Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 14
Issue 3 *Summer 2007*

Article 7

2007

Environmental Updates

Follow this and additional works at: https://scholarship.law.missouri.edu/jesl

Part of the Environmental Law Commons

Recommended Citation

Environmental Updates, 14 Mo. Envtl. L. & Pol'y Rev. 575 (2007)
Available at: https://scholarship.law.missouri.edu/jesl/vol14/iss3/7

This Environmental News is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Environmental and Sustainability Law by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

ENVIRONMENTAL UPDATES

UNITED STATES SUPREME COURT

Massachusetts v. EPA, 2007 U.S. LEXIS 3785

The U.S. Supreme Court held, in a narrowly divided 5-4 decision, that (1) states have standing to sue the Environmental Protection Agency for not taking appropriate steps in protecting them from climate change and (2) that this agency has the authority to regulate greenhouse gases as "air pollutants" under the Clean Air Act.

Petitioners, a group of local environmental organizations (including Sierra Club, Green Peace, and Friends of the Earth) and several state governments, brought an action alleging that the Environmental Protection Agency ("EPA") were failing to enforce § 202 the Clean Air Act ("CAA") and needed to begin regulating several types of greenhouse gasses, including carbon dioxide, which allegedly contributed to global warming. The EPA, backed by several states and some trade unions, argued that (1) the Clean Air Act did not authorize the EPA to address global climate change and that (2) it would be unwise at this time to begin setting up greenhouse gas emission standards.

The U.S. Supreme Court first held that petitioners had standing to challenge the EPA's denial of their rulemaking petition under Article III of the U.S. Constitution. The Court's majority recognized that states were not normal petitioners and therefore the standard rules did not apply to them. Further, the Court held that the EPA's refusal to regulate these emissions presented an actual and imminent risk of harm to the state of Massachusetts. Justice Stevens, writing for the majority, agreed with the petitioners that the rising global sea levels that have eaten away millions of dollars of the Massachusetts coastline represented a real and concrete harm to the state, that global warming and climate change was the cause of this, and that the appropriate remedy would be to force the EPA to regulate the carbon dioxide emissions and thereby slow down this process.

Turning to the second question, the Court dismissed the EPA's argument that carbon dioxide is not an "air pollutant" within the meaning of the provision, and held that § 202(a)(1) of the Clean Air Act authorizes the EPA to regulate greenhouse gas emissions from new motor vehicles in

the event that it forms a "judgment" that such emissions contribute to climate change. Essentially the majority concluded that if the EPA made a finding of endangerment, the Clean Air Act required them to regulate these emissions as pollutants.

Moreover, the majority dismissed the EPA's opinion that, even if it did have the statutory authority to regulate emissions, it would be unwise to do so. While 42 U.S.C. § 7521(a)(1) does allow the EPA to decide this issue on the formation of its judgment, the majority held that the EPA had not put forward any reasonable explanation for its refusal to decide whether greenhouse gases contribute to climate change. Because of this refusal, the EPA's actions were "arbitrary and capricious" and therefore not in accordance with the law.

In a stern dissent, Chief Justice Roberts declared these claims nonjusticiable and stated that these issues were issues for Congress and the executive branch to remedy. Roberts rebuked the majority's decision recognizing states as having special standing as litigants claiming there was no Congressional or common law backing for this decision. Further, the Chief Justice claimed that the majority relied on faulty science and conjecture in its conclusion that climate change was affecting Massachusetts.

In another dissent, Justice Antonin Scalia vociferously argued that there was nothing in the original statutes that required the EPA to regulate these emissions and that by forcing the EPA's hand, the Court was setting a dangerous precedent for the future. Finally, Scalia concluded by declaring this case a simple administrative law case and claiming that the Court had no business injecting its opinion for the judgment of the agency.

ELIJAH J. L. HAAHR

Rockwell Int'l Corp. v. United States, 127 S.Ct. 1397 (2007)

Rockwell International Corporation appealed a decision by the United States Court of Appeals for the Tenth Circuit which held that a *qui tam* relator was an "original source" under the False Claims Act ("FCA"), and the United States Supreme Court reversed.

