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REUTERS/Tim Shaffer

A worker walks past a natural gas drilling rig near Towanda, Pa., over the Marcellus Shale.

COMMENTARY

A plaintiff's primer on litigating natural gas cases

Marc J. Bern and Tate J. Kunkle of Napoli Bern Ripka & Associates discuss some of the hurdles that must be faced by plaintiffs' attorneys representing Marcellus Shale landowners who have incurred damages from gas drilling operations.

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NATURAL GAS DRILLING (FRACKING)

\$6 million water contamination class action suit filed over fracking

An Arkansas couple has filed a \$6 million class-action lawsuit alleging natural gas drillers' use of hydraulic fracturing has contaminated nearby drinking water wells.

Tucker et al. v. Southwestern Energy Co. et al., No. 11-44, complaint filed (E.D. Ark. May 17, 2011).

James and Mindy Tucker filed the lawsuit in the U.S. District Court for the Eastern District of Arkansas on behalf of themselves and all others in central Arkansas who live or own property within a 3-mile radius of any wellheads, bore holes or other gas extraction operations.

The defendants are Southwestern Energy Co., XTO Energy Inc., Chesapeake Energy Corp. and BHP Billiton Petroleum LLC.

According to the complaint, the defendants conduct gas drilling in the Fayetteville shale, which is located in central Arkansas. In drilling for gas, the defendants use the process of hydraulic fracturing, or "fracking," which involves high-pressure injection of chemicals to allow gas to flow from the fractures to the wellbore, the lawsuit says.

The fracking process uses a mixture of water, sand and numerous toxic chemicals to fracture the shale rock formation. Those chemicals can

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A plaintiff's primer on litigating natural gas cases

By Marc J. Bern, Esq., and Tate J. Kunkle, Esq.
Napoli Bern Ripka & Associates

In the last several years, the natural gas drilling boom has multiplied gas producers' efforts in gas extraction and expanded east from the historic mining areas of the Midwest and West. The move to extract natural gas from the Marcellus Shale in West Virginia, Ohio, Pennsylvania and New York has brought an unprecedented wave of industrialization into previously rural areas. Residents who fled the urban industrialized areas are finding themselves right back where they started.

Never before have natural gas wells and drilling operations been so "in your face" and directly on or adjacent to land where people live and raise their families and livestock. In one location, a gas company is seeking to put two gas wells on a golf course that is in a retirement community. In another area, gas companies are departing unoccupied federal lands and drilling gas wells next to neighborhoods and schools. It is not uncommon to see drilling rigs and waste pits right next to grazing dairy cows.

The collision of residents living in the peaceful countryside with the industrial operations that include siting, drilling and, increasingly, "fracking," or the pressurized injection of fluids into the gas wells, has left many people with nowhere to turn except to the judicial system. These historically non-litigious people who have repeatedly tried to work with the state agencies and gas companies to remedy their issues have increasingly sought attorneys to help them in their time of need, often as a last resort.

THE CLIENTS

Many people suffering from the negative affects of gas drilling operations have little to no experience in litigation. They stayed in (or moved to) the country to avoid the noise, pollution and industrialization of urban areas and are very reluctant to seek legal advice. They think if they bring a lawsuit, their neighbors will look down on them or become angry for complaining about an industry that has brought (at least for the short term) an influx of jobs and money into the area.

They also do not want to irritate their neighbors who have received significant signing bonuses for drilling leases and who continue to receive royalties.

Our clients do not want to see the gas companies leave. Indeed, many even work for them. Almost all of our clients have tried over long periods of time to negotiate with the gas companies to resolve issues including contaminated air and water, noise and light pollution and problems with their oil and gas leases.

representations are made to the individual landowner to entice him or her to sign a lease without legal advice.

When approaching the client's property, take note of the topography of the area both from a micro and macro perspective. Getting the lay of the land will help you in drafting the complaint or during oral argument, and it will help you work with the experts in developing your theories of how the natural gas wells, air emissions, equipment and vehicles or any part of the drilling and extraction operations

Never before have natural gas wells and drilling operations been so "in your face" and directly on or adjacent to land where people live and raise their families and livestock.

In many cases they work with these large powerful companies because they truly believe that no one can successfully stand up to them. Others are reluctant to seek legal advice for fear of being called unpatriotic or perceived as simply looking to make a quick dollar. Although the list of reasons why people are reluctant to turn to legal help goes on and on, in our experience the number-one reason is that they feel alone and helpless. The people in these rural areas are often unaware that their neighbors are suffering from the same problems and are equally afraid to come forward.

EVALUATING AND INVESTIGATING POSSIBLE CLAIMS

In addition to the typical client interview and review of documents, a lot of investigation should be done before commencing an action. First, conduct a site visit to gain a real perspective on what conditions the client is living with. Getting a feel for the area and seeing the case through your client's eyes will pay dividends in your ability to structure your claim and prosecute your client's actions. Inquire about conversations the client had with landmen prior to entering into any leases. Many times, suspect tactics are used and fraudulent or questionable

have created damages incurred by your client.

For instance, if gas wells are located upgradient from the property, any liquid release will generally work its way downhill. If a compressor station is located in a low-lying hollow or meadow, its volatile organic compound or VOC emissions will generally stay close to the ground and affect those in the path of its dispersion.¹

Have the client show you how the contamination has affected the quality of his or her life. If there is contaminated water, go look at the pump to see where it is located in relation to the gas well. See how the water enters the home and how it is distributed. If clients or their family members are sick from the fumes, have them show you where and how their exposure occurs. Then try to go see the gas well (without trespassing, since many well sites have locked gates) to again put the gas drilling operation in context and determine where it is located in relation to the client's property.²

After you have a clear picture of how and what has occurred or may still be occurring, it is time to collect as much data as possible. Some information is relatively easy to access and some is not. Start with

a freedom-of-information request to the Environmental Protection Agency and local environmental protection and health agencies.

