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ILLINOIS STATE BAR ASSOCIATION

Environmental Law

The newsletter of the Illinois State Bar Association's Section on Environmental Law

What is so great about a "No Further Remediation" letter anyway?

By Mathew Cohn

Recently I went to a well-attended presentation in Chicago covering the new vapor intrusion ("VI") rules that are now a part of Illinois' risk-based Tiered Approach to Corrective Action Objectives ("TACO") regulations. The discussion that spontaneously ensued among those in attendance moved away from the specific nitty-gritty of the new rules and on to the nuance of contaminated property liability—the room was filled with smart, savvy, and sophisticated scientists, engineers, lawyers, lenders, property managers, insurance agents, municipal officials, and other professionals, all experienced and intimately familiar with the perils and risks associated with contaminated real estate. The new VI rules are important because, as everyone in the room recognized, the VI rules add a new layer of complexity to obtaining No Further Remediation ("NFR") letters issued by the Illinois Environmental Protection Agency ("IEPA") through its voluntary Site Remediation Program ("SRP"). The new VI rules also can disrupt the status quo with respect to previously issued NFR letters. Until recently, NFR letters were based on site analyses that did not include consideration of the VI pathway. "Are old NFR letters now worthless or less valuable?" some of the attendees asked.

Listening for a while and seeing what I perceived to be an elephant in the room, I asked the question, "What is so great about an NFR letter anyway?" Not to the fault of any of the thoughtful presenters and attendees, I never did get a satisfactory answer. All I could conclude was that lenders and buyers like to see NFR letters before clos-

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Battles over hydraulic fracturing moving to the hinterland

By William J. Anaya

The Pennsylvania Supreme Court decided an eagerly anticipated case in mid-December 2013 involving hydraulic fracturing and local regulations of the process. See *Robinson Township, et al. v. Commonwealth of Pennsylvania, et al.,* 52 A.3d 463 (Pa. Commwlth, 2012). The Pennsylvania legislature had enacted a statute allowing and providing for the regulation of hydraulic fracturing within the Commonwealth and specifically preempted local governmental units from enacting zoning laws that could restrict or prohibit hydraulic fracturing operations within the local government's jurisdiction. Robinson Township and other units of local government challenged the pre-emption restriction of local government's authority under a so-called Environmental Rights Amendment to the Pennsylvania Constitution.

The Pennsylvania Supreme Court decided that case on a 4-2 vote with three of the justices finding the statute did violate the Environmental Rights Amendment to the Pennsylvania Constitution. The fourth justice found the statute unconstitutional on more traditional, substantive due process grounds. The dissenting justices each

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What is so great about a "No Further Remediation" letter anyway?

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ings because such letters are seen by many as certifications that properties are clean, safe, and without risk. Owners and operators of contaminated property are comforted by having NFR letters in their files because they think these letters will keep the environmental enforcers away. And the IEPA is thrilled to see contaminated properties cleaned up without having to compel responsible parties into action.

For practical purposes though, while you should see your NFR letter as beneficial, you should not see it as a panacea. Never forget that an NFR letter really just provides an acknowledgement by the IEPA that it will leave you alone, for now, until the IEPA changes its mind, and it might never change its mind, although it possibly will change its mind. An NFR letter also means that if the IEPA is leaving you alone, the United States Environmental Protection Agency will probably leave you alone too, unless of course, it decides not to. And as to individuals and businesses who allege that they have been adversely affected by your site's contamination, your NFR may serve as some limited persuasive evidence in your favor.

And remember that an NFR letter can be rescinded if additional data or information contradicting what was known at the time of the site investigation later becomes available. A site can be also be reopened when the rules change and a new risk is brought to the IEPA's attention (e.g., the new VI rules). It is important to notice here that the IEPA's position is that it is not looking to reopen sites, but it will do so in appropriate situations when it believes it is necessary to do so. So much for the clarity and finality sought by the holders of NFR letters.