Rockwell operated under a management and operating contract with the Department of Energy ("DOE") between 1975 and 1989 to run a nuclear weapons plant in Colorado. In the early 1980s, Rockwell investigated the possibility of disposing of the toxic pond sludge which the weapons plant accumulated in its solar evaporation ponds by mixing the sludge with cement. The hardened cement-sludge mixture ("pondcrete") either would be stored at the weapons plant or be transported to other sites for storage.

One of Rockwell's engineers, James Stone, reviewed a proposed methodology for making "pondcrete" in 1982 and concluded that the proposal would not work, believing that the proposed process would make an unstable mixture that would eventually deteriorate and release harmful chemicals into the environment. Nevertheless, Rockwell initiated its "pondcrete" program and started making "pondcrete" at the weapons plant. Shortly after Stone was laid off in 1986, Rockwell discovered that "pondcrete" blocks were not as solid as originally thought. Although Rockwell knew of the problem with the "pondcrete" blocks as early as October 1986, DOE did not learn about the problem until May 1988, when several "pondcrete" blocks started leaking harmful chemicals.

In 1989, Stone filed a *qui tam* suit under the False Claims Act ("FCA") (31 U.S.C. §§ 3729-3733) for, among other things, violations of RCRA (42 U.S.C. § 6928; 18 U.S.C. § 1001). At the same time that he filed his suit in federal court, Stone also delivered to the federal government a confidential disclosure statement that described all the evidence and materials that he had in his possession; the statement identified twenty-six environmental and safety issues but only one involved the "pondcrete."

Rockwell moved to dismiss the complaint for lack of subject-matter jurisdiction, because they claimed that Stone was not an "original source" as required to file a *qui tam* suit under the FCA. The District Court denied the motion because it was satisfied that Stone had the direct

and independent knowledge that Rockwell's compensation for running the weapons plant was linked to its compliance with environmental, health, and safety regulations, and that he also had direct and independent knowledge that Rockwell allegedly concealed deficient performance to continue receiving compensation.

In amended pleadings after the federal government was allowed to intervene in the suit, Stone alleged that Rockwell replaced its "pondcrete" foreman and that the new foreman increased "pondcrete" production rates by reducing the cement-to-sludge ratio. Stone further alleged that the newer ratio was a major reason why the "pondcrete" blocks were falling apart. The pleadings did not mention any of the problems that Stone had identified in 1982.

At trial, Stone relied on the new allegations to the exclusion of the 1982 allegations. When Rockwell filed a motion to dismiss after the jury found in favor of Stone, Stone acknowledged that his claims were based on publicly disclosed allegations but maintained that he was an original source. The district court agreed with Stone, but the Tenth Circuit remanded the case on appeal, instructing the district court to determine if Stone had disclosed his information to the Government before filing the *qui tam* suit.

The district court held that Stone had not sufficiently communicated his allegations and had also failed to establish that he orally informed the FBI about his allegations before filing his lawsuit. On appeal, the Tenth Circuit reversed, holding that the 1982 report was enough to carry Stone's burden of persuasion. On appeal to the Supreme Court, the issue was whether Stone was an original source, and thus able to sue Rockwell for violations of RCRA and other environmental laws, when Stone's successful claims were based upon publicly disclosed allegations. Justice Scalia, writing for the Court, held that Stone was not an original source under the FCA and thus could not sue as a *qui tam* relator.

The Court first addressed the meaning of "direct and independent knowledge of the information on which the allegations are based" in the part of the FCA, 31 U.S.C. § 3730(e)(4)(B), which allows *qui tam* suits; specifically the Court had to decide if the phrase applied to the relator's allegations or those allegations which were publicly disclosed. The Court reasoned that the phrase must refer to the relator's allegations and not the

publicly disclosed ones, and then also noted that the phrase does not merely apply to statements in an initial pleading to a court but also to amended pleadings.

Next, applying its interpretation of the FCA, the Court held that Stone was not an original source. Because the only claims ultimately found by the jury were false statements respecting health, safety, and environmental compliance between April 1987 and September 1988, and Stone only claimed to have direct and independent knowledge about insolid "pondcrete" during that time, and because Stone was not employed at Rockwell at that time, the Court said that Stone actually didn't know that the "pondcrete" was not solid or leaking chemicals at the time.