Many websites of state environmental agencies identify the owners and location of gas wells according to county and their corresponding American Petroleum Institute numbers.³ Reference the API numbers on all information requests because well names are unreliable and change often. Other websites, such as WellWatch (<http://scrapper.media.mit.edu/wiki/WellWatch>), a project run by the Massachusetts Institute of Technology, have very useful databases about gas wells and provide information including the well depth, drilling dates and complaints that have been filed or incidents reported.

Be prepared to appeal denials, since many companies are new to the gas industry and attempt to keep any information pertaining to the wells confidential. Many deadlines to appeal a denied request for information are short, so it is imperative that you keep a record of all deadlines and be scrupulous about meeting them.

If the client has entered into a lease with a gas company, be sure to review it carefully. Compare the royalty rate in the lease with the royalty stubs provided by the gas company to ensure the client is getting paid what is due to him or her under the contract. Review the terms of the lease for arbitration clauses, notification requirements for breach of certain terms of the lease and testing requirements of the gas company. If the lease provides for pre-drilling water tests, make sure you review the test results and any post-drilling water tests. Some leases (and state regulations) say that the gas company must return the water to the pre-drilling condition if it is affected.

CAUSES OF ACTION

As in many environmental contamination and personal injury cases, look first to the common law causes of action. Negligence, negligence per se, breach of contract, nuisance and trespass should all be analyzed for use in the case. Strict liability for ultrahazardous activity is another option to consider.⁴ Make sure to research other regulations, statutes and laws such as hazardous waste cleanup laws, oil and gas statutes and water-pollution regulations; many of these allow for the recovery of

attorney fees. Because each state is different and the law is undeveloped with respect to many of these causes of action pertaining to natural gas well drilling, operations and fracking, do not be afraid to think outside of the box.

STAY AWAY FROM THE TERM 'FRACKING'

Unfortunately, there are too many aspects of litigating these cases to even begin to cover in a short "primer" article. But if there is one piece of advice our firm has learned and can pass on, it is that plaintiff's counsel should stay away from the term "fracking."

"There has never been a confirmed case of hydraulic fracturing contaminating a drinking water supply" is a favorite mantra of the natural gas industry. The industry says the fracturing is occurring so far underground (thousands of feet below the shallow aquifers that provide residents their potable water) that it is impossible for the fracturing process to cause any contamination. These representations are in almost every advertisement or statement issued by the natural gas industry claiming the safety of their practices during this essentially unregulated modern-day gold rush.

chemicals forced under tremendous pressure to permeate the rock, causing the release of the natural gas held there (usually methane, propane and ethane) into the well. The "fracking fluids" are a means of transporting the materials (sand and chemicals) to the end of the well casing to permeate the rock fissures and allow for the gas to come back up the well unimpeded.

Theoretically, one could litigate with the goal of proving that the fracking caused new fissures that allowed both gas and fracking fluids to make their way up through the thousands of feet of strata and into the shallow aquifer. And this may one day be proved. But, in addition to being extremely hard to prove, there are too many pitfalls and roadblocks and it will only lead to an expensive and potentially damaging sidetrack for a client's case.⁵ The fact is, you do not need it to win your case.

Instead, focus on the entire natural gas extraction process. Most of the contamination documented to date arising from natural gas wells was caused by activities on the surface or by the construction of the gas well itself. On the surface, there are a myriad of opportunities to cause damage to a client's property, air and water. Surface spills of

Landowners often cooperate with gas companies because they believe that no one can stand up against them.

The terms "slickwater fracturing," "hydraulic fracturing" or "fracking" are all sexy terms that industry, politicians, activists and the public love to use, albeit somewhat haphazardly. Take caution and do not fall into the trap of trying to prove fracking is all that might be causing the contamination of your client's groundwater. The reasons are numerous and it helps to understand what exactly the industry is referring to when it says that fracking has never contaminated drinking water.

When representatives of the natural gas industry use the term, they are referring to the actual explosive charges set off inside the well casing (essentially a steel pipe) thousands of feet underground. These charges cause shards of metal to fire through the well casing and into the surrounding rock. That is all "fracking" is — nothing more. It is the "fracturing" of the rock that allows the

diesel, gasoline, ethylene glycol, produced water, chlorine and fracking constituents are common on or around a well pad. All of these substances, once leaked, can seep into and contaminate surface and groundwater.

The constant running back and forth of large trucks with water and equipment can cause not only a nuisance but also air contamination of particulates and hazardous fumes. When the frack tanks are linked together via piping and the liquids are mixed and eventually pumped down into the well, there are numerous connections and valves where liquids can escape into the ground and contaminate the groundwater or drain off the well pad into surface waters.

A gas well that is not constructed properly can cause both gas and fluids to migrate, not inside the well as they are supposed to, but outside the well, which allows them to enter the shallow aquifer system. Even properly

Litigating contamination from gas wells and natural gas extraction operations can get very expensive and complex. It is important to keep your claims and the strategy of litigation as simple as possible.

constructed gas wells will eventually fail and permit migration outside the well after some period of time.

