

Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 3
Issue 1 1994

Article 6

1994

Cases to Watch and Legislative Summaries

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Recommended Citation

Cases to Watch and Legislative Summaries, 3 Mo. Envtl. L. & Pol'y Rev. 42 (1994)
Available at: <http://scholarship.law.missouri.edu/jesl/vol3/iss1/6>

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CASES TO WATCH AND MISSOURI LEGISLATIVE SUMMARIES

United States v. Vertac, 46 F.3d 803 (8th Cir. 1995), *petition for cert. filed*, 63 U.S.L.W. 3707 (U.S. Mar. 21, 1995)(No. 94-1557)

Hercules, Incorporated and others (Hercules) appealed from a denial of their motion for summary judgment in a cost recovery action brought by the United States government for costs associated with the cleanup of dioxin from the production of Agent Orange by Hercules under contract for the United States. Hercules supplied Agent Orange to the United States Department of Defense during the Vietnam War pursuant to the Defense Production Act of 1950 (DPA) which provides for "rated contracts" that take priority over other government contracts if necessary to promote the national defense. Although these rated contracts contained standardized government terms and conditions, Hercules was allowed limited negotiation and modification of the contract terms. In addition, pursuant to the Walsh-Healey Act, the Department of Labor had the authority to enforce health and safety standards at Hercules' facility. The production of Agent Orange resulted in waste containing dioxin, the disposal of which was not addressed in the rated contracts. As such, Hercules buried the waste on-site without participation by the United States government.

Affirming the district court, the Eighth Circuit Court of Appeals held first that the United States was not an "operator" or "arranger" such that it would be liable for the clean up costs of the dioxin contamination pursuant to §107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Noting that operator liability may arise from "actual or substantial control exercised by one entity over the activities of another," the court found that the United States did not exert sufficient control over Hercules for it to be liable as an operator. In addition, the court

held that the United States was not liable as an arranger in that the United States never owned or possessed the hazardous waste containing dioxin even though it had statutory and regulatory authority to control activities which include the production, treatment, or disposal of hazardous waste. Further, the United States was not an arranger despite the existence of its contractual relationship with Hercules. Alternatively, the court found that the United States could not be considered an arranger in that it never supplied Hercules with the raw materials or work in process which ultimately generated the hazardous waste.

In addition, Hercules argued that it was immune from liability pursuant to § 707 of the DPA which holds harmless from liability for damages those acting in compliance with the DPA. However, the court concluded that Hercules could not claim immunity since doing so would exceed the risk imposed by §101(a) of the DPA which authorizes the prioritization of certain government contracts when necessary to promote national defense, a result contrary to prior caselaw interpreting the scope of the § 707 immunity.

The issues presented on appeal include: (1) may the United States require Hercules to bear clean up costs by itself after invoking the authority of the DPA to appropriate all of Hercules' production capacity to the production of Agent Orange for the United States during the Vietnam War; (2) whether the United States may avoid all clean up costs even though it had the authority to dictate the disposal of the hazardous waste and further by contract required Hercules to take measures to control the release of the hazardous waste, but not argues that Hercules' actions were inadequate; (3) whether the United States is liable as an "arranger" pursuant to CERCLA; (4) whether the United States is liable as an "operator" pursuant to

CERCLA; (5) whether Hercules is immune from liability for damages under § 707 of the DPA; and (6) whether the United States should be required to indemnify Hercules for liability. Petition for certiorari to the United States Supreme Court was filed on March 21, 1995.

Clouser v. Espy, 42 F.3d 1522 (9th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3692 (U.S. Mar. 6, 1995)(No. 94-1482)

Plaintiffs asserting mining claims in areas within federal national forests challenged the Department of Agriculture's regulation through the Forest Service of transportation means to access these mining claims. Two of the plaintiffs held mining claims on land designated as "wilderness areas," while the third plaintiff's claims was located on non-wilderness land. The first Forest Service ruling refused to allow motorized access to pending mining claims before the validity of the claim is established. Next, the Forest Service disallowed motorized access even for valid mining claims located within federal lands when non-motorized access is adequate to carry out the mining operation. Finally, plaintiffs challenged a Forest Service ruling which required plaintiffs to file a plan of proposed mining operations.