Furthermore, the Court said that, during that time, Stone also did not know the "pondcrete" blocks were subject to RCRA or that Rockwell would not remedy the problems in the blocks. Thus, Stone lacked the direct and independent knowledge that the FCA required for him to be able to pursue a *qui tam* lawsuit against Rockwell. The Court concluded by ruling that the district court lacked jurisdiction to hear Stone's case, but left intact the federal government's claims.

JOHN H.A. GRIESEDIECK

UNITED STATES COURT OF APPEALS

Coliseum Square Ass'n, Inc. v. Jackson 465 F. 3d 215, (5th Cir. 2006)

In Coliseum Square Ass'n, Inc. v. Jackson, the Fifth Circuit Court of Appeals reviewed several claims made by a number of New Orleans Community organizations against the United States Department of Housing and Urban Development ("HUD"). The plaintiffs argued that it was essential for HUD to prepare an Environmental Impact Statement ("EIS") for a New Orleans, LA housing project.

The plaintiffs argued that because the EIS was essential to the project, HUD was not in compliance with NEPA and all federal funding for the project should cease until the project came into compliance. HUD, by issuing a finding of no significant impact ("FONSI") determined that the procedures it used to determine if an EIS was required for the project were sound procedures and that an EIS was not essential to this project nor was it required. The plaintiffs asked the courts to enter a declaratory judgment that HUD failed to comply with the statutes in funding the St. Thomas Housing Development Revitalization Project ("development project") and to compel HUD to withhold funds from the project until it fully complied.

The development project that received funding from HUD was a plan to demolish the preexisting St. Thomas Housing Development ("St. Thomas") in New Orleans. St. Thomas was a residential housing project built between 1937 and 1949. About forty-five years after the construction of the St. Thomas projects they were run down and "crime ridden." In 1996, HUD granted HANO a $25 Million grant through the HOPE IV program for the revitalization of the St. Thomas projects. When the grant for the project was approved by HUD, the revitalization was limited to residential housing. The project eventually provided for construction of new low income housing, new market rate housing, a senior care facility, and a retail shopping center.

In July 2001, after the environmental assessment ("EA") was complete, the private developer which the government hired recommended that the retail space be scaled back from 275,000 to 199,000 square feet and that a Wal-Mart store fill the space.

HUD reopened the previously signed memorandum of understanding and expanded its environmental assessment to include specifically the impact that Wal-Mart would have on historic properties in the area and the environment. HUD believed that all of the NEPA requirements would be met and that the project could go forward in compliance with the statute. HUD never performed an environmental impact statement. In February 2003, an amended Memorandum of Agreement ("MOA") was signed and a new environmental assessment and FONSI was issued.

The court addressed the plaintiffs' arguments by applying the "arbitrary and capricious" or "clearly contrary to law" standard which placed a huge obstacle in the plaintiffs' path. The plaintiffs were not able to produce enough evidence to overcome this standard on any of their claims. The court applied this standard to the several arguments the plaintiffs raised in support of their contention that HUD's funding of the housing project violated NEPA.

One of the more colorful arguments the plaintiffs raised is the argument that HUD's consideration of the project's environmental justice impacts was arbitrary and capricious. Essentially, the plaintiffs had to prove that HUD was arbitrary and capricious in its examination of what disproportionately high and adverse human health or environmental effects the St. Thomas project would have on low-income or minority populations. The court looked to HUD's administrative record and noted that the agency considered many environmental justice concerns in making its decision not to prepare an EIS. Because the record proved that HUD gave consideration to the environmental justice concerns, the plaintiffs were not able to prove that HUD acted arbitrarily or capriciously in its consideration of these concerns.

The court held that because HUD had not acted arbitrarily, capriciously or contrary to law in its study, consideration, and findings regarding the project's environmental and historical impact, it was not required by NEPA or NHPA to cease federal funding of the project.

KRISTOL L. WHATLEY

Lombardi v. Whitman, 2007 WL 1148709 (2nd Cir. 2007)

In late November 2004, five New York search and rescue workers who had participated in post-9/11 clean up efforts brought a *Bivens* substantive due process action against current and former federal officials alleging that these officials knowingly made false and misleading statements regarding the air quality of the lower Manhattan clean up site. A *Bivens* action is a qualifed immunity doctrine that allows a plaintiff to bring suit against government officials in their individual capacities when the plaintiff's constitutional rights have been allegedly violated.

