

Environmental Litigation and Toxic Torts Committee Newsletter

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MESSAGE FROM THE CHAIR

Daniel M. Krainin
Beveridge & Diamond, P.C.
New York, N.Y.
dkrainin@bdlaw.com

Greetings and welcome to the Summer 2012 issue of the Environmental Litigation and Toxic Torts (ELTT) Committee's newsletter! This newsletter examines major decisions by the U.S. Supreme Court, offers practical advice for environmental practitioners on taking depositions, and analyzes emerging contamination concerns relating to the impact of lawn fertilizers on water resources.

Kevin Haroff of Marten Law PLLC leads off the issue by analyzing the impact and implications of the landmark Supreme Court pleading-standard rulings, *Twombly* and *Iqbal*, on environmental cases.

Sticking with the High Court for our second article of this issue, W. Parker Moore of Beveridge & Diamond, P.C., tackles the recent *Sackett v. EPA* opinion, examining both its restrictions on the U.S. Environmental Protection Agency's Clean Water Act enforcement actions and its potential applicability to other federal environmental statutes.

In the third article, Philip Comella of Seyfarth Shaw offers some indispensable practical advice for environmental litigators: nine tips on how to take an effective deposition in an environmental case.

Finally, Tzvi Levinson and Dario Hunter of the Levinson Environmental Law Firm in Israel identify an emerging area of environmental law both in state capitols and courtrooms: efforts to address the impact of lawn fertilizer runoff on surface water and groundwater via legislation and litigation.

I trust you will find this issue of the Environmental Litigation and Toxic Torts Committee Newsletter both interesting and informative. Please contact me (dkrainin@bdlaw.com) or newsletter editor Alex Basilevsky (alex.basilevsky@obermayer.com) with feedback on this issue or suggestions for additional newsletter themes or articles. Likewise, please contact me if you wish to become more involved in or have suggestions for ELTT Committee newsletters, programs, or activities.

Happy reading and stay cool!



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**Environmental Litigation and
Toxic Torts Committee Newsletter**
Vol. 13, No. 2, July 2012
Alex Basilevsky, Editor

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OPEN OR SHUT?—PLEADING FEDERAL ENVIRONMENTAL CLAIMS AFTER *TWOMBLY* AND *IQBAL*

Kevin T. Haroff

In 2007, the U.S. Supreme Court issued its decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), a class action suit against a number of local telephone and Internet service providers, alleging conduct constituting an unlawful restraint of trade under section 1 of the Sherman Antitrust Act. The district court initially dismissed the complaint for failure to state a claim under rule 12(b)(6) of the Federal Rules of Civil Procedure.

The Second Circuit Court of Appeals reversed the dismissal on grounds that the complaint met the liberal “notice” pleading standard previously articulated by the U.S. Supreme Court in *Conley v. Gibson*, 355 U.S. 41 (1957), where the Court held that claims must be allowed under Fed. R. Civ. P. Rule 8(2)(a) unless “no set of facts” could be alleged to support those claims. Fed. R. Civ. P. 8(2)(a) does not itself describe any standard for assessing the sufficiency of pleadings, but requires only that a “pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief. . . .”

In overturning the Second Circuit’s reversal of the district court in *Twombly*, however, the Supreme Court made clear that it was no longer enough for a challenged pleading to just meet the Conley “no set of facts” standard. According to the Court, “[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Going forward, claims would not be sustained unless the pleadings contained “facts to state a claim to relief that is plausible on its face.” 550 U.S. at 555.

Although at first the decision seemed limited to antitrust claims, *Twombly* soon became viewed as setting a new standard for pleading any claim in federal court

under Fed. R. Civ. P. 8(2)(a). This was confirmed by the Supreme Court’s 2009 decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009). There, the Court observed that “[t]o survive a motion to dismiss [under Fed. R. Civ. P. 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” 129 S. Ct. at 1949. Moreover, while a reviewing court must take all of the factual allegations in the complaint as true, it is not bound to accept as true a legal conclusion couched as a factual allegation. “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.* at 1949–50.

