Borcik appealed to the 5th Circuit, and a three-judge panel said it wanted the Louisiana Supreme Court to define "good faith" as used in the statute, citing a lack of definition and guidance.

'GOOD FAITH' DEFINED

The high court examined the purpose and context of the term "good faith" in the whistleblower statute and the text of the law.

It concluded that Louisiana is concerned with providing its citizens with a safe, healthy environment.

The state put comprehensive policies, including the whistleblower statute, in place to preserve and protect the environment, the opinion said.

The court said broadly defining good faith to mean an honest belief would comport with that framework by encouraging employees to report true environmental violations.

Crosby's proposed malice standard, it said, would do the opposite.

It would make establishing a prima facie whistleblower suit more difficult because it would always look like the employee is trying to harm the employer since every report would harm the employer, the opinion said. WJ

Related Filing:
Opinion: 2017 WL 1716226

See Document Section C (P. 41) for the opinion.

EPA seeks more than $4 million for cleanup of oil, hazmats from sunken tug

By Kenneth Bradley, Esq.

The cleanup of oil and hazardous materials from a derelict tugboat that sank near the San Francisco Bay cost about $4.5 million and the U.S. Environmental Protection Agency is demanding that the tug's owner pay for it, according to a federal court lawsuit.

United States v. Cook, No. 17-cv-2653, complaint filed (N.D. Cal. May 8, 2017).

Defendant Ronald L. Cook failed to maintain the vessel in even minimally seaworthy condition before it sank in Oakland Estuary in 2007, a complaint filed May 8 in the U.S. District Court for the Northern District of California says.

After the U.S. Coast Guard raised the tug and stabilized it in a shipyard, officials removed about 31,000 gallons of oil-laden sediment and about 40 cubic yards of asbestos from the vessel, according to the complaint.

The federal government brought the suit under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9607.

The lawsuit was also filed pursuant to the Oil Pollution Act of 1990, 33 U.S.C.A. § 2701, on behalf of the Oil Spill Liability Trust Fund.

SUBSTANTIAL THREAT OF OIL DISCHARGE

The suit was filed on behalf of the EPA, which said the tug "posed a substantial threat of discharge of oil and hazardous substances into navigable waters of the United States and its adjoining shorelines," the complaint says.

Cook purchased the tug named Respect for $1 in 2006, according to the complaint. The boat sank after copper thieves stole the plug from the tug's sea chest, the National Oceanic and Atmospheric Association said in a case study on the vessel.

The suit alleges that Cook abandoned the vessel after it sank and he made no effort to raise it or prevent it from further deterioration.

In September 2013 the EPA, serving as federal on-scene coordinator, began to remove sediment from inside the tug and discovered various hazardous substances on the vessel, including PCBs, arsenic, cobalt, lead and asbestos, according to the complaint.

In order to lessen the potential discharge of oil and hazardous substances, the EPA decided to raise the tug and remove the materials.

The removal and response action was needed due to the defendant's omissions, gross negligence, willful misconduct and violations of federal safety regulations, the government says.

MITIGATION COST MILLIONS

The U.S. spent about $2.5 million, through the Oil Spill Liability Trust Fund, on the removal of oil alone from the tug, according to the complaint.

Mitigating the release of hazardous substances cost another $2 million, the government alleges.

The United States has demanded reimbursement for the costs and Cook has failed to pay, the complaint says.

In addition to recovering costs already expended, the government seeks a declaratory judgment binding the defendant to pay any future cleanup costs or damages. WJ

Attorneys:
Plaintiffs: Chad A. Readler and R. Michael Underhill, Justice Department, San Francisco, CA; Ellen M. Mahan and Steven O'Rourke, Justice Department, Washington, DC

Related Filing:
Complaint: 2017 WL 1903250

EPA sued for not acting on D.C., Philadelphia smog standards

(Reuters) – The Center for Biological Diversity and Center for Environmental Health have sued the Environmental Protection Agency, accusing it of failing to determine whether Washington, D.C., and Philadelphia are meeting clean air standards to control smog.