The industry incorrectly advises that because multiple well casings and layers of concrete are installed through the groundwater stratum, there is no way for the gas and other fluids to escape through the well into people's potable water. However, the several layers of casings and cement create multiple interfaces of the steel and concrete that may in fact increase the likelihood of gas and fluid migration into the shallow aquifer.

Litigating contamination from gas wells and natural gas extraction operations can get very expensive and complex. It is important to keep your claims and the strategy of litigation as simple as possible. Your client had good air or water, and an entity came and installed a gas well near your client. And now your client has polluted land, air or water that must, in many cases, be remediated or, in the case of water, replaced by other sources, all at great expense. There is no doubt that as the number of wells continues to increase, more and more individuals will suffer recoverable damages and injuries. From personal injuries caused by exposure to vapors emitted from a compressor station to having gas bubbles in drinking water, the development of this area of environmental litigation is surely just in its infancy. [WJ](#)

NOTES

¹ The volatile organic compounds emitted from compressor stations are unregulated and unmonitored. They most likely contain several carcinogens such as benzene, toluene, xylene, hexane and heptane.

² Many emissions and contaminants from natural gas wells can travel long distances, so do not hesitate to look for wells located within a 3-mile diameter from your client.

³ An API well number or API number is a unique and permanent numeric identifier assigned to each well drilled for oil and gas in the United States. The API number is one of many industry standards established by the American Petroleum Institute.

⁴ Two recently reported Pennsylvania cases denied motions to dismiss the cause of action for ultrahazardous activity. See *Fiorentino v. Cabot Oil & Gas*, 750 F. Supp. 2d 506 (M.D. Pa. 2010); *Berish v. Southwestern Energy Prod. Co.*, Civ. A. No. 3:10-CV-1981, 2011 WL 382420 (M.D. Pa. Feb. 3, 2011).

⁵ The so-called "Halliburton loophole" exempted the disclosure of fracking fluids from the Safe Drinking Water Act in 2005 while former Halliburton CEO Dick Cheney was vice president of the United States. Although some companies have voluntarily released some generic ingredients of their fracking fluids, the exact composition of the fracking fluids and drilling muds are often not disclosed because they are considered to be confidential trade secrets.



Marc J. Bern, a nationally recognized plaintiffs' bar trial attorney, is a founding and senior partner of **Napoli Bern Ripka & Associates** in New York. In a legal career spanning over 30 years, he has tried more than 100 cases to jury verdict and has settled hundreds of cases for amounts in excess of \$1 million, including most recently the settlement of the claims of plaintiffs injured during cleanup operations at the World Trade Center site following the 9/11 attacks for over \$800 million. He can be reached at MJBbern@NapoliBern.com. **Tate J. Kunkle** is an associate in the environmental litigation department of Napoli Bern Ripka. His practice focuses on plaintiff's mass tort litigation, concentrating on helping people harmed by natural gas drilling operations, oil spills, and exposure to hazardous water and air contaminants. He can be reached at TKunkle@NapoliBern.com

Contamination suit

CONTINUED FROM PAGE 1

include diesel fuel, toluene, formaldehyde and methanol, the complaint says.

The process of fracking causes the migration of the toxic chemicals, including methane and hydrogen sulfide, resulting in the contamination of soil, groundwater, lakes, ponds, reservoirs, drinking water wells and air, the suit says.

After the defendants began operating gas wells in the area, the Tuckers noticed that their well began to smell like "cotton poison," according to the complaint. That caused the plaintiffs to discontinue the use of their water for normal household uses, the lawsuit says.

The lawsuit asserts claims of strict liability, nuisance, trespass and negligence.

The complaint alleges the defendants, by engaging in abnormally dangerous activities, are strictly liable without regard to fault for all the damages and injuries sustained by the plaintiffs caused by hydraulic fracturing.

The plaintiffs are seeking \$1 million in compensatory damages and \$5 million in punitive damages.

The fracking process uses a mixture of water, sand and numerous toxic chemicals to fracture the shale rock formation.

The lawsuit is also seeking a medical monitoring fund for testing for any health effects stemming from the contamination.

The plaintiffs also seek funds to pay for the monitoring of the air, soil, groundwater and atmosphere for the presence of toxic chemicals. **WJ**

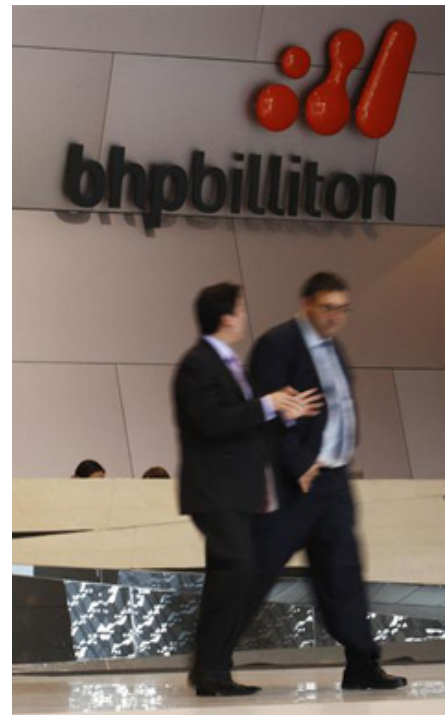
Attorneys:

Plaintiffs: Timothy Holton, Berry Cooper and John Holton, Deal, Cooper & Holton, Memphis, Tenn.; Michel McGartland, McGartland & Borchart, Fort Worth, Texas

Related Court Document:

Complaint: 2011 WL 1980530

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



REUTERS/Mick Tsikas

Defendant BHP Billiton Petroleum LLC has its headquarters in Melbourne, Australia.

