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COURT BLESSES EPA'S APPROVAL OF TEXAS SIP AND OZONE ATTAINMENT DEMONSTRATION FOR HOUSTON AREA

In BCCA Appeal Group v. State of Texas, 2003 U.S. App. Lexis 21975 (5th Cir. 2003), various parties, including owners and operators of stationary sources (facilities) of air pollution, Barzoria County and the Natural Resources Defense Council (NRDC), challenged the U.S. EPA's approval of the Texas Clean Air Act State Implementation Plan (SIP). The Clean Air Act requires EPA to establish national ambient air quality guidelines (NAAQs) for pollutants including ozone, but it is the State's obligation to implement federal guidelines, including various control measures, permitting and monitoring. A state faces sanctions unless its air pollution levels meet or fall below the NAAQs by target dates.

To review EPA's approval of the Texas program, the court applied the deferential "arbitrary and capricious" test. In doing so, the court addressed the EPA's interpretations of various provisions of the Clean Air Act and its approval of portions of the Texas SIP. Arguing that the approval of the Houston portion of the State's SIP was arbitrary and capricious, the BCCA (a group compromised of owners and operators of stationary sources of air pollution) challenged EPA's reliance on faulty Texas air modeling. Rejecting the BCCA's argument, the court found that Texas validated its model and followed the approach set forth by EPA in estimating additional emission reductions necessary to bring the area into attainment with the NAAQS. The court, accordingly, found that EPA's reliance on Texas modeling was not arbitrary, capricious or contrary to law. Although there was an issue that the model failed to account for pollution (ozone) spikes, the court concluded that EPA did not have to expect comparisons between model predictions and monitored observations to match exactly. The court observed that EPA's final rule addressed the BCCA's concern that the photochemical grid computer model (forecasting ozone pollution) both over- and under- predicted ozone in some areas. In doing so, the court noted that, because the various tests used on the model revealed no flaws in the model formulation and because statistical measures confirmed that the model generally predicted the right magnitude of pollution (ozone) peaks, EPA properly determined that the model was an acceptable tool for estimating the amount of emission reduction needed to achieve attainment. In upholding EPA's approval of the Texas photochemical grid model as reasonable, the court further concluded that EPA considered BCCA's arguments during the administration process and offered a rational explanation for its reliance on the Texas model, despite the model's inability to replicate exactly Houston-Galveston's unique meteorological conditions.

The court further considered EPA's interpretation of the Clean Air Act to allow states to use a "weight-of-evidence" approach, supplementing their photochemical modeling results with additional data to demonstrate attainment with the ozone NAAQs. The Clean Air Act provides that an attainment demonstration must be "based on photochemical grid modeling or any other analytical method determined . . . to be at least as effective." The court found that the statutory language did not require an attainment demonstration to be based solely or directly on photochemical grid modeling and instead allowed a state to reasonably supplement the modeled results with additional control measures. The court pointed out that EPA's "weight of evidence" approach was set forth in the notice and comment rulemaking for approval of the Texas SIP. The court also noted that the broad statutory grant of authority to EPA reflected that Congress could not have intended to bar EPA from considering the weight of data in addition to the modeled results. The court, therefore, concluded that EPA's "weight of evidence" approach to approving the

attainment demonstration was consistent with the Clean Air Act, was reasonable and entitled to judicial deference.

The court also found that EPA did not err in withholding action on certain portions of the Houston SIP. Although EPA approved the Houston SIP, it deferred action on a method by which Texas allowed facilities to use emission reduction credits (saving or banking excess reductions to be used for another day or other units). The court found that EPA's action did not amend the Texas proposal in a way that eliminated a material prerequisite to the SIP.

The Environmental Defense Fund argued that the EPA lacked authority under the Clean Air Act to approve a SIP containing an "enforceable commitment" to adopt unspecified control measures in the Houston area. The court pointed to three factors EPA generally considers in determining whether to approve a SIP's enforceable commitment: (1) whether the commitment addresses a limited portion of the statutorily required implementation plan; (2) whether the state is capable of fulfilling its commitment; and (3) whether the commitment is for a reasonable and appropriate period of time. The court found that Texas satisfied all three elements and that the EPA reasonably concluded that an enforceable commitment to adopt additional control measures on a fixed schedule was an appropriate means, technique or schedule for compliance under the statute.