Also be aware of one significant thing that has not changed. An NFR letter can be as narrow or as broad as the applicant for that letter wants it to be. Entering the SRP is little like going to those new yogurt stores. Instead of picking your dish size, flavor, and toppings, you select the contaminants you want to focus on, the future land use, and the types of activity restrictions and engineered controls you can live with. In theory, if a site was originally used by a pesticide manufacturer and later used as a steel mill, and the site investigation focused only on the metals, an NFR letter could be issued that effectively says something like, "So long as a concrete cap is maintained throughout the property, then the metals contamination in the soil is not a concern for future industrial and commercial uses." Is such a letter helpful? The answer is dependent on the location of the site and all of the surrounding circumstances. The letter says nothing about the pesticides, but maybe the buyer has already tested for pesticides, did not find any pesticides, and does not feel like it needs the IEPA to tell it that there are no pesticides at the site. The letter also narrows the pool of potential buyers to industrial and commercial interests, but perhaps the seller already knows that residential development is unlikely in the part of town where the property is located. The letter also requires that contaminated soil be covered with a barrier, but the site may be in a highly urbanized area and such a requirement will not have any practical limitation on redevelopment.

So why enroll your site? Participating in the SRP can be like asking for punishment when no one cares what you did. Applying to the SRP is breaking into jail, the investigation and remediation work is the time served, and the NFR letter is a certificate memorializing your probation.

Having said all of the above, you should not be discouraged from obtaining NFR letters for your contaminated properties. Generally driven by the market, the SRP often achieves good results. Society is better off when contaminated properties are voluntarily cleaned up to any conditions better than their present conditions. There is the perception that a site is clean when an NFR letter has been issued, and this perception, rightly or wrongly, allows contaminated properties to be bought, sold and financed. Also, there is nothing wrong with doing the right thing, asking someone to agree with you that you did the right thing, and then telling people that you did the right thing because that is the kind of person (or business) that you are.

So go on and get your NFR letters. It probably will not hurt, and it may even help. But know that, just as in the days before the SRP existed, when deciding whether to buy, sell, hold, investigate, remediate, manage, or do anything else with or to your contaminated properties, the most important things to have are good data, good science, good counsel, good motives, and a healthy understanding of your tolerance of risk. ■

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analyzed substantive due process and found the statute constitutional.

This case is significant for a variety of reasons. First, the Pennsylvania statute is similar to others laws in New York and Ohio, and similar cases are pending in those states' highest courts. This case also highlights that the battles associated with hydraulic fracturing will continue at local levels of government – and operators who ignore local government concerns and needs, do so at their own peril.

The case is interesting too because Pennsylvania's so-called Environmental Rights Amendment (PA. Const. article 1, Section 7) provides only that the "people have a right to clean air, pure water, and to preservation of the natural, scenic, historic and esthetic values of the environment." Like many states, Pennsylvania's Constitution provides that government—specifically the Commonwealth—holds Pennsylvania's "natural resources" in trust for the use of all of the citizens of the Commonwealth. Pennsylvania's Constitution does not provide individuals or separate units of local government with specific environmental rights, and the Pennsylvania Supreme Court stretched Pennsylvania's Environmental Rights Amendment to create local rights, where none were explicitly provided in the Commonwealth's Charter. From a constitutional perspective, it is compelling that three justices analyzed the case on substantive due process grounds, while three justices created substantive rights based on an expansive interpretation of the public trust.

Contrast that constitutional provision with a similar constitutional provision in Illinois. (See Art. XI, Ill. Const.) There, in section 1, the legislature is saddled with the "responsibility" of providing healthful environment "for the benefit of this and future generations," but in section 2, the Illinois Constitution provides that "individuals" have the right to enforce "this right against any party, governmental or private, through appropriate legal proceedings, subject to reasonable limitation and regulation as the General Assembly may provide by law." Effectively, the Illinois Constitution provides for protection of the public trust, but individuals – and by extension – local units of government have the right to challenge the Illinois Hydraulic Fracturing Regulatory Act through legal proceedings, albeit "subject to reasonable limitation and regulation as the General Assembly" provided in the law.