WESTLAW JOURNAL TOXIC TORTS



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In BP spill cases, Mexican states can't add claims or defendants

A federal magistrate judge in Louisiana has refused to let three Mexican states suing over the BP oil spill to amend their complaints to add new causes of action and defendants.

In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010, No. 10-02179, 2011 WL 2023304 (E.D. La. May 18, 2011).

U.S. Magistrate Judge Sally Shushan of the U.S. District Court for the Eastern District of Louisiana said granting the states' motions would be prejudicial to the defendants.

The District Court is home to the consolidated multidistrict litigation over the spill.

The April 2010 explosion and fire on the Deepwater Horizon drilling platform caused the rig to sink into the Gulf of Mexico. Nearly 5 million barrels of oil had been released by the time the well was capped about three months later. Some of the oil remains below the surface in the Gulf, the Mexican states say.

The Mexican states of Tamaulipas, Veracruz and Quintana Roo filed suit Sept. 15 against BP, rig owner Transocean and others over the disaster, alleging that the remaining oil will cause damage to the Gulf of Mexico's marine, coastal and estuarine environments.

The judge said the explanation for the delay in seeking leave was inadequate.

The states rely on the Gulf's natural resources for their economic well-being, including the tourism, fishing and commercial shipping industries, the complaints say.

Because of the oil that remains in the Gulf, the states say, they will suffer serious financial losses and damages, including lost fees, taxes and revenue, as well as expenses



REUTERS/Lee Celano

A slick of oil from the Deepwater Horizon oil spill floats near a boat in the Gulf of Mexico June 9, 2010. Three Mexican states say some of the oil remains below the surface.

related to performing preventive measures and conducting scientific studies.

The Mexican states asked for leave to amend their complaints April 26, arguing that they are now represented by new governors that "should be allowed to plead their respective state's case more fully."

Because the assessment of damages from the oil spill is not yet complete, the states said, they wanted to clarify and expand their allegations to more fully set out their claims and damages.

They said they also wanted to add new defendants that are already parties in other cases in the MDL, including Transocean Holdings LLC, which leased the Deepwater Horizon oil rig to BP, and Anadarko E&P Co., a part owner of the well.

Magistrate Judge Shushan said the states' explanation for the delay in seeking leave was inadequate.

The states had the information in their proposed amended complaints since at least Dec. 15, when the master complaints were filed by all plaintiffs in the litigation, Judge Shushan said.

The states could have moved to amend shortly after that date, but they waited more than four months to file their motions, the judge said.

The defendants would be prejudiced if the Mexican states were allowed to amend their complaints at this point, Judge Shushan concluded. **WJ**

Related Court Document:
Order: 2011 WL 2023304



REUTERS/Lucas Jackson

STATUTE OF LIMITATIONS

Value-diminution claim by landfill neighbor is time-barred

New Jersey's six-year limitations period bars an action by a landowner alleging the diminution in value of its property due to contamination from an adjacent landfill, the 3rd U.S. Circuit Court of Appeals has ruled.

Haddonbrook Associates v. General Electric Co., No. 10-1744, 2011 WL 1668996 (3d Cir. May 4, 2011).

The panel agreed with the lower court that the property owner, whose managing partner was aware of the complete loss in value for at least 13 years, failed to establish a "continuing tort" that would overcome the statute of limitations.

The owner, Haddonbrook Associates, brought the action in 2007 against General Electric Co., the owner of a portion of an adjacent parcel of land leased by GE's corporate predecessor to a landfill operator in the 1970s.

Hazardous waste was allegedly discarded in the landfill during that time, contaminating the surrounding environment, the opinion says.

GE sued the landfill operator in 1991, seeking to recover the money it spent cleaning up the contamination.

At the time, Plantation Homes Inc. was the owner or the adjacent property now owned by Haddonbrook. In 1994 Plantation unsuccessfully attempted to intervene in GE's lawsuit to assert claims of negligence and strict liability.

Six years later Plantation's owner and president, Joseph Samost, transferred its property to Haddonbrook, a partnership among Samost (Haddonbrook's managing partner), his wife and his daughter, for \$1.

In 2007, some 13 years after Plantation tried to intervene in GE's cost-recovery action, Haddonbrook commenced this suit against GE.

Haddonbrook alleged that contamination stemming from the disposal of hazardous waste on GE's property precluded it from developing its property for any commercial or residential use. It asserted claims for nuisance, negligence and strict liability.

The U.S. District Court for the District of New Jersey granted summary judgment in GE's favor, finding the suit time-barred because

"While it is true that contaminants may continue to flow onto Haddonbrook's property, the District Court correctly concluded that Haddonbrook failed to claim or adduce evidence of any compensable injury occurring within the limitations period," the panel said.

Samost, and thus Haddonbrook, was aware of the alleged harm at least 13 years before bringing suit.

Haddonbrook appealed, arguing that the ongoing migration of contaminants from GE's property onto Haddonbrook's land was a continuing tort that in essence triggered a new limitations period each day.

But the 3rd Circuit concluded that Haddonbrook did not allege a continuing tort because new injuries did not continue to occur.

Haddonbrook was seeking damages for property value diminution, "a measure of damages generally associated with permanent and not continuing nuisances," the panel said.

Moreover, the trial evidence established that the property's value was destroyed long before the six-year period prior to the present lawsuit, the court said.