The court also determined that EPA properly approved the monitor vehicle emissions budget in the Houston SIP and that the evidence in the administrative record supported the Texas emission reduction plan. The court concluded that the plain language in the Clean Air Act only requires the State to give assurances that it has funding, personnel and authority to implement the plan as a whole; it does not require such assurances for each specific control measure. The court found that Congress left to the administrator's sound discretion what assurances are necessary for compliance with the Clean Air Act. The court observed that EPA is allowed substantial discretion in its assessment of what constitutes an approvable SIP and whether control measures, means or techniques contained in a SIP are necessary and appropriate.

Finally, the court found that EPA's findings on reasonably available control measures in the Houston SIP were in accordance with the Clean Air Act and supported by the administrative record.

This decision relates to the problems currently faced in Louisiana in having a SIP addressing ozone non-attainment in the Baton Rouge metropolitan statistical area approved by EPA. See http://www.deq.state.la.us/evaluation/ozone/otf/sip/overview.htm and related websites. The final 2005 Baton Rouge Area Attainment Plan and Transport Demonstration (Potpourri Notice - 011P0T2), like the Texas SIP, includes issues regarding modeling, motor vehicle emissions budget, contingencies and use of a "weight of evidence" analysis. Recent EPA SIP approvals and notices of adequacy are contained in 68 F.R. 32740 (June 2, 2003) (on-road motor vehicle emissions budget) and 68 F.R. 23597 (May 5, 2003) (EPA recission of NOx exemption for Baton Rouge non-attainment area). The BCCA decision illustrates the broad leeway courts afford to EPA in approving SIPs.

By Stan Millan

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LOUISIANA SECOND CIRCUIT REJECTS PRESCRIPTION DEFENSE IN ASBESTOS SUIT, FINDING THAT ONE-YEAR PERIOD DOES NOT START UNTIL DEFINITIVE MESOTHELIOMA DIAGNOSIS

***Hughes v. Olin Corp.*, 37,404-CA (La. App. 2 Cir. 10/03/03), ___ So. 2d ___.**

The Louisiana Second Circuit Court of Appeal's decision in *Hughes v. Olin Corp.* makes it more difficult for asbestos defendants to win dismissal on prescription grounds. On May 4, 2001, plaintiffs filed suit against Olin, the former employer of Hughes, for injuries caused by occupational exposure to asbestos. Olin argued that prescription barred the suit because Hughes had actual or constructive knowledge of his claim more than a year before he filed suit. Olin's position was that the one-year prescriptive period began to run in April 2000, either when doctors told Hughes he probably had lung cancer and that it might be mesothelioma or certainly by the end of the month when doctors definitely confirmed that Hughes had lung cancer. Plaintiffs responded that prescription did not begin to run until June 9, 2000, when doctors told Hughes that he, in fact, had mesothelioma. The trial court agreed with Olin and dismissed the action. The Second Circuit reversed the trial court and reinstated the suit.

In 1990, doctors diagnosed Hughes with interstitial fibrosis typical of asbestos exposure. He joined three asbestos class actions in 1990 and 1991. All three suits were settled, with Hughes reserving the right to reassert his claim if later diagnosed with mesothelioma, an asbestos-related cancer. After reviewing the chronology and Hughes's medical history, the Second Circuit rejected Olin's argument that prescription began to run at the end of April 2000, when Hughes learned he had lung cancer. The appellate court reasoned that, although he knew in April 2000 that he had cancer, prescription did not begin to run until June 9, 2000, when doctors told Hughes that he had mesothelioma (cancer caused by asbestos). Thus, to start prescription, it was not enough that Hughes knew that he had cancer that might be mesothelioma. Given the uncertainty of his diagnosis, the court found that Hughes could not reasonably have known of the injury giving rise to his claim against Olin until he received his definitive diagnosis of mesothelioma.

Relying on *Hughes*, courts may now require a definitive diagnosis of asbestos-related injury to start the running of prescription in asbestos cases, making it more difficult for defendants to obtain a prescription dismissal.