Because Illinois' Constitution is clearer both as to rights and standards of review, the question in Illinois will only be one of substantive due process. Accordingly, when the Illinois Hydraulic Regulatory Act is tested for constitutional soundness, the Illinois Supreme Court will likely construe the statute as constitutional because the Illinois General Assembly provided the statute with constitutionally protected public participation features and enforceable regulatory and substantive principles designed to protect individuals' and due process.

Even if the statute in Illinois is held constitutional, operators in Illinois have another hurdle to negotiate, and one that is highlighted in an unpublished opinion issued by the Illinois Appellate Court in January 2012. While unpublished opinions have no precedential value in Illinois, the case of *Tri-Power Resources, Inc. v. City of Carlyle*, 2012 Il. App. (5th) 110075 has received so much attention, that its value must be recognized. It is, after all, a decision of the Fifth District Appellate Court in Illinois, which sits in southern Illinois, in the heart of oil and gas country, and in close proximity to the New Albany Shale formations reported to contain oil and natural gas suitable for hydraulic fracturing.

In the Illinois Hydraulic Fracturing Regulatory Act, the Illinois General Assembly did not specifically pre-empt local government's authority to regulate aspects of hydraulic fracturing within each local jurisdiction. Drafters and commentators have been were of the view that Home Rule Jurisdictions in Illinois would likely enact ordinances that would prohibit or confine, or otherwise condition hydraulic fracturing operations within their respective jurisdictions—and that each local Home Rule Jurisdiction was free to do so. It was widely held that there would be few hydraulic fracturing operations in many downstate towns of cities of any reasonable size. Most are of the view that nearly all hydraulic fracturing operations in Illinois would occur in unincorporated areas or within Non-Home Rule Jurisdictions, where the Illinois Municipal Code did not specifically provide any such jurisdiction with the power to regulate or ban the practice.

However, in *Tri-Power*, the Appellate Court held that a non-home rule unit of local government had the authority to prohibit the drilling or operation of an oil or gas well within its jurisdiction. According to the Court, Section 13 of the Illinois Oil and Gas Act, non-home rule jurisdictions have "limited authority" to regulate drilling or operation of an oil or gas well within its jurisdiction, even if the local jurisdiction was not authorized to permit such activity. Moreover, the Court cited Section 11-56-1 of the Illinois Municipal Code, which provides municipalities with authority to "grant permits and mine oil or gas, under such restrictions as will protect public and private property and insure proper remuneration for such governments." While the statute provides that non-home rule jurisdiction can only impose reasonable restrictions on oil and gas drilling within its jurisdiction, the Court noted that the statue also provided local governments with authority to provide "official consent." According to this Court, the authority to provide consent is tantamount to the authority to deny permission, and accordingly held that a non-home rule unit of local government had the authority to prohibit the drilling of an oil or gas well within its non-home rule jurisdiction.

The Pennsylvania Supreme Court relied on a strained interpretation of Pennsylvania's Constitution to reach its result. Indeed, it is not clear that Pennsylvania's law pre-empting local regulation would have been held unconstitutional based strictly on traditional due process analysis. And, while Illinois's statute should be held constitutional by the Illinois Supreme Court, operators in Illinois should be prepared to respond to the analysis articulated by the Fifth District Appellate Court in the unpublished *Tri-Power* case, and with the argument that each permitted operator in Illinois must "comply with all provisions of this Act, and all other applicable local, State and federal laws, rules and regulations in effect at the time the permit is issued."

Local interests have every reasonable right to expect safe operations associated with hydraulic fracturing operations – a process that has been in existence in this country for well over for sixty years, without any remarkable injury. Those local rights should not be needlessly augmented out of unjustified fear apparently given voice by some courts.