Center for Biological Diversity et al. v. Pruitt, No.1 7-cv-818, complaint filed (D.D.C. May 3, 2017).

Filed May 3 in federal court in Washington, D.C., the lawsuit by the environmental and public health groups asks the court to declare that EPA Administrator Scott Pruitt is in violation of the U.S. Clean Air Act, 42 U.S.C.A. § 7401, and require him to designate the cities' compliance status.

"Every day Scott Pruitt delays cleaning up the air will result in more people dying from smog-induced asthma attacks, heart attacks and strokes," Bill Snape, senior counsel at the Center for Biological Diversity, said in a statement.

An EPA spokeswoman declined to comment. Spokesmen for the cities could not immediately be reached for comment.

As required by the Clean Air Act, the EPA in 2008 set air quality standards for certain pollutants, including ozone, which was capped at 70 parts per billion. In 2012 the agency designated Philadelphia and Washington as not meeting the standards and gave them until July 20, 2016, to reduce smog to healthier levels.

Under the Clean Air Act, the EPA had until Jan. 20, 2017, to make a final determination as to whether the cities had met smog standards but the agency has not done so, the lawsuit said.

The cities were originally placed in a so-called marginal nonattainment class, the least severe of five categories ranging from marginal to extreme on smog pollution. A finding that they have not reached attainment, however, could bump them up to a higher category, triggering new requirements. The cities, for example, could have to find ways to reduce emissions from power plants, industries and vehicles and face penalties for noncompliance.

Among communities in the northeastern United States, the Philadelphia and Washington metropolitan areas had the most days with elevated smog pollution in 2015, the latest year for which data is available, according to a recent study by PennEnvironment Research & Policy Center, an environmental advocacy group.

Washington had 99 days of elevated smog pollution, while Philadelphia had 97, the study said. Elevated smog pollution was defined as being above levels determined by the EPA to pose little to no risk.

Ozone pollution can impair lung function, lead to emergency room visits and even premature death, the lawsuit said. Those most at risk are children, runners, people with pre-existing lung and heart diseases, and older adults, according to the complaint. WJ

(Reporting by Dena Aubin)

Attorneys:
Plaintiffs: Robert Ukeiley, Boulder, CO

No attorney fees for victors on ESA preemption claim

By Shari Pirone

Plaintiffs who were successful in getting New Jersey officials to agree not to enforce a state law banning the importation of exotic wildlife trophies against lawful hunters will not win attorney fees for their efforts, a federal judge has ruled.

Conservation Force et al. v. Porrino et al., No. 16-cv-4124, 2017 WL 1488129 (D.N.J. Apr. 25, 2017).

Conservation Force, the Garden State Taxidermists Association and their individual members are not entitled to fees under any fee-shifting rules or equitable considerations even though they prevailed on their federal Endangered Species Act preemption claim, U.S. District Judge Freda L. Wolfson of the District of New Jersey said.

She ruled in favor of state Attorney General Christopher S. Porrino and Department of Environmental Protection Commissioner Bob Martin, denying the plaintiffs' fee motion.

ESA PREEMPTION

The New Jersey Legislature on June 1, 2016, passed N.J. Stat. Ann. § 23:2A-6.1, which prohibits the possession and transport of parts or products of the African elephant, leopard, lion, and black and white rhino.

Conservation Force, a hunting and wildlife conservation organization, had warned Gov. Chris Christie before the bill was passed that the Endangered Species Act, 16 U.S.C.A. § 1531, preempted the legislation, according to Judge Wolfson's opinion.

After its passage, the plaintiffs served Christie and the U.S. secretary of the interior with a 60-day notice of intent to sue under the ESA. The plaintiffs filed suit eight days later.

The complaint's first count was brought under the U.S. Constitution's Supremacy Clause, alleging the ESA preempted the state law.

The second count was framed as a civil rights claim under 42 U.S.C.A. § 1983, alleging violation of unspecified constitutional rights.