By Judith V. Windhorst

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LOUISIANA FIRST CIRCUIT DENIES LANDOWNERS' REQUEST FOR REHEARING AND REMAND IN AN OIL AND GAS PROPERTY RESTORATION CASE, FINDING ACT 1166, THE "CORBELLO" LEGISLATION, INAPPLICABLE

Simoneaux v. Amoco Production Co., 2002 CA 1050, 2003 La. App. LEXIS 3310 (La. App. 1st Cir., 12/4/03)

After the Louisiana First Circuit Court of Appeal reinstated a jury verdict awarding plaintiff landowners $375,000 in oilfield remediation costs – rather than the nearly $13 million awarded by the trial judge in a judgment notwithstanding the verdict, *see Simoneaux v. Amoco Production Co.*, 2002-1050, 2003 La. App. LEXIS 2581 (La. App. 1st Cir. 9/26/03) – the landowners applied for rehearing and sought remand. In requesting remand, the landowners relied upon Act 1166 of 2003, La. R.S. 30:2015.1, urging that Act 1166 obligated the First Circuit to remand the matter to the trial court for a determination of an appropriate remediation plan to address ground water contamination.

The Louisiana Legislature enacted Act 11166 in reaction to the decision rendered by the Louisiana Supreme Court in *Corbello v. Iowa Production*, 2002-0826 (La. 2/25/03), 850 So.2d 686, *reh'g granted in part for clarification* (La. 6/20/03). In *Corbello*, the Louisiana Supreme Court affirmed a $33 million property restoration damage award against a surface lessee based on the lessee's failure to restore the property it leased to its original condition. In affirming the award, the Louisiana Supreme Court rejected the argument that the private award erroneously included $28 million for "public" injury to the Chicot Aquifer. Even though the plaintiff landowners had no legal duty to use the award to remediate the ground water contamination, the court found that the Oilfield Site Restoration Law, La. R.S. 30:80, *et seq.*, did not preclude a private landowner's right to seek redress against an oil company. Immediately following *Corbello*, the legislature enacted Act 1166 to address litigation involving claims seeking damages for remediation of "usable ground water." Generally, Act 1166 requires parties seeking damages for ground water contamination to notify the Louisiana Department of Natural Resources ("DNR") and the Louisiana Department of Environmental Quality ("DEQ"), granting the agencies the opportunity to intervene in the litigation. It also requires a court that finds that ground water contamination exists to adopt a plan for remediation and to seek input from DNR and DEQ in adopting the plan. The Act further requires the courts to administer the funding for the remediation and to issue all orders necessary to ensure that the funds are actually expended for the evaluation and remediation of the contamination. The Act additionally specifies that it is to be applied retroactively (with certain exceptions) to all cases filed after August 1, 1993.

Seeking to take advantage of the new legislation, the *Simoneaux* plaintiffs contended that the trial court had determined that contamination existed requiring evaluation or remediation to protect usable ground water, thus triggering the procedural requirements of Act 1166. Requesting remand, plaintiffs argued that the Act required the trial court to adopt a plan to protect usable ground water after receiving and examining proposed plans from all parties and DNR and DEQ.

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Denying, with written reasons, the *Simoneaux* plaintiffs' application for rehearing and request for remand, the First Circuit concluded that the provision contained in Act 1166 requiring a trial court to adopt the most feasible plan to protect usable ground water "requires a finding by a court that contamination exists which poses a threat to public health requiring an evaluation or remediation to protect usable ground water." Disagreeing with plaintiffs' argument that the Act applied, the court observed that "A finding of liability by the jury does not equate to ground water contamination or automatically trigger the provisions of the Act." The court stressed that the jury's finding of liability failed to satisfy the Act's requirement that there be a "judicial determination that contamination exists." Accordingly, the court found Act 1166 inapplicable.

Dissenting in part, Judge Fitzsimmons opined that the trial court's findings concerning ground water triggered the provisions of Act 1166 requiring the trial court to consider and adopt a remediation plan.

Although Act 1166 specifies that it is to be applied retroactively, the First Circuit's denial of plaintiffs' request for rehearing and remand indicates that Louisiana courts may be reluctant to find that the Act applies to matters that were tried before the enactment of Act 1166. Meanwhile, in the flood of cases that have been filed following *Corbello* and the enactment of Act 1166, many plaintiff landowners, although seeking recovery of damages related to ground water contamination, disclaim application of Act 1166 by pleading that they do not seek to recover damages for contamination of "usable" ground water.