And, Operators, let's be cognizant of local interests' fears and be prepared to arguable sensibly, based on a good record of compliance, safety and transparency. ■

For more information, contact Bill at Arnstein & Lehr LLP, wjanaya@arnstein.com or 312-876-7109.

Illinois court says insurer cannot escape duty to defend hog odor lawsuit under "pollution exclusion" in umbrella policy

By Kristine Tidgren

In what could broaden an insurer's duty to defend Illinois livestock producers in odor lawsuits, an Illinois appeals court has rejected an insurer's denial of coverage to hog confinement operators pursuant to a standard "pollution exclusion" provision in an umbrella liability policy.

In *Country Mutual Insurance Company v. Hilltop View, et al.,*No. 4-13-0124,2013 Ill. App (4th) 130124, 2013 Ill. App. LEXIS 788 (November 13, 2013), neighbors filed a nuisance and negligence action against the operators of a hog confinement facility and the owners of the surrounding fields upon which the manure was applied. The neighbors alleged that the "foul and obnoxious odors" caused them to suffer loss of enjoyment of their property and harmed their way of life. The operators' insurer sought a declaratory judgment that it had no duty to defend the operators pursuant to a number of exclusions in the operators' policies. A trial court summarily ruled that the insurer could not deny coverage based upon a "pollution exclusion" clause in the operators' umbrella liability policy. The Illinois appellate court affirmed that ruling.

Relying on the Illinois Supreme Court's decision in *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 687 N.E.2d 72 (Ill. 1997), the court began with the rule that a "pollution exclusion" clause applies only to injuries caused by "traditional environmental pollution." In distinguishing this case from those involving "nonnaturally occurring" chemicals, the court found that odors emanating from hog confinements and the resulting manure application did not constitute "traditional environmental pollution." In reaching this conclusion, the court relied on the fact that neighbors had "dealt with the smells" created by hog farms since their inception and that these farms were traditionally thought of as a source of food, not pollution. The court did note that while it "might be difficult" not to find "traditional environmental pollution" if, for example, a hog farmer dumped manure into a creek, that was not the issue before it.

The court also rejected the insurer's argument that characterizing the hog odor as "traditional environmental pollution" was consistent with the Illinois Environmental Protection Act's alleged treatment of odors as "air pollution." The court stated that even if such odors now constituted air pollution for purposes of the Act, that finding would have no bearing on whether these odors constituted "traditional environmental pollution." What now constituted an environmental hazard under environmental protection laws, said the court, was far greater than what the Illinois Supreme Court had in mind when it spoke of "traditional environmental pollution."

Finally, in turning the insurer's own argument against it, the court stated that the Illinois Livestock Management Facilities Act supported a finding that manure application onto farm fields did not constitute "traditional environmental pollution." In so finding, the court noted that the Act itself stated that the application of livestock waste to the land was an "acceptable, recommended, and established practice in Illinois." ■

This article originally appeared on the Iowa State University Center for Agricultural Law and Taxation Web site at <http://www.calt.iastate.edu/escapeduty.html>.

Upcoming CLE programs

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Tuesday, 3/4/14- Webinar—Introduction to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1:00.

Tuesday, 3/4/14- Live Studio Webcast—Criminal Dispositions Without a Conviction! Presented by the ISBA Committee on Corrections and Sentencing. 3:30-4:30.

Tuesday, 3/4/14- Teleseminar—Employment Agreements, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 3/5/14- Teleseminar—Employment Agreements, Part 2. Presented by the Illinois State Bar Association. 12-1.

Thursday, 3/6/14- Webinar—Advanced Tips to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1:00.

Thursday, 3/6- Friday, 3/7/14- Chicago, ITT Chicago-Kent School of Law—13th Annual Environmental Law Conference. Presented by the ISBA Environmental Law Section. 8:30-4:45 with reception from 4:45-6; 8:30-1:30.

Tuesday, 3/11/14- Webinar—Boolean (Keyword) Searches on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1:00.

Tuesday, 3/11/14- Live Studio Webcast—Game On- What's Happening in the Illinois Gaming World. Presented by the ISBA Local Government Section. 11-1.