The plaintiffs followed up with an application for an order to show cause, which the court converted to a motion for summary judgment on the first count.

The defendants opposed the motion. They conceded the ESA preempted the state law in certain respects but said the state would not enforce it in a manner that conflicted with an ESA exemption or federal hunting permits.

Based on the state's concession on the preemption question, the court asked the parties to negotiate a consent order.

The parties crafted an order in which the defendants agreed the ESA at least partially preempted the state law. As part of the agreement, the plaintiffs voluntarily dismissed their Section 1983 claim without prejudice.

The court entered the consent decree Aug. 29, and the plaintiffs filed their motion for attorney fees and costs.

NO STATUTORY ATTORNEY FEES

Judge Wolfson said the plaintiffs were not entitled to attorney fees under the citizen-suit provision of the ESA, 16 U.S.C.A. § 1540(g), because they failed to provide the required 60-day notice before filing suit.

They filed their complaint just one week after serving their notice of intent to sue, the judge said.

Nor were the plaintiffs entitled to attorney fees under 42 U.S.C.A. § 1988 based on a successful civil rights claim because they voluntarily dropped that claim in the settlement, she said.

They were therefore not a "prevailing party" under Section 1983, according to Judge Wolfson.

The sole basis for the plaintiffs' success was the Supremacy Clause, which does not provide for recovery of attorney fees, the judge said.

NO EQUITABLE ATTORNEY FEES

Judge Wolfson said the case did not warrant the exercise of her equitable power to grant attorney fees.

Federal courts can award attorney fees when an unsuccessful litigant has acted in bad faith or when successful litigation confers a substantial benefit on members of an ascertainable class, the judge said.

Here, there was no evidence that the defendants acted vexatiously or that there was a readily ascertainable group of beneficiaries, Judge Wolfson said.

Although the settlement will benefit lawful hunters and related businesses, they do not comprise a readily identifiable group, the judge explained.

She noted that any attorney fee award would be paid from the state treasury, meaning all New Jersey citizens would be charged for the benefit of African game hunters and their associates. WJ

Attorneys:
Plaintiffs: Jennifer C. Critchley, Connell Foley, Newark, NJ; Brendan Judge, Connell Foley, Roseland, NJ

Defendants: Jason T. Stypinski, New Jersey attorney general's office, Trenton, NJ

Related Filing:
Opinion: 2017 WL 1488129

EPA fines reality TV host for toxic lead violations

By Carin Ford

The Environmental Protection Agency has reached a $30,000 settlement with three contractors associated with the Denver-based host of a home-improvement reality TV show for not complying with lead paint regulations that apply to house renovations.

Keith Nylund, host of "Raise the Roof" on the DIY Network, and three associated firms allegedly renovated seven Denver homes between 2014 and 2016 without complying with the EPA's Renovation, Repair and Painting Rule, the agency said in a May 4 statement announcing the settlement.

The RRP Rule, 40 C.F.R. Part 745, Subpart E, requires the EPA or an authorized state agency to certify firms performing renovation, repair and painting projects that disturb lead-based paint in homes, child care facilities and preschools built before 1978.

It also requires firms to use certified renovators, trained by EPA-approved providers, and to follow lead-safe work practices, according to the agency's statement.

Denver-area firms KGN Asset Management LLC, KGN Asset Management Inc. and Restoration Realty Inc., which are associated with Nylund, allegedly failed to obtain the necessary certification and keep the required records for several properties, the statement said.

The firms also violated lead-safe work practice standards on several properties, the statement added.

KGN Asset Management LLC has since become a lead-safe certified firm, according to the statement.

On "Raise the Roof," Nylund, a contractor and real estate investor, buys older houses and then rips off the roof or "pops the top." He then adds stories to double or triple the home's size and sells them for a profit, according to the show's website.

Although the EPA banned use of lead-based paints in 1978, the agency estimates more than 30 million U.S. homes still contain it.

When lead paint is disturbed during renovations, the home's occupants risk exposure to lead-contaminated dust and debris, the EPA said.