The Ninth Circuit Court of Appeals affirmed the district court ruling which held that the Forest Service has the authority to regulate the mode of transportation a holder of a mining claim utilizes to gain access to that claim when that area is surrounded by federal national forests. On appeal plaintiffs argued that since issues of access materially affect the validity of their mining claims, adjudication of these issues is solely within the jurisdiction of the Department of the Interior which normally determines the validity of mining claims. The Ninth Circuit Court of Appeals held that the two mining claims located in wilderness areas are subject to the reasonable regulation of the Department of Agriculture and the Forest Service pursuant to 16 U.S.C. § 1134(b) relating to the ingress and egress of the mining areas. Similarly, the court held non-wilderness areas are subject to regulation by the Department of Agriculture under the Organic Administration Act of 1897 to protect national forests lands from destruction and depreciation. 16 U.S.C. §§ 478, 551.

The court next held that the plaintiff's failed to exhaust their administrative remedies pursuant to the Administrative Procedure Act (APA) in their objections to the Forest Service regulations. Plaintiffs argued

that they fell within the "futility exception" to the exhaustion of administrative remedies requirement since the Forest Service's position regarding relating to the means of transportation used was not "set" such that resorting to agency action would be futile.

Among other issues, the court additionally denied the plaintiffs' Fifth Amendment Takings claim which argued that the Forest Service regulations denying motorized access to the mining claims constituted a taking of private property without just compensation. As the plaintiffs only sued for injunctive and declaratory relief and not for money damages, the only court that could hear the takings claim would be the Court of Claims pursuant to the Tucker Act. Finally, the court held that the plaintiffs' right to procedural due process were not violated in light of the Forest Service's detailed administrative procedures even though evidentiary hearings were not held.

The questions presented on appeal include: (1) whether holders of mining claims possess a Fifth Amendment property right to gain access to their claims when they are surrounded by federal national forest lands; and (2) whether the Forest Service is authorized to disallow motorized access to mining claims surrounded by federal national forest lands without affording the holders of the mining claims the right to an evidentiary hearing to ensure that statutes governing access are fairly and accurately applied. Petition for certiorari to the United States Supreme Court was filed on March 6, 1995.

United States v. B & W Investment Properties, 38 F.3d 362 (7th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3660 (U.S. Feb. 27, 1995)(No. 94-1431)

The Clean Air Act (CAA) and National Emissions Standards for Hazardous Air Pollutants (NESHAP) set forth regulations for the treatment of asbestos, a hazardous air pollutant. NESHAP also requires written notification to the Environmental Protection Agency (EPA) from "any person who owns, leases, operates, controls or supervises" a property about to be renovated before the renovation so the EPA may take measures to prevent asbestos from entering the air. 40 C.F.R. § 61.141 (1989). The CAA imposes strict liability on violators of its terms.

Defendants Wolf and B & W Investments Properties (B & W) leased property which included old buildings that contained asbes-

tos. B & W agreed with the lessor of the property to buy the property pending the removal of the asbestos. The lessor hired a contractor to remove the asbestos, but the lessor did not notify the EPA nor did it comply with the safety regulations of NESHAP. Specifically, the asbestos removal was performed in such a way that friable asbestos could enter the air. The EPA learned of the asbestos removal site and halted all removal pending an investigation. After the asbestos was removed the EPA filed this civil suit alleging the defendants began asbestos removal without proper notification to the EPA, and that they violated NESHAP by failing to comply with the procedures of asbestos removal set forth in the CAA.