Tuesday, 3/11/14- Live Studio Webcast—Municipal Animal Ordinances. Presented by the ISBA Animal Law Section. 2-4.

Tuesday, 3/11/14- Teleseminar—Planning with Special Needs Trusts. Presented by the Illinois State Bar Association. 12-1.

Thursday, 3/13/14- Chicago, ISBA Chicago Regional Office—Litigating, Defending, and Preventing Employment, Housing and Public Accommodation Discrimination Cases: Practice Updates and Tips Concerning the Illinois Human Rights Act. Presented by the ISBA Human Rights Section. 9-4.

Thursday, 3/13/14- Live Webcast—Litigating, Defending, and Preventing Employment, Housing and Public Accommodation Discrimination Cases: Practice Updates and Tips Concerning the Illinois Human Rights Act. Presented by the ISBA Human Rights Section. 9-4.

Thursday, 3/13/14- Teleseminar—Diligence in Business Transactions. Presented by the Illinois State Bar Association. 12-1.

Friday, 3/14/14- Fairview Heights, Four Points Sheraton—Spring 2014 DUI & Traffic Law Conference. Presented by the ISBA Traffic Law Section. All Day.

Friday, 3/14/14- Chicago, ISBA Chicago Regional Office—Medical Malpractice Seminar. Presented by the ISBA Tort Law Section. 8:30-4:30.

Tuesday, 3/18/14- Live Studio Webcast—City Dogs- Dog Complaints, Shootings & Other Issues Arising in Urban Environments. Presented by the ISBA Animal Law Section. 2-4.

Tuesday, 3/18/14- Teleseminar—"Crowd-funding" in Business Ventures: Raising Capital from the Public. Presented by the Illinois State Bar Association. 12-1.

Thursday, 3/20/14- Teleseminar—Employment Law Torts in the Workplace. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 3/25/14- Chicago, ISBA Chicago Regional Office—Master Series: The Cybersleuth's Guide to the Internet: Super Search Engine Strategies and Investigative Research. Presented by the Illinois State Bar Association. All day.

Tuesday, 3/25/14- Teleseminar—Designing and Drafting GRATS in Estate Planning. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 3/26/14- Teleseminar—LIVE REPLAY: Joint Ventures in Business, Part 1. Presented by the Illinois State Bar Association. 12-1.

Thursday, 3/27/14- Teleseminar—LIVE REPLAY: Joint Ventures in Business, Part 2. Presented by the Illinois State Bar Association. 12-1.

Friday, 3/28/14- Chicago, ISBA Chicago Regional Office—Master Series: The Uniform Commercial Code Made Easy: A Groundbreaking Approach to Incorporating the UCC into Your Practice. Presented by the Illinois State Bar Association. All day.

Friday, 3/28/14- Live Webcast—Master Series: The Uniform Commercial Code Made Easy: A Groundbreaking Approach to Incorporating the UCC into Your Practice. Presented by the Illinois State Bar Association. All day.

Friday, 3/28/14- Quincy, Quincy Country Club—General Practice Update 2014: Quincy Regional Event. Presented by the ISBA General Practice Section; co-sponsored by the Adams County Bar Association. 8:15 a.m.-5 p.m.

April

Tuesday, 4/1/14- Teleseminar—Planning and Drafting Revocable Trusts. Presented by the Illinois State Bar Association. 12-1.

Thursday, 4/3/14- Chicago, ISBA Chicago Regional Office—Exempt Offerings: Regulation D to Crowdfunding. Presented by the Business and Securities Law Section. 9-11:30am.

Thursday, 4/3/14- Live Webcast—Exempt Offerings: Regulation D to Crowdfunding. Presented by the Business and Securities Law Section. 9-11:30am.

Thursday, 4/3/14- Live Webcast—Insurance Coverage Issues for the General Practitioner. Presented by the ISBA Insurance Law Section. 12-2:15. ■

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