Even at low levels, lead-paint exposure can lead to developmental impairment, learning disabilities, impaired hearing, reduced attention span, hyperactivity and behavioral problems, according to the statement.

Infants, young children and pregnant women are the most vulnerable to toxic lead hazards, the statement added.

The EPA announced the settlement "as part of an ongoing initiative to protect residents of Denver neighborhoods from toxic lead-paint hazards during home renovations," according to the statement. WJ

Workers, residents seek access to toxic spill emergency response plans

By Kenneth Bradley, Esq.

New Jersey municipalities have been illegally refusing to share their emergency response plans with the public, according to a lawsuit multiple labor, environmental and community organizations have filed in federal court.

New Jersey Work Environment Council et al. v. State Emergency Response Commission et al., No. 17-cv-2916, complaint filed (D.N.J. Apr. 28, 2017).

The city of Linden, New Jersey, has denied numerous requests to share its plan for responding to accidents involving toxic materials, the groups allege in a complaint filed in the U.S. District Court for the District of New Jersey.

Linden is home to the Phillips 66 Bayway Refinery complex, the largest petroleum refining facility east of the Mississippi River, the complaint says.

The plaintiffs allege the city and the State Emergency Response Commission have violated the Emergency Planning and Community Right to Know Act, 42 U.S.C.A. § 11001.

Congress passed EPCRA in response to public concern over exposure to toxic substances after a Union Carbide pesticide plant in Bhopal, India, accidentally released toxic gases in 1984, killing or severely injuring more than 10,000 people, according to the complaint.

One of the plaintiffs in the recent suit, the New Jersey Work Environment Council, says its member organizations represent employees working in chemical plants and storage facilities, oil refineries and waste treatment plants. WEC says it also represents individuals who live near the more than 5,000 New Jersey facilities that process or store hazardous chemicals.

The labor union Teamsters Local 877, which says its members include more than 600 oil, chemical and terminal workers at Bayway, joined WEC in suing the city and the commission.

The commission, composed of state officials including the superintendent of the New Jersey State Police and the Department of Health commissioner, was created in 1987 under a mandate in EPCRA.

The federal law requires the commission to form emergency planning districts and a local emergency planning committee for each district. New Jersey designated each municipality and county as such a district, the complaint says.

EPCRA further stipulates each local committee must have an emergency response plan for an accidental release of toxic chemicals, according to the complaint. The plan should be available to the public during normal working hours at an appropriate location designated by the governor or an emergency response official, the plaintiffs say.

Linden has not only denied the plaintiffs' requests to see the city's emergency response plan but has also violated EPCRA by failing to inform the public in annual public notices that it has access to the plan, the complaint says.

The plaintiffs say a study they performed in 2014 found that about 68 percent of New Jersey's municipalities and counties surveyed failed to comply with EPCRA by providing public access to local emergency response plans.

The commission subsequently trained certain municipalities and counties on the obligation to provide access to their emergency response plans. But a post-training study in 2016 showed that about 58 percent of municipalities and 84 percent of counties surveyed still failed to comply with EPCRA, the complaint says.

The plaintiffs are asking the District Court to grant declaratory and injunctive relief to require the defendants to comply with the public access requirements in EPCRA. WJ

Attorney:
Plaintiffs: David Tykulsker, David Tykulsker & Associates, Montclair, NJ

Related Filing:
Complaint: 2017 WL 1730873

Exxon not complying with refinery explosion investigation, U.S. says

By Shari Pirone

Exxon Mobil Oil Corp. has refused to fully cooperate with a U.S. Chemical Safety Board probe into a 2015 refinery explosion that injured four workers and caused substantial property damage, according to a government court filing.

United States v. Exxon Mobil Oil Corp., No. 17-cv-3326, petition filed (C.D. Cal. May 2, 2017).

The U.S. filed a petition with the U.S. District Court for the Central District of California on behalf of the agency charged with investigating the Torrance, California, incident, seeking enforcement of the board's administrative subpoenas against the oil company.