Consequently, Haddonbrook failed to show it sustained any "new" injury within the limitations period so as to warrant application of the continuing-tort doctrine, the 3rd Circuit concluded, affirming the District Court's ruling. **WJ**

Attorneys:

Plaintiff: Louis Cappelli Jr., Cherry Hill, N.J.

Defendant: Craig W. Davis, McCarter & English, Newark, N.J.

Related Court Document:

Opinion: 2011 WL 1668996

Judge rejects CERCLA claim for failing to allege 'release'

An Oregon federal judge has dismissed an oil reprocessor's CERCLA complaint against a scrap metal recycler for PCB cleanup costs because it did not expressly allege a release or threatened release of the contaminant into the environment.

***Oil Re-Refining Co. v. Pacific Recycling Inc. et al.*, No. 6:11-cv-06042, 2011 WL 1696254 (D. Or., Eugene Div. May 3, 2011).**

However, saying the recycling firm's alleged transfer of contaminated used oil posed a "very real" threat, U.S. District Judge Michael R. Hogan of the District of Oregon granted the dismissal without prejudice to the plaintiff's ability to refile the complaint.

According to the opinion, Oil Re-Refining Co., which collects and reprocesses used oil, picked up 1,000 gallons of used oil from Pacific Recycling's scrap metal recycling plant in March 2010 at Pacific's request. Pacific did not notify ORRCO of any contaminants in the oil.

ORRCO later discovered significant PCB contamination at the storage facility where it had transported the oil. Subsequently testing revealed the presence of the same type of PCBs at Pacific's facility, the opinion says.

"[T]he threat is very real given that the oil was specifically transferred to plaintiff for such processing and the cleanup is the response to that threat," the judge said.

After undertaking cleanup efforts, ORRCO sued Pacific under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, to recover the costs of the cleanup.

Pacific moved to dismiss the complaint, contending ORRCO failed to allege any release or threat of release of PCBs into the environment, as required for CERCLA liability.

CERCLA imposes liability for a "release" or "threatened release" of a hazardous substance that "causes the incurrence of response costs." The law defines "release" as an emission into the environment.

Pacific argued that because ORRCO alleged that only its storage facility and the equipment stored within the structure were exposed to



PCBs, it did not allege a release into the environment within the scope of CERCLA.

Furthermore, pointing to case law, Pacific argued that ORRCO failed to allege any threatened release since the complaint contained no allegation that the PCBs stored in ORRCO's facility could escape into the environment. *Powell Duffryn Terminals v. CJR Processing*, 808 F. Supp. 652 (N.D. Ill. 1992).

Judge Hogan agreed with Pacific that the complaint failed to allege any release, or threat of release, into the environment.

However, the judge noted that if ORRCO had not discovered the PCB contamination, it would have processed the used oil into oil that would have been burned by customers, ultimately resulting in the release of PCBs.

He concluded that the threat of release "is very real given that the oil was specifically transferred to plaintiff for such processing and the cleanup is the response to that threat."

If ORRCO's complaint had contained allegations to that effect, it would have stated a CERCLA claim, Judge Hogan said.

Consequently, he granted ORRCO leave to amend its complaint to cure its shortcomings. **WJ**

Attorneys:

Plaintiff: Aaron J. Bell, Bell Law Firm, Wilsonville, Ore.

Defendants: Christopher J. Kayser, Larkins Vacura LLP, Portland, Ore.

Related Court Document:

Opinion: 2011 WL 1696254

Alaska Native groups sue over polar bear habitat designation

A number of Alaska Native groups and the state's North Slope Borough have sued the Interior Department, challenging the designation of vast portions of coastal areas as a critical habitat for polar bears.

Arctic Slope Regional Corp. et al. v. Salazar et al., No. 11-cv-00106, complaint filed (D. Alaska May 13, 2011).

The complaint, filed in the U.S. District Court for the District of Alaska, alleges the government's designation of 187,157 square miles along the North Slope — an area larger than California — will impede oil and gas production and other activities.

The Arctic Slope Regional Corp., which represents the business interests of the local Inupiat and is one of 12 plaintiffs in the case, said in a May 13 statement that the financial burden to the state and region from the designation could total billions of dollars.

Furthermore, the designation "will disproportionately harm Alaska Natives and other North Slope Borough residents, the people



REUTERS/Geoff York World Wildlife Fund

The critical-habitat designation "provides little to no assistance to polar bears and risks crippling the North Slope villages and Alaska Native communities in its path," the complaint alleges.

who share habitat with polar bears and whose livelihood depends on those lands," the complaint says.

The U.S. Fish and Wildlife Service made the designation after listing polar bears in May 2008 as a "threatened" species under the Endangered Species Act, 16 U.S.C. § 1532.

According to the complaint, the government has identified the primary threat to polar bears as the projected loss of sea ice due to climate change.

But the critical habitat designation will provide no conservation benefit to the polar bear species and instead "risks crippling the North Slope villages and Alaska Native communities in its path," the complaint says.

The plaintiffs allege the Interior Department and the Fish and Wildlife Service violated the Endangered Species Act because the designation includes large areas that lack physical or biological features essential to the conservation of polar bears.

The government also failed to adequately consider the economic impact of its designation and to conduct "full and meaningful consultation" with Alaska Native groups beforehand, the complaint says.

The plaintiffs ask that the designation be declared unlawful and that the Fish and Wildlife Service be ordered to create a new polar bear critical habitat designation that complies with the Endangered Species Act.