While the standards they have set are clearly ones of general applicability, in the environmental context, different commenters have expressed different views on the significance of the *Twombly* and *Iqbal* decisions. Some commenters have suggested that any changes in pleading standard jurisprudence reflected by these cases (even if real) should have less probity in environmental cases, where the elements of any claim are more thoroughly delineated by applicable federal statutes and administrative regulations than in other areas of the law. *See, e.g.,* B. Detterman, *Rumors of Conley’s Demise Have Been Greatly Exaggerated: The Impact of Bell Atlantic Corporation v. Twombly on Pleading Standards in Environmental Litigation*, 40 ENVTL. L. REV. 295 (2010). Under this view, defendants in environmental cases “ought not invest much hope” in obtaining dismissal based on *Twombly* and *Iqbal*.

Other commenters have predicted that these decisions “raise potentially dire consequences” for plaintiffs in environmental law cases, particularly in citizen suits brought by private parties to vindicate alleged public interest concerns. *See, e.g.,* S. Foster, *Breaking the Transubstantive Pleading Mold: Public Interest Environmental Litigation After Ashcroft v. Iqbal*, 35 WM. & MARY ENVTL. L. & POL’Y REV. 885 (2011). Under this view, the heightened burden of establishing the plausibility of claims under *Twombly* and *Iqbal* “threatens the enforcement of environmental norms by reducing both the threat and the consummation” of citizen suit-type actions.

Environmental Fact v. Inference

As usual, however, the reality is somewhere between these two extremes, and discerning any pattern in the cases where *Twombly* and *Iqbal* have actually been applied to environmental claims can be a challenge. In *Goliad Cnty. v. Uranium Energy Corp.*, No. V-08-18, 2009 WL 1586688 (S.D. Tex. June 5, 2009), for example, the district court dismissed a citizen suit claim that the defendant had failed to properly seal and plug a series of exploratory boreholes drilled for mining purposes, thus allowing storm water to seep into the holes and become comingled with water in a local underground aquifer. Plaintiff alleged in the complaint that defendant's conduct supported an "inference" of intent to convert the boreholes into underground injection wells requiring a permit under the federal Safe Drinking Water Act. On defendant's motion to dismiss, plaintiff sought to characterize this allegation as a factual one that the court was obliged to accept as true in evaluating the sufficiency of the complaint. The court rejected this characterization, however, and stated the allegation to be "one more accurately characterized as a conclusion of law, which the Court is not mandated to, and does not, accept as true," citing *Iqbal*.

By contrast, in *Environmental World Watch, Inc. v. Walt Disney Co.*, No. CV 09-04045 DDP, 2009 WL 3365915 (C.D. Cal. Oct. 19, 2009), a different court found that allegations supporting an "inference" of unlawful conduct were sufficient to meet the fact-based plausibility standards of *Twombly* and *Iqbal*. In *Environmental World Watch*, plaintiffs contended that defendant's discharged contaminants (specifically, chromium 6, or Cr VI) in wastewater from an air-cooling system in violation of the federal Resource Conservation and Recovery Act (RCRA). Defendant moved to dismiss this claim under *Iqbal*, on grounds that the complaint lacked factual allegations to establish that contaminant concentrations were sufficiently high to qualify the discharges as "hazardous waste" within the meaning of RCRA. The court rejected this argument, however, holding that plaintiffs "are not required to prove that [defendant] is disposing of a specific concentration of Cr VI at the pleading stage—they need only plead facts that plausibly suggest a Cr VI release that exceeds the federal standard." Thus, the court found that by taking the factual allegations

made by plaintiffs, and "drawing all reasonable inferences in [p]laintiffs' favor," the complaint plausibly suggested that defendants had disposed of hazardous waste within the meaning of the statute.