Exxon's failure to respond to the CSB's requests for interrogatory answers and production of documents has impeded the agency's investigation and its effort to make safety recommendations, according to the petition.

The government seeks an order directing Exxon to provide the responses within 14 days.

2015 EXPLOSION

The CSB said in a May 3 statement that the Feb. 18, 2015, explosion followed the accidental release of flammable hydrocarbons from the Exxon refinery's fluid catalytic cracking unit.

The cracking unit is where gasoline and other products are made, according to the statement.

The explosion happened when a slide valve that "had not been replaced in years" failed to close completely after being significantly degraded by constant contact with an abrasive, sand-like catalyst, according to the government's petition.

The explosion had the force of a 1.7 magnitude earthquake, shaking the surrounding area, tearing through equipment and sending ash filled with metals, fiberglass and glass-wool insulation into nearby neighborhoods, according to the petition.

A 40-ton piece of debris flew 100 feet, narrowly missing a tank filled with thousands of gallons of a modified version of highly corrosive and toxic hydrofluoric acid, the petition says.

The explosion also sent debris from the cracking unit onto equipment in the adjacent platinum reformer unit, causing it to leak flammable fluid, the petition says.

During cleanup weeks later, sparks from that fluid ignited and caused a fire that burned for several hours March 11, 2015, according to the petition.

Then in September 2015, over 5 pounds of modified hydrofluoric acid was released into the air over a two-hour period from a leak in a pipe clamp that had been used to patch an aging pipe, the petition says.

The CSB blames the explosion and aftermath on Exxon's failure to use proper safety procedures at the facility, according to the statement.

Recovery from the incidents required running the refinery at limited capacity for over a year, resulting in higher state gas prices and costing California drivers an estimated $2.4 billion, the agency said.

THE PETITION

As part of its investigation into the incidents, the CSB asked Exxon to provide relevant documents and answers to interrogatories, using the board's administrative subpoena power under the Clean Air Act, 42 U.S.C.A. §§ 7607(a) and 7412(r)(6)(M).

The petition says Exxon has failed to provide documents concerning all the risk assessments performed on the equipment involved in the explosion for the last 15 years. The CSB says it needs this information to determine how Exxon identified hazards and what safeguards were implemented.

The agency also says the company has failed to turn over all reports, interviews, action items and recommendations on the March 2015 fire; information on internal training procedures, cost-cutting measures, and possible health effects from the incidents; and other evidence.

The CSB's statement notes that PBF Holdings Co. acquired the refinery last year. It now operates as Torrance Refining Co. WJ

Attorneys:
Plaintiff: Sandra R. Brown and Dorothy A. Schouten, U.S. attorney's office, Los Angeles, CA

Related Filing:
Petition to enforce administrative subpoenas: 2017 WL 1739425

Agencies may follow 'obsolete' CWA guidelines, Kentucky high court says

By Conor O'Brien

Kentucky's highest court has reinstated a federal permit allowing a coal-fired electric power plant in Trimble County to discharge toxic pollutants into the Ohio River, reversing two lower court rulings.

Louisville Gas & Electric Co. v. Waterways Alliance et al., No. 2015-SC-461, 2017 WL 1536247 (Ky. Apr. 27, 2017).

In a unanimous opinion, the state Supreme Court said a trial court and the Court of Appeals misapplied federal law when they vacated the permit the Kentucky Division of Water issued to Louisville Gas & Electric Co. in 2010.

A coalition of environmental groups including the Sierra Club and the Kentucky Waterways Alliance challenged the permit's issuance under the Clean Water Act, 33 U.S.C.A. § 1251. The groups argued the permit failed to set limits on the amount of arsenic, mercury and selenium that could be discharged in the facility's wastewater.

The high court said the Division of Water properly followed existing, albeit outdated, U.S. Environmental Protection Agency guidance, which did not require the permitting agency to set effluent limits for the specified pollutants.