The Seventh Circuit Court of Appeals affirmed the district court decision finding that the defendants were in violation of CAA and NESHAP. Relying on §113(b)(2) of the CAA, defendants argued that the CAA requires the EPA to give notice to a violator before filing suit which the defendants never received. However, the EPA argued and the Seventh Circuit Court of Appeals found that the EPA did not rely on this provision of the Act for enforcement. The EPA and the court distinguish between hazardous air pollutants which have "no ambient air quality standards" and air pollutants which do have "ambient air quality standards". The court found that §113(b)(2) only requires the EPA to give notice to those violators who are in violation of state implementation plans for "ambient air quality standards". The court reasoned that defendants were not in violation of state implementation plans for "ambient air quality standards" since asbestos can have no ambient air quality standards. Therefore, because asbestos cannot be part of state implementation plans, the requirement of notice and procedure of the EPA are not governed §113(b)(2) but by a different section of the CAA. The court found that §112 of the CAA, which regulates work practice standards involving hazardous air pollutants with no ambient air quality standard such as asbestos, was controlling in this case. Further, §113(b)(3) of the CAA gives the EPA authority to issue compliance orders or commence civil actions "whenever" the EPA finds a violation of §112 of the Act. Therefore, the court found that the EPA was

not required to give notice before commencing suit upon violators of work practice standards involving hazardous air pollutants with no ambient air quality standard.

Defendants further argued that they were not liable for the violations because they were not the owners of the property. NESHAP extends strict liability to those who lease, operate, control, and supervise the property. The court found the trial court did not abuse its discretion in holding that the defendants were within the scope of the "owner and operation" requirement.

The issues presented by B & W on appeal are: (1) where asbestos is the pollutant whether the EPA must give notice to violators pursuant to §113(a)(1) prior to filing suit when the state implementation plan encompasses the pollutant; and (2) whether the Seventh Circuit Court of Appeals was authorized to directly address this question. Petition for certiorari to the United States Supreme Court was filed on February 27, 1995.

Missouri House Bill 251

UNDERGROUND STORAGE TANK REMEDIAL FUND

During the last days of the 1995 session, the Missouri General Assembly passed and the Governor is expected to sign House Bill 251. House Bill 251 amends the underground storage tank law codified at Mo. REV. STAT. §§ 319.100-139 (1994). In 1989, H.B. 77 created the "underground storage tank insurance fund." Prior applicants seeking to be accepted into the insurance fund only received coverage for cleanup of contamination caused by releases which occurred after acceptance into the fund. However, H.B. 251 now allows all owners and operators of underground storage tanks to participate in the fund regardless of when the release occurred. Newly enacted § 319.131.8 provides that "[t]he fund shall provide moneys for cleanup of contamination caused by releases from underground storage tanks, the owner or operator of which is participating in the underground storage tank insurance fund or the owner or operator of which has made application for

participation in the fund by August 28, 1995, *regardless of when such release occurred*, provided that those persons who have made application are ultimately accepted into the fund. Applicants shall not be eligible for fund benefits until they are accepted into the fund." (Emphasis added). With regard to underground storage tanks which have been taken out of use prior to August 28, 1995, the fund will provide cleanup moneys if the contaminated site has "been documented by or reported to the department of natural resources prior to August 28, 1995" MO. REV. STAT. § 319.131.9. However, "the fund shall make no reimbursements for expenses incurred prior to August 28, 1995." *Id.*

Assuming that the Governor signs H.B. 251, owners and operators of USTs will have less than three months to file an application with the Missouri Department of Natural Resources (MDNR) for participation in the fund. Practitioners should also note that USTs taken out of use prior to August 28, 1995 must be documented by or reported to MDNR prior to August 28, 1995.

House Bill 251 now requires MDNR to use risk-based cleanup standards. Mo. REV. STAT. § 319.109 (1994) was amended to require the MDNR to use "risk based corrective standards which take into account the level of risk to public health and the environment associated with site specific conditions and future land usage." This amendment may provide fertile ground for argument over appropriate cleanup standards.

— by Robert J. Brundage, Esq.

Missouri House Bill 414

"BROWNFIELDS"

On May 12, the Missouri Legislature passed the third "Brownfields" law in the country. I wrote the law for the St. Louis Regional Commerce and Growth Association and the law was supported by RCGA, the Missouri Chamber of Commerce, Associated Industries of Missouri and other businesses and business groups. The law balances economic development interests with environmental safety. A "brownfield" is an abandoned commercial or industrial property which, although generally marketable, cannot be sold because of actual or per-

ceived contamination problems. These abandoned properties end up being owned by governments, such as the City of St. Louis or St. Louis County. Inventories of such abandoned properties, and the associated costs of maintenance of these properties, have continued to grow and drain government revenues. Currently, there are millions of square feet of otherwise valuable commercial properties owned by our local governments because no potential buyer wants to become liable for the past contamination which may exist at these sites.