In *SPS Limited Partnership, et al. v. Serverstal Sparrows Point, et al.*, Civil No. JFM-10-2579 (D. Md. July 5, 2011), the court went out of its way to find that plaintiff's allegations of CERCLA liability met the *Twombly/Iqbal* plausibility test. Plaintiffs alleged only that they had incurred environmental response costs that were "not inconsistent" with the National Contingency Plan (NCP) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—this, of course, is the more lenient standard for NCP consistency that is available only to governmental entities, not private parties, and therefore was not relevant to plaintiffs' claims in *SPS Limited Partnership*. Rather, private parties must affirmatively show that response costs are consistent with the NCP. Nevertheless, the court looked beyond plaintiffs' characterization of the applicable legal standard and relied instead on specific factual allegations in the complaint, to the effect that plaintiffs had installed a contaminant treatment system as part of their compliance with wastewater discharge permitting requirements under the Clean Water Act. The court found that these actions were affirmatively consistent with the NCP (not just *not inconsistent*). On that basis, the court found that plaintiffs had "met their burden of demonstrating that at least some of their response costs substantially comply with the NCP for liability purposes."

Plausibility v. Probability

The Supreme Court made clear in *Iqbal* that a plausibility standard does equate with a requirement of probability, much less proof, under rule 8(a)(2). As the Court stated, "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. [citation omitted] Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief.'" 129 S. Ct. at 1949.

In *Ford Motor Co. v. Michigan Consolidated Gas Co.*, Case No. 08-CV-13503-DT (E.D. Mich. Aug. 27, 2010), the court followed this reasoning in assessing the adequacy of pleadings filed in an action to recover costs incurred in response to environmental conditions at a former manufactured gas plant in Dearborn, Michigan. Plaintiff asserted claims for cost recovery and contribution under CERCLA sections 107 and 113. Defendant filed counterclaims under the same statutory provisions; however, according to the district court, the only factual allegation made to support the counterclaims was an allegation that defendant had incurred response costs within the meaning CERCLA, “including the retention of various professionals to analyze the [affected] property . . . the extent and cause of the contamination, and potential remedial measures, including the [p]roposed [r]emedy.”

The court in the *Ford* case found this allegation insufficient to state plausible CERCLA claims under *Twombly* and *Iqbal*. The court made clear that the counterclaim did not have to be supported by allegations that response costs “probably” were necessary, something that the *Twombly* and *Iqbal* standards do not require. The counterclaim did at least have to “allege ‘enough factual matter (taken as true) to suggest that’ the response costs were ‘necessary’” for CERCLA purposes. The court observed that was particularly true, “where, as here, the remaining allegations of the counterclaims are specifically detailed, thus suggesting facts in support of a ‘necessary’ cost of response do not exist.”

In *Hinds Investments LP, et al. v. Team Enterprises, Inc., et al.*, No. 07-0703, 2010 U.S. Dist. LEXIS 48554 (E.D. Cal. Apr. 21, 2010), plaintiffs filed CERCLA claims against a number of defendants with respect to their alleged costs of responding to perchloroethylene (PCE) contamination from dry-cleaning operations on their property. One of the defendants manufactured and sold a piece of equipment used by the dry cleaners; however, there was no allegation that it otherwise participated in the operation of the business. Instead, plaintiffs alleged that the defendant was liable under CERCLA § 107(a) as a person who had arranged for the disposal of PCE at the property, solely because it provided guidance to

users of its equipment to discharge PCE-containing process wastewater to sewers rather than to “environmentally sound options.”

The court found that these allegations were insufficient in light of the Supreme Court’s decision in *Burlington Northern and Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870 (2009), which requires that a defendant intend to dispose of hazardous substances to support a claim of arranger liability. The Court also found that plaintiff’s allegations were insufficient to overcome a “useful product” defense, in relation to which allegations that merely identify a “hazardous substance” are insufficient to establish that its placement in a facility constitutes a disposal of the substance under CERCLA. Finally, the court found that plaintiff’s guidance allegations were inadequate to support a plausible claim that defendant had the requisite authority or duty for arranger liability to control the disposal of hazardous substances.

Chubb v. SS/Loral, et al.

As these cases suggest, *Twombly* and *Iqbal* clearly have created opportunities (which might not have existed under *Conley*) to mount a meaningful challenge to environmental claims at the earliest possible stage, before costly discovery and pre-trial motion practice can alter a defendant’s tolerance for protracted litigation. At the same time, the willingness of most trial courts to give plaintiffs at least one chance to amend and re-file claims initially dismissed under rule 12(b)(6) mitigates the risk that truly meritorious claims will not be fully entertained, just because there were poorly pled in the first instance.