1982 PERMIT GUIDELINES

LG&E began plans to add a second generating unit to its Trimble County facility in 2007 and applied to the Division of Water for a permit revision to accommodate increased discharge, according to the Supreme Court's opinion.

Its original permit, issued in 1990, complied with 8-year-old EPA guidelines addressing water pollution caused by coal-fired electricity-generating facilities, the opinion said.

The 1982 guidelines acknowledged concerns about a long list of pollutants including arsenic, mercury and selenium, but deferred establishing limitations on them because the technology for effectively removing them from wastewater had not been sufficiently developed, according to the opinion.

By the mid-2000s, however, both the technology to reduce these pollutants and public concern about them had advanced. In response, the EPA began to create new CWA regulations, the opinion said.

In November 2015 the EPA issued a new guideline, but by 2010 the Division of Water had issued LG&E its revised permit, which did not require removing the arsenic, mercury or selenium from its waste, according to the opinion.

When the environmentalists' petition for administrative review of the permit decision failed, they appealed to the Franklin County Circuit Court, which vacated the permit.

The state agency and LG&E then appealed to the Court of Appeals, which affirmed the Circuit Court's decision in a split ruling. They then sought relief in the Supreme Court.

ARSENIC, MERCURY, SELENIUM ADDRESSED

The appeals panel said the 1982 EPA guidelines' failure to address limits on toxic pollutants did not excuse the state agency from using its "best professional judgment" to determine an "appropriate technology-based effluent limit" for them, the Supreme Court opinion said.

The state and LG&E argued to the high court, however, that the 1982 guidelines did in fact address discharges of arsenic, mercury and selenium, and explicitly deferred establishing limitations on them until technology had advanced.

The pollutants therefore were not within the scope of 40 C.F.R. § 125.3, an EPA regulation allowing permitting agencies to use best professional judgment to set effluent limitations when the EPA has failed to provide guidance, the permit's proponents said.

The Supreme Court agreed, saying the state agency's interpretation of the law was reasonable.

"If the EPA allows a guideline to grow obsolete so that it no longer accurately reflects the technologies available, the remedy would seem to be against the EPA," the opinion said.

Although it reinstated the 2010 permit, the high court noted that new EPA rules would likely be incorporated into the permit sometime between November 2018 and December 2023. WJ

Attorneys:
Plaintiffs: Joe F. Childers, Getty Law Group, Lexington, KY

Defendants: Sheryl G. Snyder, Frost Brown Todd, Louisville, KY

Related Filing:
Opinion: 2017 WL 1536247

4 U.S. states sue Interior Department over coal leases on public lands

(Reuters) – Four U.S. states have sued Interior Secretary Ryan Zinke, the Interior Department and the U.S. Bureau of Land Management to block new leases of public lands for coal mining, according to papers filed May 9 in Montana federal court.

New Mexico et al. v. U.S. Department of the Interior et al., No. 17-cv-42, complaint filed (D. Mont. May 9, 2017).

State prosecutors for California, New Mexico, New York and Washington are arguing new coal extraction would exacerbate global warming and violate the federal government's statutory duty to use public lands "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values," according to the filings.

The move was one of several recent attempts to block a broad pledge by U.S. President Donald Trump to roll back environmental regulations put in place under former President Barack Obama. The former president placed a moratorium on new coal mining leases on public lands more than a year ago, in January 2016.

On March 29, Zinke, whom Trump appointed Interior secretary, formally lifted the ban.

The prosecutors argued in addition to harming the environment, more coal mining on public lands would burden state and local governments with expenses related to health care, flood control and other infrastructure needs related to potentially harmful effects of nearby mines.

They also argued the United States' "outdated structure" for collecting royalties from mining companies meant the government was not obtaining as much money for the leases as it deserved.

A spokesman for the Interior Department declined to comment. A spokesman for the Department of Justice did not immediately respond to a request for comment. WJ

(Reporting by Emily Flitter; editing by Matthew Lewis)

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No sealing of documents in asbestos reinsurance dispute, federal judge says

By Kenneth Bradley, Esq.