The plaintiffs argued that press releases and public statements issued by officials of the Environmental Protection Agency ("EPA"), White House Council on Environmental Quality ("CEQ"), and Occupational Safety and Health Administration ("OSHA") led the workers to believe that the air-quality was at a level safe enough for them to work with little or no respiratory equipment and, as a result, these workers suffered or reasonably feared suffering illness or injury caused by exposure to harmful substances contaminating the clean up site.

As part of their case, the plaintiffs offered into evidence an internal EPA report from the Inspector General criticizing the EPA Office's response to the events of September 11th. Among other things, the report noted that despite test results indicating potentially harmful levels of asbestos, EPA officials issued statements that the air quality levels in Lower Manhattan were safe and assured that search and rescue workers would receive adequate equipment.

The United States District Court for the Southern District of New York granted the defendants' motion to dismiss for failure to state a claim, holding that the workers had not established a violation of their constitutional rights. Alternatively, the court held that even if such a violation had been established, the defendants possessed qualified immunity given that the right allegedly violated was not clearly established at the time of their conduct. Two of the plaintiffs were individually dismissed because one could not bring a valid *Bivens* action for injuries sustained during military service, and the other was already eligible for compensation as a U.S. Marshal under the Federal Employees' Compensation Act.

The plaintiffs appealed the dismissal to the Second Circuit Court of Appeals which affirmed the district court's decision. The Court of Appeals rejected the workers' substantive due process claim that the government had failed to protect or warn them of a known risk of bodily harm on the ground that failure to warn is not the type of affirmative act that amounts to a substantive due process violation.

The court also rejected the workers' claim that the government created the danger and the resulting harm was a direct cause of the workers' detrimental reliance on the government's assurances of safe working conditions. On this claim, the court's decision turned on the issue of whether the defendants' actions rose to a conscience-shocking level; therefore, the court never reached the issues of whether the officials violated clearly established law or whether the plaintiffs had properly raised a *Bivens* cause of action.

In order for a plaintiff to successfully plead this type of substantive due process violation, the plaintiff must show that he or she received a false sense of security from the government's intentional misrepresentation, bodily harm directly resulted, and the government action in question shocks the conscience. The standard under which the Court of Appeals analyzed whether the officials' actions rose to a conscience-shocking level was whether their actions were egregious or outrageous. The court determined that because the defendants' press releases and statements were not intentionally misleading but were issued pursuant to the EPA's duty to supply the public with essential health information, the officials' conduct was not so egregious or outrageous as to shock the conscience. Because the conduct did not rise to the conscience-shocking level, the court held that no substantive due process violation occurred.

AMY GLEGHORN

Mayo Foundation v. Surface Transportation Board, 472 F.3d 545 (8th Cir. Dec. 28, 2006)

A group of plaintiffs challenged the decision of the Surface Transportation Board ("the Board"), which approved a proposal by the Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") to construct approximately 280 miles of new rail line to the coal mines of Powder River Basin, Wyoming and to upgrade 600 miles of rails in Minnesota and South Dakota. The plaintiffs contended that approval for the project violated 49 U.S.C. § 109001 and the National Environmental Policy Act ("NEPA"). The court first held that because the Board's rejection of the sound insulation treatments was not arbitrary and capricious, the Board's decision was adequate. The court held that because the Surface Transportation Board adequately considered the "reasonably foreseeable significant adverse effects [of increased coal consumption] on the human environment," the board's decision was appropriate.

Before DM&E could begin construction on the new rail line it was required by federal statute to seek approval from the Board. NEPA requires that the Board evaluate the environmental impact of the project because the approval is "a major Federal action[] significantly affecting the quality of the human environment." In order to comply with NEPA, the Board prepared both a draft and a final environmental impact statement. The environmental impact statements examined the effects of the proposal, taking into account 147 conditions imposed by the Board to mitigate adverse environmental effects.