By Alida C. Hainkel

EASTERN DISTRICT DENIES ARMY CORPS' MOTION TO DISMISS INDUSTRIAL CANAL SUIT

Holy Cross Neighborhood Association, et al. v. United States Army Corps of Engineers
2003 U.S. Dist. LEXIS 20030, E.D. La. 11/3/03

Judge Eldon Fallon of the U.S. District Court for the Eastern District of Louisiana denied a motion of the U.S. Army Corps of Engineers ("the Corps") seeking dismissal of a suit brought by neighborhood and environmental organizations challenging a dredging proposal associated with the Inner Harbor Navigational Canal ("Industrial Canal") Lock Replacement Project in New Orleans. The court also granted the plaintiffs' motion for summary judgment, holding that the plaintiffs had standing to bring the suit under the Resource Conservation and Recovery Act ("RCRA") and the National Environmental Policy Act ("NEPA").

The plaintiffs – the Holy Cross Neighborhood Association, the Gulf Restoration Network and the Louisiana Environmental Action Network – brought suit against the

Corps, seeking to enjoin proposed dredging activity associated with plans to replace a lock in the Industrial Canal. Plaintiffs claimed that the proposed dredging of the canal would stir up contaminated sediments on the canal bottom, releasing the hazardous material into the surrounding ecosystem, endangering nearby residents and environmental resources. Specifically, plaintiffs asserted three causes of action: (1) a claim under RCRA that the Corps, by its plans to dredge the canal and store the resulting contaminated material, had contributed to the past or present handling, storing, treatment, transportation or disposal of solid and hazardous waste that may present an imminent and substantial danger to health or the environment; (2) a claim under NEPA that the Environmental Impact Statement ("EIS") completed by the Corps for the project was inadequate; and, (3) a claim under NEPA that the Corps failed to file a supplemental EIS, as required by NEPA, when the potential adverse impact was brought to its attention.

In response to the lawsuit, the Corps filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim. First, the Corps argued that plaintiffs could not bring claims under RCRA because the basis for their claims was future dredging and not past or ongoing activities. As such, the Corps argued, plaintiffs' claims under RCRA's citizen suit provisions were premature and improper because Congress, in enacting RCRA, did not specifically waive sovereign immunity with respect to future events. Second, the Corps claimed that RCRA specifically bars suits regarding the siting of hazardous waste storage facilities. Third, the Corps contended that plaintiffs, in failing to allege detailed facts in support of their RCRA claims and thus not satisfying the pleading requirements of Rule 8 of the Federal Rules of Civil Procedure, failed to state a claim.

The court denied the Corps' motion, rejecting each argument and permitting the suit to continue. With respect to the first argument – that the citizen suit provisions of RCRA could only be used against past and ongoing activities – the court held that such an interpretation would "render the statute meaningless." In doing so, the court looked to legislative history and judicial precedent, as well as existing administrative guidelines, finding that they all indicated that the citizen suit provisions should be interpreted broadly, in keeping with the interpretation given to RCRA provisions allowing EPA to bring suit. EPA provisions have consistently been construed broadly to permit the agency to use RCRA to "minimize the present and future threat to human health and the environment." As a result, the court concluded that the citizen suit provisions should likewise be construed broadly and interpreted to allow suits aimed at minimizing future environmental threats.

Similarly, the court rejected the Corps' argument that permitting plaintiffs to attack the location of a proposed waste storage facility would constitute an unauthorized collateral attack on an agency decision. Despite language in RCRA that specifically prohibits challenges to storage facilities, the court held that plaintiffs' challenge to the proposed location could not be viewed as a collateral attack because there had been no formal permitting or administrative process pursuant to which the challenge would be collateral. Therefore, the court held that there had never been a previous opportunity for plaintiffs to challenge the siting and the current challenge could not be considered a collateral attack barred by RCRA.

The Corps' third argument in support of its motion to dismiss was that plaintiffs had failed to allege facts to show: (1) how the Corps had contributed to the handling, storage, treatment, transportation or disposal of solid or hazardous waste; or 2) that the waste allegedly present in the canal may present an imminent and substantial danger to

health or the environment. The Corps thus asserted that plaintiffs had not met the pleading requirements of Rule 8(a), which require a pleading to give the defendant fair notice of what the claim is and the grounds upon which it rests. Rejecting the Corps' assertion, the court noted that plaintiffs did not seek to end the project but merely to delay it until proper planning and analysis could be done. The court pointed to "numerous facts" included in the plaintiffs' complaint that supported their contentions that the Corps owned, operated and maintained the canal, which was already contaminated with toxins and metals. Further, the court observed that plaintiffs had alleged that any dredging of canal bottom would expose and release toxic contaminants into the environment. Accordingly, the court determined that the facts alleged by plaintiffs were sufficient to state a claim under RCRA and adequate to put the Corps on notice that the complaint rested on the "management of and plan to dredge the Industrial Canal."