Nearly a year ago, the RCGA formed its Brownfields Task Force. Composed of representatives from the St. Louis Development Corporation, the St. Louis County Economic Council, and environmental professionals from the fields of engineering, environmental consulting, law, banking, and insurance, the Task Force devised a plan to move the millions of square feet of abandoned properties into active uses which create jobs in the St. Louis Metropolitan Area. One piece of the plan resulted in the writing and passage of the "Brownfields" law section of House Bill 414.

The Brownfields law addresses selling abandoned properties owned by governmental units for new use. It creates incentive programs for funding assistance, tax credits and abatements, and additional liability releases and immunities. The Brownfields bill will encourage businesses to expand or relocate into existing industrial and commercial facilities rather than buying new properties and building new facilities in "greenfields".

The funding assistance and tax credit programs are controlled by the Missouri Department of Economic Development. One key condition of both forms of assistance is that once built or rehabbed, the facility operation must either retain at least 10 full time jobs in the State or create at least 25 new full time jobs. This reinforces the focus of the bill on economic development. More weight is given in awarding tax credits to creating jobs in economically depressed neighborhoods, such as those beset by employer closings and high unemployment.

The Brownfields law authorizes the creation of a \$10 million Property Reuse Fund within the State treasury. The money can be used for direct loans and loan guarantees to prospective purchasers, and grants to governmental units. Except for environmental

remediation costs, the projects must be commercially viable. No project loan, loan guarantee or grant can exceed \$1 million dollars. Private lenders who make loans under the guarantee program receive immunity from the associated environmental conditions of the property.

Prospective purchasers, under specified conditions — especially job creation and retention — may receive tax credits and abatements ordinarily available under the enterprise and satellite zone laws. But, these Brownfield facilities will not be either an enterprise zone or a satellite zone. These credits and abatements include ad valorem tax credits, income tax refunds and exemptions, and worker training credits.

The single most important tax credit in the Brownfields law is the new remediation credit available to the purchaser for the costs of voluntarily cleaning up the contamination at the abandoned property. This includes the costs of equipment and installation, and the ongoing operation and maintenance costs associated with long term remediation projects such as groundwater treatment. This means that for creating jobs and rehabilitating older industrial facilities, the purchaser can, in effect, obtain a no cost or low cost clean up of the property and be protected from the liabilities associated with the property's past use.

This benefits the general public, the government and the purchaser. The Purchaser creates and retains jobs, elevating the abandoned properties from governmental cost burdens to revenue producers. The remediation and other credits incubate these relocated businesses to protect their future viability, the stability of the jobs they directly create, and the additional jobs they may spawn in the neighborhood to support the new operation. The government and the public also obtain a clean up of the property contamination financed by private money. The remediation tax credit is a reimbursement because the purchaser had no part in creating the contamination problems but is voluntarily cleaning them up.

The final major aspect of the Brownfields Law, alluded to previously, is the release of liability which the prospective purchaser receives in exchange for cleaning the property to levels that are safe for its intended use. Under current environmental laws the current owner or operator of a contaminated property can be held liable for the entire

clean-up even though they may have had nothing to do with creating the problem. The Brownfield clean-ups will be governed by the existing Missouri Voluntary Clean-Up Program and supervised by the Department of Natural Resources. If an environmental investigation shows that property conditions do not warrant remediation activity for the property to be safe for the intended industrial or commercial use, then the Department of Natural Resources will issue a letter indicating that no further action is required at that time. This reserves the possibility that if new conditions are discovered or if the use changes, such as from a warehouse to apartments, additional investigation and remediation may be required.

If a purchaser significantly cleans up the contaminants found so as to improve the condition of the property and make it safe for its intended industrial or commercial use, then the purchaser will also receive a "no further action" letter from the Missouri DNR. A clean-up to industrial or commercial use standards contemplates that in some cases these clean-ups may not lower the contamination to the absolute safe levels generally reflected in regulatory standards and intended for application in residential areas. Institutional controls, such as restrictive covenants being placed in a property deed or lease, can also be used to enforce adherence to the intended commercial use. Again, if conditions or uses change, additional actions may be required.