In a prior challenge to the proposal, the Eighth Circuit remanded the case to the Board to further consider the decision not to impose mitigating conditions for horn noise and to consider the possible environmental effects of increased coal consumption due to the availability of shorter and cheaper rail routes for coal distribution. On remand, the Board issued a draft and final supplemental environmental impact statement, and it approved the project based on the analysis in the supplemental environmental impact statement. The Board again imposed the original 147 mitigating factors, which included a modification to one of the conditions that would require DM&E to assist communities in establishing and funding quiet zones.

The Eighth Circuit reviewed the Board's compliance with NEPA under the Administrative Procedure Act ("APA") and its standard of setting aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The plaintiffs argued that the Board's decision not to impose the cost of quiet zones on DM&E was arbitrary and capricious because the Board failed to consider the cost of the noise mitigation measures in the context of the total cost of the project.

The court ultimately found that because the Board had found that sound walls could pose safety risks to motorists, might not be effective, and posed substantial costs, the Board's decision was not arbitrary and capricious. The plaintiffs also argued that the Board failed to adequately consider the environmental impact of increased coal consumption in the area due to the ease of access with the construction of the new rail line. The Eighth Circuit held that because the Board took into account a national study that considered the effects of increased coal consumption and recognized that there was no study that took into account local effects of increased coal consumption, the Board's decision was not arbitrary and capricious.

BROCK H. COOPER

United States v. Cooper, 2007 WL 914314 (4th Cir. Mar. 28, 2007)

On April 28, 2005, a jury convicted D.J. Cooper for knowingly discharging pollutants into the waters of the United States in violation of the Clean Water Act ("CWA"). Cooper operated a sewage lagoon at his trailer park since 1967 under a permit issued by the Virginia Department of Environmental Quality ("DEQ"). The lagoon served as a reservoir, which allowed solid waste to settle on the bottom and fluid to overflow into a treatment system. After the fluid was passed through a chlorination process, it was discharged into a small nearby creek. Cooper's permit required him to sample the discharged water each month and report the results, so the DEQ could ensure that the discharge was not exceeding limitations set for various pollutants.

From 1993 to 1998, the DEQ found that Cooper had violated is permit over 300 times. The DEQ fined Cooper $5,000 and gave him until August 2000 to perform remedial action pursuant to a Consent Order. The Consent Order gave him the option to "upgrade[e] the lagoon, replac[e] the lagoon with a self-contained treatment plant or septic field, or clos[e] the trailer lots served by the lagoon." Cooper failed to comply, continued to discharge sewage containing pollutants above allowable regulatory levels, and by August 2000, the DEQ fined him another $2,000 in violation of the Consent Order. The DEQ gave him a second chance to remedy his actions by August 2002. The permit violations continued, and when Cooper failed to complete the remedial actions, he was notified that his permit was revoked. By 2003, the EPA investigated Cooper for criminal violations of the CWA, and on October 21, 2004, he was indicted.

Cooper's main point on appeal was that the government failed to prove that he knowingly discharged the pollutants into waters of the United States. His argument suggested that the term "knowingly" applied not only to his actions discharging pollutants, but also to his knowledge that discharge occurred in streams of the United States. The Court rejected this argument by noting, "mens rea requirements typically do not extend to jurisdictional elements of a crime." Thus, Cooper did not need to "know" that he was discharging pollutants into waters of the United States in order to be hauled into federal court for violation of the Clean Water Act. The Court compared this to felons transporting firearms across state lines or

knowledge that a murder victim is a federal officer. In both cases, courts impose federal jurisdiction regardless of whether the defendant knows the crime is a federal crime.

Finally, the court examined the legislative intent of the CWA. The Court concluded that Congress intended to afford the nation's waterways protection to the fullest extent possible. Moreover, Congress would not be able to deter criminal activity if a conviction imposed a burden on the state to prove a defendant's knowledge of jurisdictional facts.

The court simply needed to prove that Cooper knowingly discharged sewage into the nearby stream in violation of the CWA, which it sufficiently did. The district court's order for Cooper to serve 27 months imprisonment and pay a total fine of $270,000 was affirmed.

