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Environment—Procedure

New York's Superfund Suit Timely Filed: Cleanup Is Removal, Not Remedial, Action

Measures taken by the state of New York to address contamination of a town's drinking water supply are ongoing ''removal'' actions under the Superfund law, which did not trigger the statute of limitations for filing a cost recovery claim, the U.S. Court of Appeals for the Second Circuit held Oct. 15 (*New York v. Next Millennium Realty LLC,* 2013 BL 283589, 2d Cir., No. 12-2894, 10/15/13).

Because the measures were not complete when the state filed its cost recovery action, the suit is timely, the court said, vacating the lower court's ruling.

The decision was ''wrongly decided,'' Larry Schnapf, an environmental attorney and blogger in New York, told BNA in an Oct. 18 e-mail. The state's cleanup systems were ''about as permanent as you can get,'' he said.

The statute of limitations for such permanent ''remedial'' actions has a different trigger under the superfund law than the statute for ongoing removal actions.

''The decision rewards the state for sitting on its rights for over a decade which flies in the face of the purpose of a statute of limitations,'' Schnapf said.

Seth D. Jaffe of Foley Hoag LLP in Boston is ''largely persuaded that the Court of Appeals got it right.'' But, he told BNA in an Oct. 18 e-mail, ''this is just one of those very close cases and the courts are just trying to do the best that they can with some statutory language that is, to say the least, ambiguous.''

Jaffe said in a post on his firm's Law & the Environment blog that he worries about where common sense fits into these questions.

''Looking at the structure of the statute of limitations provisions in CERCLA, one gets the distinct impression that members of Congress surely expected that removal actions would start and finish first, and that the removal limitations period would always run first,'' he wrote. ''The notion that the removal action limitations period would extend beyond the remedial action limitations period is definitely a head-scratcher. But, then, so is most of CERCLA.''

VOCs Threatened Drinking Water. New Cassel Industrial Area, a 170-acre site in North Hempstead, N.Y., was home to a variety of light industries that produced volatile organic compounds. The VOCs eventually found their way into the ground water.

In 1989, the town detected VOCs in two of its water supply wells at levels approaching state limits for drinking water. A granulated activated carbon adsorption system was installed to remove the VOCs. The GAC has remained in operation since.

Over the next few years, the town found that rising concentrations of VOCs had ''markedly increased'' the cost of running the GAC system. Construction of an air stripper tower to treat the water before it is pumped into the GAC was completed in 1997. The air stripper tower is still in operation.

The New York Department of Environmental Conservation issued a final record of decision in 2003, selecting a permanent remedy to address the pollution at the site. The remedy incorporated the existing GAC and air stripper tower.

In 2006, the state sued several potentially responsible parties for cost recovery under the Comprehensive Environmental Response, Compensation, and Liability Act § 107.

The magistrate judge recommended that the defendants' motion for summary judgment be granted, finding that the state's claims are barred by the statute of limitations. The district court adopted the recommendation.

The state appealed.

Removal v. Remedial Actions. Section 107 authorizes state governments to recover response costs from PRPs for both removal and remedial actions.

Removal actions are cleanup measures taken to respond to immediate threats to public health and safety. Remedial actions are generally designed to permanently remediate hazardous waste.

Different statutes of limitations applying depending on the characterization of the action.

For removal actions, the government must seek reimbursement of its costs within three years of completion of the removal action. For remedial actions, the government must sue within six years of initiation of physical on-site construction of the remedial action.

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Immediate Threat. The district court held that the state's suit is time-barred because the GAC and air stripper tower are remedial actions.

The Second Circuit disagreed, holding that the actions are removal measures that were still incomplete when the state sued the defendants.

''First, both systems were installed in response to an imminent public health hazard, a defining characteristic of removal actions,'' the court said.

The contamination posed an impending threat to Hempstead's drinking water that required immediate action, the court found.

The GAC and air stripper tower were designed as measures to address water contamination in the wells, the court said, not to permanently remediate the problem by preventing the VOCs from migrating into the wells.

The state was ''responding to a water-supply problem, not an environmental cleanup problem,'' the court said, distinguishing the state's actions as removal measures.

''Even though the GAC and the air stripper tower eventually were ultimately adopted as part of a permanent remedial solution, they still constituted 'removal' actions at all times relevant to the statute of limitations question,'' the court said.

Because the two systems are removal measures that are still in operation, the statute of limitations has not started to run, the court concluded.

Duration, Cost Not Determinative. The court also rejected the defendants' argument that the two systems are too expensive and have been used for too long to be considered removal actions.

The defendants pointed to a section of CERCLA that provides that a removal measure ''shall not continue after $2,000,000 has been obligated for response actions or 12 months has elapsed from the date of initial response.''

However, the court noted, there are two exceptions to this cap where (1) an immediate risk to public health or the environment requires continued response actions to prevent, limit or mitigate an emergency, or (2) continued response action is otherwise appropriate and consistent with the remedial action to be taken.

The GAC and air stripper tower fall within both exceptions, the court concluded. ''Because both the GAC and the air stripper tower were urgent responses designed to combat rising levels of VOCs that threatened the water quality, the duration and cost of these measures do not mean that they constituted remedial actions ab initio.''

Judge Denny Chin wrote the opinion. Judges Raymond Joseph Lohier Jr. and Laura Taylor Swain, sitting by designation from the U.S. District Court for the Southern District of New York, also served on the panel.

Attorneys for the parties did not return e-mails seeking comment.

Solicitor General Barbara D. Underwood, and Deputies Solicitor General Cecelia C. Chang and Matthew W. Greico represented the state.

Kathleen M. Sullivan and William B. Adams of Quinn Emanuel Urquhart & Sullivan LLP in New York, and Kevin Maldonado of Kevin Maldonado & Partners LLC in Windham, N.Y., represented Next Millennium Realty LLC, 101 Frost Street Associates LP, 101 Frost Street Corp., and Pamela Spiegel Sanders and Lise Spiegel Wilks.

BY PERRY COOPER

Full text at http://www.bloomberglaw.com/public/document/State_of_New_York_v_Next_Millennium_Realty_LLC_Docket_No_1202894_.

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