A case that currently is on appeal in the Ninth Circuit—*Chubb Custom Insurance Co. v. Space Systems/Loral, et al.*, No. 11-16272 (filed May 19, 2011)—provides a good example of how courts can balance more rigorous demands on the quality of pleadings against the legitimate interests of plaintiffs to pursue claims they believe have merit. The case is noteworthy primarily because it raises some novel issues involving the intersection of insurance and environmental law; however, those issues were only properly framed through application of the *Twombly*/

Iqbal standards in dismissal motions under rule 12(b)(6).

Plaintiff filed its original complaint (OC) on September 23, 2009, alleging claims under CERCLA sections 107 (cost recovery) and 112 (subrogation). Plaintiff sought to recover the amount of payments made to an insurance policyholder in connection with the remediation of soil and groundwater contamination at a former aerospace manufacturing facility in Palo Alto, California. On February 23, 2010, the District Court for the Northern District of California dismissed the OC with leave to amend. Citing *Twombly* and *Iqbal*, the court held that the factual allegations of the OC were insufficient to state any of plaintiff's asserted claims and concluded that the OC was therefore subject to dismissal in its entirety; nevertheless, the court gave plaintiff leave to amend the complaint, and it addressed several of defendants' specific challenges to the OC "in hopes of streamlining the litigation going forward."

In its first amended complaint (FAC), plaintiff sought to reallege its CERCLA cost recovery and subrogation claims as a single cause of action. On June 23, 2010, however, the court dismissed the FAC, again without prejudice, and held that "while a [s]ection 112(c) plaintiff is not required to show that the compensation it paid relates to a CERCLA claim that already has been resolved through settlement or litigation, a plain reading of [s]ection 112(a) requires plaintiffs to plead that the compensation was paid for damages or costs *resulting from a CERCLA violation*." The court concluded that plaintiff had not "connect[ed] the dots" between the payment to its insured under the insurance policy, the costs the policyholder had incurred, and the alleged CERCLA violations.

Plaintiff filed its second amended complaint (SAC) on July 23, 2010. The only federal claim for relief asserted in the SAC was a CERCLA section 112(c) subrogation claim that did not invoke or refer to section 107. On December 7, 2010, the court granted defendants' motions to dismiss the SAC under *Twombly/Iqbal*, once more with leave to amend; however, the court urged plaintiff "to address carefully the defects noted throughout [the order]," and noted that because the court had granted defendants' motions to dismiss on two previous occasions, plaintiff "is

cautioned that unless these issues are addressed, further amendment may not be permitted."

Plaintiff filed its third amended complaint (TAC) on January 6, 2011. Despite the court's prior orders, plaintiff revived its cost recovery claim under CERCLA section 107, although now the claim was couched as a subrogation claim. The court granted defendants' motions to dismiss the TAC on April 20, 2011. Given plaintiff's repeated failure to plead facts sufficient to establish any claims against defendants, the court concluded that "good cause" existed for dismissing the TAC with prejudice. The court ordered the entry of a final judgment for defendants, and Chubb filed its notice of appeal with the Ninth Circuit on May 19, 2011. Although the case has now been fully briefed, the Court has not yet set a date for oral argument.

Lessons Learned

The handling of plaintiff's claims in the *Chubb* case shows that federal courts have discretion to give plaintiffs ample opportunity to comply with the pleading standards described in *Twombly* and *Iqbal*. The more liberal "notice" pleading standards previously applied under *Conley* are simply not needed to ensure that plaintiffs asserting substantial claims will get their day in court. At the same time, the day is past when counsel can safely assume that the best response to an environmental complaint, even one that dutifully lays out each of the statutory elements of an asserted claim, is to just file an answer and allow the merits to be resolved on summary judgment or trial after a protracted discovery process. Unless it is supported by substantial factual allegations that provide a plausible basis for assigning liability, the most effective and cost-efficient response to a federal environmental claim may be a simple motion to dismiss it under Fed. R. Civ. P. 12(b)(6), before any answer is ever filed. That might not have been true prior to *Twombly* and *Iqbal*, but as the cases discussed show, it almost certainly is true now.