RYAN WESTHOFF

STATE COURTS

Putnam County Nat'l Bank v. City of New York, 37 N.Y.S.2d (N.Y. App. Div. 2007)

In 1995, Putnam County National Bank ("Bank") acquired title to an undeveloped parcel of real estate in the Town of Carmel in Putnam County, New York. The Town of Carmel and the Putnam County Board of Health approved a plan for the subdivision of the parcel into 36 lots, and the State of New York issued a water pollution discharge permit allowing the operation of a central sewage system for the subdivision. However, the New York City Department of Environmental Protection determined that the central sewer system could not be constructed in compliance with the City's Watershed Regulations. Therefore, the State-issued water pollution discharge permit allowing operation of the central sewage system on the property was revoked.

The Bank then obtained approval of an alternative plan, under which the parcel would be developed as a 17-lot subdivision using subsurface septic systems. In 2003, the Bank sold the property for more than $1.4 million, which it alleged was approximately 20% of the value it would have realized had the parcel been approved for development as a 36-lot subdivision with a central sewer system. The Bank then sued the City of New York alleging that the enforcement of the Watershed Regulations was an unconstitutional taking of its property without just compensation. The trial court dismissed the complaint and the Bank appealed.

The appellate court affirmed the decision of the trial court and first explained that a land use regulation may diminish the value of private property without resulting in a compensable taking. Such regulations are not unconstitutional merely because they cause the property's value to be substantially reduced, or because they deprive the property of its most beneficial use. Instead, the constitutionality of a regulation is determined under a balancing test which considers the economic impact of the regulation, the extent to which the regulation has interfered with reasonable investment-backed expectations, and the character of the government action. Also, the court explained that the property owner must show that under no permissible use would the parcel as a whole be capable

of producing a reasonable return upon enforcement of the challenged regulation.

The court noted that the Bank's property was approved for residential development after enactment of the Watershed Regulations, and that the Bank failed to prove that it did not receive a reasonable return upon its sale of the property for $1.4 million. In addition, the court stated that the alleged economic impact on the Bank was insufficient as a matter of law to outweigh the substantial public interest in the City's enforcement of the Watershed Regulations. Therefore, the court held that the motion to dismiss was properly granted.

DARRYL CHATMAN

City of Bridgeton v. Missouri-American Water Co., -- S.W.3d --, 2007 WL 1121807 (Mo.)

The Missouri Supreme Court addressed when right of passage contracts involving a public utility require that utility to pay the cost of moving facilities when the city alters areas for a public purpose. Under the facts of the case, the city of Bridgeton ("Bridgeton"), located outside St. Louis City, approved the application of TRiSTAR Business Communities, LLC ("TRiSTAR") to create a new I-370 exit in exchange for TRiSTAR's financial assistance in improving Taussig Road. The changes to Taussig Road would require the movement of water facilities owned by Missouri-American Water Company ("Missouri-American"). Missouri-American refused to relocate the facilities without payment of more than $500,000. The city council then passed a resolution stating the public safety and interest in the road improvements. The council gave the mayor rights to advance such improvements by any lawful means, including the revocation of licensing. Bridgeton then filed a trespass suit against Missouri-American to have the pipes removed.

Missouri-American's predecessor first received a franchise right to service the area currently covered by Taussig Road in 1902. At that time, the land was governed by St. Louis County. After Bridgeton annexed the land in 1951, the city passed a twenty year franchise to Missouri-American's predecessor. The twenty year franchise was not renewed but both the city and the company continued the relationship as if it had been renewed.

In 1967, Missouri-American's predecessor executed a license with a railway, whose land was later sold to Bridgeton. This land was adjacent to Taussig Road and not covered by the former agreements. The license provided that Missouri-American would pay for any relocation of pipes or facilities to accommodate changes in the land. The court addressed the rights to maintain pipes created by the agreements and the rights regarding the cost of relocation. Bridgeton also owned land known as Parcels 21 and 22 that were not covered by any agreement with Missouri-American or its predecessors.

Regarding the land surrounding Taussig Road under the 1902 and 1951 agreements, the court found that the change in ownership through annexation cancelled the effects of the 1902 agreement. The 1951

agreement then controlled. Under law governing a contract with a durational limit, once the twenty year time has passed, both parties have a right to withdraw from the provided duties and privileges. However, when both parties continue to operate without change, there is an implied contract that may be cancelled on reasonable notice under the terms of the franchise ordinance.