WJ

Attorneys:

Plaintiffs: Matthew A. Love, Van Ness Feldman, Seattle; Jeffrey M. Feldman, Feldman Orlansky & Sanders, Anchorage, Alaska

Related Court Document:

Complaint: 2011 WL 2148645

Exxon sues feds for cleanup funds

Exxon Mobil Corp. is suing the federal government for costs related to the cleanup of a company-owned hazardous waste site in Baton Rouge, La., saying the United States used the site during World War II to manufacture synthetic rubber and gasoline.

Exxon Mobil Corp. v. United States, No. 11-1814, complaint filed (S.D. Tex. May 12, 2011).

The complaint was filed in the U.S. District Court for the Southern District of Texas for contribution and cost recovery under Sections 107 and 113 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601.

Exxon Mobil operates the Baton Rouge complex as an oil refinery and chemical plant.

According to the complaint, the site began operations as a small oil refinery in 1909 operated by Standard Oil Co., a predecessor of Texas-based Exxon.

In the early 1940s, the United States greatly expanded the Baton Rouge complex into one of the largest manufacturing facilities for critical war-related materials, including aviation gasoline and synthetic rubber, in the interests of national defense, the plaintiff says.

The federal government had the authority to transform the site because it had enacted a series of laws and issued numerous executive orders to assume control over industries and facilities deemed critical to the national defense, according to the suit.

Throughout World War II and during the Korean War, the federal government exercised day-to-day operational control of the refinery at the complex, the plaintiff asserts.

The federal government also allegedly transformed the Baton Rouge complex from an oil refinery to a facility that contained six additional war-related production plants, including those for synthetic rubber.

The United States retained ownership of all six plants until the early to mid-1950s, the plaintiff says.

All the facilities generated a large amount of hazardous waste that was treated and disposed of at the site, contaminating the soil, sediments, groundwater and surface water, the plaintiff adds.

Exxon says it has incurred response costs, including investigation and cleanup costs, at the site, where it now operates an oil refinery and chemical plant.

The lawsuit says the federal government is a potentially responsible party that is obligated to reimburse Exxon for its past and future cleanup costs under CERCLA because the United States owned or operated the facility at the time hazardous wastes were disposed of at the site.

Exxon wants the court to order the government to provide contribution for all costs that the company has incurred or may incur in responding to the release of hazardous substance at the site. [WJ](#)

Attorneys:

Plaintiff: J. Gregory Copeland, Baker Botts LLP, Houston; Daniel Steinway and Michael McGovern, Baker Botts LLP, Washington

Related Court Document:

Complaint: 2011 WL 2038401

See Document Section B (P. 26) for the complaint.



REUTERS/Jessica Rinaldi



REUTERS/Chip East

BANKRUPTCY

Reorganized chemical company can sue parent over spin-off

A chemical manufacturer that recently emerged from bankruptcy can proceed with its breach-of-fiduciary-duty claim against its parent company for allegedly saddling it with decades' worth of environmental liabilities, a federal judge has ruled.

In re Tronox Inc., No. 09-10156; Tronox Inc. et al. v. Anadarko Petroleum Corp. et al., Adv. No. 09-1198, 2011 WL 1815149 (Bankr. S.D.N.Y. May 11, 2011).

Judge Allan L. Gropper of the U.S. Bankruptcy Court for the Southern District of New York dismissed part of Tronox Inc.'s complaint last year but gave the company an opportunity to replead its claims for breach of fiduciary duty, aiding and abetting, and civil conspiracy.

Acting on a renewed motion to dismiss filed by the defense, the judge allowed the fiduciary duty claim to proceed against Tronox's former parent, Kerr-McGee Corp.

However, he struck as insufficiently pleaded Tronox's claims that Anadarko Petroleum Corp. conspired with Kerr-McGee, aiding and abetting its fiduciary breaches.

Judge Gropper noted that his decision did not relate to claims against certain defendants for actual and constructive fraud.

Titanium dioxide maker Tronox and its affiliates filed for Chapter 11 protection in January 2009.

Later that year the debtor companies filed an adversary action against Anadarko, Kerr-McGee and numerous affiliates.

Tronox claims that Kerr-McGee set up a new entity, which retained the Kerr-McGee name, to isolate its valuable oil and gas assets. The remaining assets, and 70-years' worth of environmental cleanup and litigation costs, remained with a group of entities spun off from the old Kerr-McGee. Those entities later became Tronox and its affiliates, the plaintiffs say.

In June 2006 — less than three months after the spin-off — Anadarko acquired the

new Kerr-McGee for \$18 billion, the court's opinion said.

In their second amended adversary complaint, the Tronox companies claim the spin-off left them insolvent or severely undercapitalized. They also allege the defendants orchestrated the spin-off to immunize the oil and gas business from the burden of the long-standing environmental liabilities in order to facilitate the Anadarko transaction.

The defendants sought the dismissal of the repleaded claims.

This time, Judge Gropper ruled the plaintiffs could proceed with their breach-of-fiduciary-duty claim.

He said the Tronox companies had adequately pleaded that the new Kerr-McGee owed a fiduciary duty to them. At the time of the spin-off, the Tronox companies were subsidiaries of Kerr-McGee. These subsidiaries had minority shareholders, the judge concluded.

It is settled law that a parent companies owes a fiduciary duty to a subsidiary that has minority shareholders, Judge Gropper said.

The judge also found the plaintiffs sufficiently pleaded that the new Kerr-McGee breached that duty by allegedly engaging in transactions that lacked intrinsic fairness, involved gross overreaching and caused Tronox to become insolvent.

However, Judge Gropper dismissed the aiding-and-abetting and conspiracy claims.