Kevin T. Haroff is an environmental litigator and a partner in the San Francisco office of Marten Law PLLC. He currently is representing one of the defendants in the *Chubb v. Space Systems/Loral* case, including the Ninth Circuit appeal.

SUPREME COURT TO EPA: CWA COMPLIANCE ORDERS ARE SUBJECT TO REVIEW

W. Parker Moore

In a long-awaited decision, on March 21, 2012, a unanimous U.S. Supreme Court told the U.S. Environmental Protection Agency (EPA) to stop “strong-arming . . . regulated parties” that want to challenge administrative compliance orders (“ACOs”) based on assertions of Clean Water Act (“CWA”) jurisdiction. EPA had long maintained that ACOs were not subject to judicial review, meaning that property owners could not challenge assertions of federal jurisdiction over their property when the agency ordered them to restore wetlands and waters that were filled without authorization by a CWA permit. Accordingly, property owners either had to comply with the order or wait for EPA to bring a civil suit against them for alleged CWA violations before they could seek judicial review. Under that practice, landowners who chose to stand their ground, arguing that the wetlands and waters on their property were not jurisdictional, often were assessed substantial penalties for each day they failed to abide by an ACO and for violating the CWA’s unauthorized discharge prohibition. In *Sackett v. EPA*, No. 10-1062 (U.S. Mar. 21, 2012), the Supreme Court put an end to that. Moreover, the Court’s ruling may have implications for EPA’s enforcement activities under other federal environmental statutes.

Background

The Clean Water Act prohibits the “discharge of any pollutant” into jurisdictional waters except in compliance with a permit. 33 U.S.C. §§ 1311, 1342, 1344. Thus, when a landowner plans to discharge dredged or fill material into waters or wetlands that are subject to CWA jurisdiction, it must first obtain a section 404 permit from the U.S. Army Corps of Engineers. *Id.* § 1344. Although the Corps and EPA share enforcement authority under the CWA, the statute provides EPA with a broader range of options for enforcing CWA violations. When EPA believes that an unlawful discharge to jurisdictional waters has

occurred, it may (1) assess civil penalties against the discharger, (2) bring a civil action against the discharger in federal district court, or (3) issue an ACO ordering the discharger to remediate the affected waters and restore them to pre-discharge conditions. *Id.* § 1319. The CWA authorizes penalties of up to \$37,500 per day for failure to comply with an ACO and daily penalties of the same amount for violating the CWA’s unauthorized discharge prohibition. *Id.* § 1319(a); *see also* 40 C.F.R. § 19.4 (providing EPA’s adjustments for inflation to civil monetary penalties).

EPA chose the third enforcement option, an ACO, when it determined that Idaho couple Mike and Chantell Sackett had discharged dredged or fill material into jurisdictional wetlands on their property without first obtaining a section 404 permit. The Sacketts’ troubles began when, preparing to build a house in Bonner County, Idaho, they filled wetlands on their property with dirt and rock. The Sacketts believed those wetlands were not jurisdictional under the CWA because several lots containing permanent structures separated their land from a nearby lake—the closest navigable water body. The Corps and EPA believed otherwise, and EPA issued an ACO ordering the Sacketts to remove the fill from the wetlands and restore their property to its original condition.

Seeking to make their case that the wetlands on their land were not jurisdictional, the Sacketts requested an administrative hearing from EPA but were turned away. They then filed suit in the U.S. District Court for the District of Idaho, asking the court to review the propriety of the jurisdictional determination underlying the ACO. EPA opposed the lawsuit by arguing that an ACO is not “final” agency action that is subject to judicial review under the Administrative Procedure Act (APA), and that the Sacketts could obtain judicial review only if EPA attempted to enforce the order by initiating a civil suit against them in federal court. The district court agreed and dismissed the case, finding that the Clean Water Act precludes pre-enforcement judicial review of ACOs. On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed, holding that the CWA “impliedly” prohibited pre-enforcement review of ACOs under APA. *Sackett v. EPA*, 622 F.3d 1139 (9th Cir. 2010).