Finally, a purchaser may receive a covenant not to sue for the clean-up performed by or on behalf of a purchaser which lowers the contamination levels to safe residential standards. This covenant is an agreement by the State that they will not try to enforce or sue for additional remediation actions. Residential standards are generally reflected in regulations of environmental regulatory agencies. This form of release is unique to the Brownfields program and is not ordinarily offered through Missouri's Voluntary Clean-Up program. Obtaining a covenant not to sue requires public comment on the proposed clean-up plan, including a public hearing held in the affected area of the property. Once the Missouri DNR has issued written approval of the completed clean-up, the purchaser is immune from liability to third parties for the preexisting environmental conditions to the extent of the clean-up performed.

While there are other aspects to the Brownfields law, these are the major components that will make abandoned properties attractive to prospective businesses for relocation and expansion opportunities. It reopens a new segment of millions of square feet of otherwise commercially valuable properties that were ignored because of the strict environmental liabilities associated with mere current ownership or operation of contaminated properties. The Missouri Legislature has taken a bold step to revitalize the region.

—by Sheldon D. Korlin

Missouri Senate Bill 407

HAZARDOUS WASTE DISPOSAL; OIL SPILLS

Senate Bill 407 (SB 407), amending Chapter 260 of the Missouri Revised Statutes by adding new sections relating to hazardous waste and oil spills, was signed into law on May 18, 1995. The first new section created by SB 407, § 260.482, provides that in first class counties with a population of less than 300,000, incineration or disposal by the United States Department of Defense of any hazardous waste resulting from activities associated with the cleanup of a facility not involved in the production of weapons shall be conducted only at the site where such waste was produced. In addition, § 260.482 states that no such incineration shall take place after five years following the completion of the test burn of such incineration. Section 260.819, which relates to oil spill responses, exempts certain persons from liability for removal costs or damages resulting from actions taken or omitted that are consistent with the National Contingency Plan or directive from a party with responsibility for the oil spill response. However, this exemption does not apply to any responsible party, for damages that include personal injury or wrongful death, or to any person who is negligent or engages in willful misconduct. If a person is relieved of liability for removal costs or damages pursuant to this section, those costs shall be borne by a responsible party. Finally, § 260.818 provides for nine definitions for terms used in § 260.819.

— by Alyse Hakami

BILLS ADOPTED, PENDING GOVERNOR'S SIGNATURE

Missouri House Bill 81

BATTERY SALES

House Bill 81 (HB 81), relating to the sale of batteries, has been passed by both the House and Senate and is awaiting the Governor's signature. HB 81 first provides for definitional distinctions between alkaline, lead, and mercury batteries, whereas existing law applies to batteries in general. Further, HB 81 prohibits the sale of button cell mercury batteries after January 1, 1996, and no mercury batteries may be sold after January 1, 1998. In addition, alkaline batteries manufactured after January 1, 1997 are prohibited from sale if the mercury content is intentionally introduced into the battery, or if the mercury content exceeds 25 milligrams in button cell alkaline batteries. Finally, HB 81 provides that a violation of these sale provisions is punishable as a Class C misdemeanor.

Missouri Senate Bill 60 & 112

WASTE TIRES; OIL RECYCLING

Senate Bill 60 & 112 (SB 60 & 112), dealing with the disposal of waste tires and recycling of used motor oil, has been passed by both House and Senate and is now eligible for the Governor's desk. Along with providing for new definitions relating to the waste tire disposal statutes, this bill establishes a tire trade-in program and a record keeping system for tire retailers and waste tire haulers. In addition, the measure provides for the storage of waste tires at solid waste facilities upon compliance with certain requirements, along with penalties for waste tire violators. SB 60 & 112 also extends the Waste Tire Fund new tire fee and removes most exemptions to the new tire fee. Finally, SB 60 & 112 establishes a recycling program for used motor oil.

— by Alyse Hakami