He said the complaint contained insufficient allegations that Anadarko acted in concert with the new Kerr-McGee.

"Plaintiffs have not alleged that Anadarko demanded that any particular liabilities be imposed upon Tronox or that New Kerr-McGee promised to sweeten the deal at Anadarko's behest by foisting additional liabilities upon Tronox prior to the spin-off," the opinion said. [WJ](#)

Attorneys:

Debtors: David J. Zott and Jeffrey J. Zeiger, Kirkland & Ellis, Chicago

Defendants: Melanie Gray, Lydia Protopapas and Jason W. Billeck, Weil Gotshal & Manges, Houston; James J. Dragna, Bingham McCutchen LLP, Los Angeles

Related Court Document:

Opinion: 2011 WL 1815149

See Document Section C (P. 32) for the opinion.

Louisiana appeals court changes its mind on 'proprietary interest' test

A Louisiana appeals court has reversed its prior ruling that to maintain an action against a manufacturer for property damage caused by a defective product, the plaintiff must have some proprietary interest in the damaged property.

***Phillips et al. v. G&H Seed Co. et al.*, No. 10-1405, 2011 WL 1773269 (La. Ct. App., 3d Cir. May 11, 2011).**

Courts instead should conduct a duty-risk analysis to determine the scope and extent of the defendant's duty to the plaintiff, the 3rd Circuit Court of Appeal said May 11.

The appeal involves dozens of cases brought against Bayer CropScience, the manufacturer of the insecticide Icon, and various companies that purchased the product and applied it to rice seed.

The plaintiffs, crawfish buyers and processors, claim the use of Icon in rice fields and crawfish ponds in Louisiana caused the annual crawfish crop to drop from 60 million pounds to 10 million pounds, the opinion says.

"Our review of the jurisprudence establishes that the Louisiana Supreme Court in *PPG*, and the cases that followed, abandoned the per se no-duty rule in favor of a duty-risk analysis."

Bayer moved for dismissal, arguing that because the plaintiffs are not crawfish farmers and did not own the crawfish crops, they did not have any proprietary interest in the damaged crop.

The St. Landry Parish Circuit Court denied the motion, rejecting the "proprietary interest" rule in favor of a duty-risk analysis that examines a defendant's duty to the plaintiff on a case-by-case basis.

During a trial in three test cases, the court entered a directed verdict for the plaintiffs on the issue of whether the defendants' duty to crawfish farmers extended to them. The jury then returned six-figure damages awards to the three representative plaintiffs.

On appeal, a five-judge panel reversed the verdict, saying the plaintiffs had failed to prove a proprietary interest in the damaged crawfish crop.

With the case back in the trial court, the defendants obtained summary judgment.

The trial court said it disagreed with the appellate court's ruling but that it was constrained to dismiss the claims under the proprietary-interest rule.

The case then returned to the Court of Appeal, this time on appeal by the plaintiffs.

The panel ruled this time that it had failed during the first go-round to consider the state Supreme Court's holding in *PPG Industries v. Bean Dredging*, 447 So. 2d 1058 (La. 1984), that a duty-risk analysis



REUTERS/Lee Celano

A fisherman dumps a catch of crawfish at the Atchafalaya Basin near Butte LaRose, La. The plaintiffs claim the use of the insecticide Icon in crawfish ponds in Louisiana caused the annual crawfish crop to drop from 60 million pounds to 10 million pounds.

should be performed to determine the scope and extent of a particular defendant's duties.

"Our review of the jurisprudence establishes that the Louisiana Supreme Court in *PPG*, and the cases that followed, abandoned the per se no-duty rule in favor of a duty-risk analysis," the appeals court said.

As a result, the panel reversed the trial court again and returned the case for further proceedings. [WJ](#)

Attorneys:

Plaintiffs: Elwood C. Stevens Jr., Domengeaux Wright Roy & Edwards, Lafayette, La.; Jerald Edward Knoll Sr., Marksville, La.; Andre F. Toce, Lafayette

Defendant (Bayer): Gary A. Bezet, Robert E. Dille, Carol L. Galloway and Allison N. Benoit, Kean Miller Hawthorne D'Armond McCowan & Jarman, Baton Rouge, La.; Raymond P. Ward, Adams & Reese, New Orleans

Related Court Document:

Opinion: 2011 WL 1773269

See Document Section D (P. 40) for the opinion.



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ENFORCEMENT

Egg producer to pay \$5.4 million for Clean Water Act violations

A Texas-based egg producer has agreed to pay \$1.9 million in fines and to spend \$3.5 million in remedial measures to resolve Clean Water Act violations at plants in Oklahoma and Texas.

United States et al. v. Mahard Egg Farm Inc., No. 11-01031, consent decree entered (N.D. Tex. May 18, 2011).

Mahard Egg Farms struck the deal with Justice Department regulators. The agreement was filed in the U.S. District Court for the Northern District of Texas May 18.

The agency said the civil penalty is the largest ever in a federal case involving "concentrated animal feeding operations."

"Ensuring the lawful handling of CAFO will mean cleaner streams and waterways in Texas and Oklahoma, which is important for aquatic habitats, safe drinking water and public recreation," Ignacia Moreno, assistant attorney general of the Justice Department's Division of the Environment and Natural Resources, said in a statement.

According to the agency's complaint filed simultaneously with the consent decree, Mahard is an egg production company with four operating farms in Texas and Oklahoma. In addition to the facilities associated with egg production, Mahard maintains a property at each facility that is planted with Bermuda grass, hay or crops.