Since both parties maintained the franchise-type relationship and Bridgeton expressed a desire to have the pipes moved rather than the relationship cancelled, the court found Missouri-American has authority to maintain the pipes in the Taussig Road right of way. Although the franchise agreement did not address the cost of relocation, *Union Electric Co. v. Land Clearance for Redevelopment Authority of St. Louis*, 555 S.W. 2d 29 (Mo. Banc 1977), stated that a utility company must relocate at its own expense when changes are required for pubic convenience, safety or necessity. The court discarded the timing issues as irrelevant and found the city council noted that the Taussig Road improvements were for public safety. Therefore, Missouri-American was responsible for the relocation of facilities in the Taussig Road right of way.

The court found that Missouri-American also had a duty to pay the relocation of facilities in the adjacent area formerly owned by the railway. This duty is derived from the licensing agreement which specifically bound the successors and assigns of the railway. The agreement specifically contained a cost provision to accommodate changes in the land. The issue regarding Parcels 21 and 22 was less certain. Because of a lack of support provided by Missouri-American in its brief, the court accepted statements that Bridgeton owned the land and the land was free from any franchise, easement, or license. Thus, the court found the record to be insufficient to establish that Missouri-American was entitled to judgment as a matter of law with respect to Parcels 21 and 22.

ANNA ROSS

Meyer v. Fluor Corporation, 2007 Mo. LEXIS 41 (2007)

The Fluor Corporation, along with other entities and individuals, were involved with a lead smelter in Herculaneum, Missouri. The smelter emitted large quantities of lead and other toxins into the environment each year. In this case, there was no dispute over the following facts: that the lead was toxic, children are more susceptible to injury from lead poisoning than adults, injuries from lead exposure often present themselves in latent form in that injuries are not immediately apparent, and years may pass before symptoms are discovered.

The plaintiff in this case, a minor child, filed suit against Fluor claiming to be a member of a class of children in and around Herculaneum exposed to toxic emissions from the smelter. The proposed class consisted of over 200 children. The plaintiff alleged negligence, strict liability, private nuisance, and trespass. Based on these allegations, the plaintiff sought compensatory damages to establish a medical monitoring program for the class members. The circuit court, however, denied class certification under Federal Rule of Civil Procedure 52.08. On appeal, the plaintiff claimed that the circuit court erred in assuming that present physical injury was a necessary element of a medical monitoring claim.

Rule 52.08(a) has four prerequisites: the class must be so numerous that joinder of all members is impracticable; there must be questions of law or fact common to the class; the claims or defenses of the representative parties must be typical of the claims or defenses of the class; and the representative parties must be able to fairly and adequately protect the class' interest. After one of the four prerequisites of 52.08(a) is met, the class action can be maintained only if the class satisfies one of the three requirements of Rule 52.08(b). In the case at bar, the plaintiff sought certification under 52.08(b)(3), which requires a finding that the question of law or fact common to the class is predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the matter.

Medical monitoring is common in toxic tort cases, where physical injury and illness is often latent and not discoverable or diagnosable for months or even years after the exposure. A medical monitoring claim seeks recovery for the costs of future periodic diagnostic testing to detect

the latent injuries that develop from exposure to toxic substances. Some courts, Missouri not included, have recognized such medical monitoring claims because of the significant economic and physical harm that befalls someone exposed to toxic substances. Missouri is clear, however, that plaintiffs are entitled to recovery for the prospective consequences of a defendant's tortious conduct if the injury is "reasonably certain to occur."

The defendants in this case contended that any recovery for medical monitoring is contingent upon the existence of a present physical injury. While some courts follow that reasoning, the Missouri Supreme Court found a present physical injury requirement inconsistent with tort recovery. Because of the latent nature of injuries related to toxic substance exposure, having a present physical injury requirement destroys the tort claim and bars the plaintiff from a full recovery. Despite the fact that a plaintiff may not yet have a diagnosable physical injury, it is inaccurate to conclude that the plaintiff has not suffered any compensable injury. Further, the plaintiff is entitled to be fully compensated for any of the defendant's wrongs, which may include paying for periodic examinations to determine if any physical injury or illness exists. Therefore, the Missouri Supreme Court found that class certification was wrongly denied in this case because the circuit court's reasoning was premised on a present physical injury requirement, which is relevant for personal injury claims, but need not be met in medical monitoring cases.

AMANDA K. WOLF