An insurance company seeking reimbursement for reinsurance contracts it entered into to avoid asbestos-related litigation costs cannot have certain documents it produced in support of a summary judgment motion placed under seal, a New York federal judge has ruled.

Utica Mutual Insurance Co. v. Munich Reinsurance America Inc., No. 12-cv-196, 2017 WL 1653608 (N.D.N.Y. Apr. 26, 2017).

"Documents submitted to a court for its consideration in a summary judgment motion are — as a matter of law — judicial documents to which a strong presumption of access attaches," U.S. District Judge Brenda K. Sannes of the Northern District of New York said in an April 26 order.

The judge was quoting *Lugosch v. Pyramid Co. of Onondaga,* 435 F.3d 110 (2d Cir. 2006), in which media organizations sought documents filed under seal in a civil suit about alleged financial improprieties in a business operation.

"The court's decision is primarily based on its finding that [plaintiff Utica Mutual Insurance Co.] failed to make a particularized showing as to why each document should be sealed," said Tancred Schiavoni of O'Melveny & Myers. Schiavoni represents Century Indemnity Co., which is not involved in the Utica case but is a party in related litigation.

Utica is suing Munich Reinsurance America Co. for reimbursement related to reinsurance contracts Munich issued to Utica in 1973 and 1977 for underlying insurance coverage involving asbestos claims, the order said.

Utica moved to seal certain exhibits in support of a motion for summary judgment. The documents include communications with law firms the insurer selected to represent its insured, Goulds Pumps Inc., a defendant in asbestos-related litigation, according to the order.

Munich opposed the motion, as did Century Indemnity Co. Century is a party in other litigation involving Utica and Goulds.

Among the exhibits Utica wished to be sealed were:

- Communications among Utica's in-house counsel and Utica employees.
- Documents containing Utica's in-house counsel's handwritten notes.
- Documents involving Utica's outside counsel.
- Communications among Utica's outside counsel.
- Documents containing Utica counsel's handwritten notes.
- Deposition transcripts.
- Arbitration documents.
- Expert reports.

Utica offered a declaration from senior vice president and general counsel Bernard Turi, who said the communications at issue included legal advice he and other inside counsel sought, received and provided and are protected by attorney-client privilege, the order said.

Judge Sannes' analysis began with the assertion that under the Constitution and the First Amendment specifically, the public has a right to access judicial documents.

The judge added that common law offers similar support to the idea of access to court documents.

"The 2nd Circuit has instructed that the weight of the presumption of public access given to summary judgment filings 'is of the highest: documents used by parties moving for, or opposing, summary judgment should not remain under seal absent the most compelling reasons,'" Judge Sannes said, quoting *Lugosch* and *Joy v. North*, 692 F.2d 880 (2d Cir. 1982).

ATTORNEY-CLIENT PRIVILEGE OR WORK PRODUCT?

Utica did not say whether the communications it sought to protect were ever intended to be confidential, which is a prerequisite to asserting attorney-client privilege, according to the judge.

The attorney work product doctrine also protects materials an attorney prepares if they are opinion or fact work product, the order said.

But Utica failed to indicate whether it seeks to seal the communications under attorney-client privilege or the work product doctrine, and without that information, the court cannot make a finding on whether they should be sealed, Judge Sannes said.

Utica partially prevailed on its motions to seal briefs it intends to file in this litigation that have already been filed in redacted form in a separate lawsuit against Clearwater Insurance Co. *Utica Mut. Ins. Co. v. Clearwater Ins. Co.,* No. 13-cv-1178, 2016 WL 254770 (N.D.N.Y. Jan. 20, 2016).

Those briefs may be filed in redacted version in this litigation, too, Judge Sannes concluded. WJ

Attorneys:
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Defendant: Bruce M. Friedman, Rubin, Fiorella & Friedman, New York, NY

Related Filing:
Order: 2017 WL 1653608

CASE AND DOCUMENT INDEX