The company had a practice of land management that applied various waste from its facilities, including manure and process wastewater, to the surrounding fields, the complaint said.

The manure contains high levels of the pollutants nitrogen and phosphorus which, during and after rainfall, are discharged into streams and waterways, the Justice Department said.

The complaint alleged Mahard abandoned inactive and improperly designed manure lagoons at several facilities rather than close them as required by law.

In settling the charges, the company agreed to implement system-wide changes to bring each of its seven facilities into compliance with federal and state laws.

Among the changes, Mahard agreed to conduct proper lagoon closures, monitor groundwater, and to implement ongoing restoration and management procedures, such as restricting the application of manure on land, the Justice Department said. **WJ**

EPA wants data from gas drillers on wastewater disposal

The Environmental Protection Agency has directed six natural gas drillers to disclose how and where they dispose of drilling process wastewater in the Marcellus Shale region of Pennsylvania.

The companies are Atlas Resources, Talisman Energy USA, Range Resources–Appalachia LLC, Cabot Gas & Oil Corp., SWEPI LP and Chesapeake Energy Corp.

The companies account for more than half the natural gas drilling in Pennsylvania.

The EPA's action follows a request from the Pennsylvania Department of Environmental Protection asking drillers to voluntarily stop taking wastewater from the hydraulic fracturing process to state treatment plants.

The process of hydraulic fracturing, or fracking, involves high-pressure injection of water and chemicals to fracture rock and allow trapped gas to escape.

The DEP said the action was necessary because recent surface water sampling found elevated levels of bromide in rivers in the western part of the state, where the majority of natural gas drilling is occurring.

Bromide is nontoxic, but when combined with chlorine for disinfection at water treatment plants, it turns into a combination of potentially unsafe compounds.

In a May 12 letter to DEP Secretary Michael Krancer, EPA Regional Administrator Shawn Garwin said, "Modifications to the prior wastewater disposal practices should be legally enforceable to the greatest extent possible."

The EPA is urging the DEP to seek formal written confirmation of the change in



REUTERS/Daniel Wallis

A natural gas drilling rig discharges waste fluid into a holding pond in Clearville, Pa. The Pennsylvania Department of Environmental Protection has asked drillers to voluntarily stop taking wastewater from the hydraulic fracturing process to state treatment plants.

disposal methods from the gas drillers since that may affect which companies are subject to federal pre-treatment regulations.

"We want to make sure that the drillers are handling their wastewater in an environmentally responsible manner," Garwin said in the letter.

The EPA has also requested that the DEP:

- Notify the federal agency when facilities are accepting fracking wastewater so the EPA can assess if additional permits are needed.

- Apply water quality standards for drinking water at the point of wastewater discharge, not at the first downstream drinking water intake.
- Consider more representative sampling where drinking water facilities are downstream of treatment plants accepting wastewater from gas drilling.

The EPA said it was taking these actions to ensure that companies engaged in gas drilling operations protect public health and the environment. **WJ**

GAS DRILLER WILL PAY \$1 MILLION AFTER VIOLATIONS

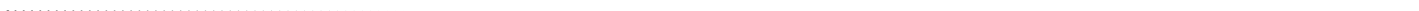
Chesapeake Energy Corp. will pay nearly \$1.1 million to resolve violations of the Pennsylvania Oil and Gas Act related to natural gas drilling in the Marcellus Shale, the state Department of Environmental Protection said May 17. Under a consent order and agreement, the company promised to pay \$900,000 to the DEP for methane contamination of private water wells in Bradford County. Under a second consent order, the company will pay \$188,000 over a Feb. 23 tank fire at a drilling site in Washington County. DEP Secretary Mike Krancer said in a statement that the well contamination fine was the largest single penalty the agency ever assessed against an oil and gas operator. The tank fire penalty is the highest that could be assessed under the Oil and Gas Act, the DEP said.

GAS DISTRIBUTORS TO PAY \$2.5 MILLION IN CAA SETTLEMENT


Three gas distribution companies will pay a \$2.5 million fine to settle allegations that they illegally mixed and distributed more than 1 million gallons of gasoline without meeting Clean Air Act emissions and fuel quality requirements, federal regulators announced May 4. Under the consent decree filed in federal court, Rocky Mountain Pipeline System, Western Convenience Stores Inc. and Offen Petroleum Inc. will also undertake an environmental project designed to offset the harm caused by their actions. According to the Environmental Protection Agency, gasoline that does not meet Clean Air Act standards for fuel can result in increased emissions from car tailpipes. In a complaint, the Justice Department charged that the companies produced millions of gallons of illegal gasoline by mixing natural gasoline (a byproduct of natural gas production) and ethanol with gasoline certified to meet Clean Air Act requirements.

SENATE BILL WOULD EASE RULES ON SMALL WATER SYSTEMS

U.S. Sen. James Inhofe, R-Okla., ranking member of the Committee on the Environment and Public Works, introduced legislation May 17 that would modify the Safe Drinking Water Act for small water systems by stopping the enforcement of federal regulations unless sufficient funding and resources are in place. According to a statement by Inhofe, the bill would ensure that the Environmental Protection Agency could not pursue an enforcement action against a system serving fewer than 10,000 people without investigating whether the water authority has funds to meet the requirements. The legislation also authorizes technical assistance and training provided by qualified nonprofit associations to small water systems to help them meet requirements of the EPA rules. Additionally it creates a pilot program to demonstrate new technologies for systems of all sizes to comply with the regulations. "Too often federal regulations come with a price tag that is unreasonable for small towns and cities with lower budgets," Inhofe said.



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