Finally, the court granted plaintiffs' motion for summary judgment on the issue of standing. The court found that at the current stage of the proceedings, plaintiffs had satisfied the three elements of constitutional standing. First, the court concluded that plaintiffs satisfied the requirement of injury in fact, as they averred that they used the affected area and were persons for whom the value of the area would be lessened by the challenged activity. Second, plaintiffs, by alleging that the Corps intended to dredge the Industrial Canal and that the dredging would cause harm to the surrounding environment, established the requisite causal connection between the challenged activity and the harm. Lastly, the court concluded that the relief requested – an injunction to enjoin any dredging activity until the Corps adequately analyzed and planned for the contamination threat – would in fact redress the alleged injury. Although granting plaintiffs' motion, the court noted that Corps, which did not oppose the motion, was free to challenge plaintiffs' standing at later stage should the issue become relevant.

By Bob Rivers

EPA TRIES TO SOLVE ITS DIRTY RAG PROBLEM

For years, generators have had the problem of how to classify waste in used rags. Generators who applied solvents on rags to wipe down and clean machinery frequently found that under EPA's and Louisiana's various hazardous waste rules, e.g., the mixture rule, the rags would, by operation of law, become contaminated with listed waste and have to be handled and managed as hazardous waste themselves, despite the often low environmental risk associated with those rags.

For the last several years, EPA has allowed the states to regulate contaminated rags on a case-by-case basis using site specific factors. Finally, however, EPA has proposed a rule at 68 Fed. Reg. 65586 (November 20, 2003), which proposes to exempt most contaminated rags from strict hazardous waste regulation. In proposing the rule, EPA offers several options for de-regulation of "industrial wipes" and asks for comments by February 18, 2004.

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EPA observes that industrial wipes represent a heterogeneous group of products that come in a wide variety of types and brands to meet a broad range of application needs. The major division is between reusable shop towels, which are laundered or drycleaned and used again, and disposal wipes and rags that are used for a limited number of applications and then discarded. Disposal wipes include both non-woven types and woven types. A variety of industries use the wipes in conjunction with solvents to clean surfaces, parts, accessories and equipment.

EPA proposes to exclude wipes from the hazardous waste definition of "solid waste," which would take the wipes totally out of regulation. This proposed exclusion would include any reusable industrial wipes exhibiting hazardous waste characteristics, like ignitability, due to the wipes' use with solvents or the wipes containing listed solvents when the industrial wipes are laundered or cleaned for re-use under specific conditions. Liquids removed from the wipes are subject to hazardous waste regulation if they contain listed hazardous waste solvents or if they exhibit hazardous waste characteristics.

The proposed exclusion from the definition of solid waste does not apply to disposable discarded wipes. When the wipes are discarded, they cease being reusable industrial wipes and become disposable industrial wipes and must be handled accordingly.

EPA also proposes conditionally excluding disposable industrial wipes from the definition of hazardous waste. There are various conditions to this exclusion. For instance, for generators, they must accumulate used wipes on-site in non-leaking containers, they must insure the wipes do not contain free liquids when transported off-site, they must handle any removed solvents subject to hazardous waste regulation according to that regulation, they must package wipes for shipment off-site in containers that are designed, constructed and managed to minimize loss to the environment and they must mark containers "excluded solvent contaminated wipes." There are various other conditions that apply to non-hazardous waste landfills (certain listed solvents contaminated rags cannot be disposed of there), for industrial laundries and dry cleaners and for intra and inter-company transfers.

Should EPA adopt the rule exempting contaminated wipes sometime in 2004, the LDEQ would be free to accept or reject the exclusion in its hazardous waste regulations because Louisiana has primacy over EPA on regulating hazardous waste, and it need not follow the more liberal exemptions that the EPA may grant from time to time.

By Stan Millan

# # #

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding this E*Zine or this practice group, please contact:

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