The Supreme Court's Ruling

The Supreme Court wasted little time in reversing the Ninth Circuit, ruling that ACOs are clearly “final” agency actions that are subject to judicial review because nothing in the Clean Water Act precludes such review under APA. Justice Scalia, writing for the unanimous Court, said a citizen should not have to “wait for the agency to drop the hammer” of suing the citizen in order for that citizen to put the threshold issue of disputed CWA jurisdiction before a federal judge.

The Court explained that APA authorizes judicial review of “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. Considering the first issue, the Court had little difficulty finding that ACOs issued under the CWA bear “all the hallmarks of APA finality that our opinions establish.” The justices explained that EPA’s order “determined rights or obligations” because it required the Sacketts to restore their property to pre-discharge conditions pursuant to a plan approved by the agency. Moreover, the Sacketts were subject to “legal consequences”—namely, fines and penalties and increased difficulty in obtaining a section 404 permit—for failure to comply with the order. Finally, the Court reasoned that issuance of the ACO was not merely “a step in the deliberative process,” as EPA had suggested. Rather, it consummated EPA’s decision-making process because the order’s requirements, while open to “informal discussion,” were not subject to further agency review.

The Court next found that the Sacketts satisfied the second requirement for APA review because they had no other adequate remedy for challenging the ACO in court. EPA had no choice but to concede this issue because it had long argued that the Sacketts either had to comply with the order or wait until the agency initiates a civil suit in federal court before challenging the order and any penalties associated with it.

Finally, the Court determined that the CWA did not bar pre-enforcement review of ACOs. Although the statute does not expressly bar such review of administrative orders, EPA argued that the CWA’s structure, purpose, and history suggest that Congress “impliedly” intended to bar pre-enforcement judicial review of ACOs. The Court rejected that argument, finding that allowing pre-enforcement review of compliance orders would not

frustrate the CWA’s enforcement scheme because, while ACOs are an important mechanism for achieving voluntary compliance with the CWA, “[i]t is entirely consistent with this function to allow judicial review when the recipient does not choose voluntary compliance.” The Court further explained that the CWA’s authorization of prompt judicial review of administrative penalties cannot “overcome the APA’s presumption of reviewability for all final agency action.”

For these reasons, the Court concluded, an ACO issued under the Clean Water Act constitutes final agency action that is subject to pre-enforcement judicial review under the Administrative Procedure Act. As a result, the Sacketts now will have the opportunity to immediately challenge the assertion of federal jurisdiction over the wetlands on their property.

Conclusions and Implications

The Supreme Court’s emphatic decision in *Sackett* made short work of EPA’s “do or die” policy under the CWA of forcing citizens either to comply with a disputed ACO or face a federal lawsuit along with substantial penalties for every day a citizen declines to abide by the agency’s order. With the possibility of pre-enforcement judicial review of its orders now in play, EPA may be forced to be more selective about when it issues an ACO. And when it determines that an ACO is appropriate, the agency may need to take extra steps to ensure that its decision is supported by a comprehensive administrative record that allows the order to withstand judicial review.

The decision may have broader implications as well. EPA issues administrative compliance orders, like the order at issue in *Sackett*, under other federal environmental statutes, including the Clean Air Act and the Resource Conservation and Recovery Act. Like the CWA, those statutes do not expressly preclude pre-enforcement judicial review of compliance orders. As a result, though narrowly worded, *Sackett* may affect EPA’s enforcement activities under those laws as well as how lower courts apply the ruling to them.

W. Parker Moore is a principal in the Washington, D.C., office of Beveridge and Diamond, P.C. He co-chairs the firm’s Environmental Practice Group and focuses his practice on wetlands regulation and related natural resource laws.

NINE TIPS FOR TAKING AN EFFECTIVE DEPOSITION IN AN ENVIRONMENTAL CASE

Philip L. Comella
Seyfarth Shaw LLP

Taking a deposition in an environmental case presents a number of formidable challenges. Complex scientific issues often overlay an intricate regulatory scheme. Fact witnesses may know as much as experts about key technical details; exhibits may be voluminous and tedious. Without a clear grasp of the underlying legal framework, preparation and deposition time may be wasted, and you may find yourself slogging through a morass of information with no firm grasp of how to assemble it into a cohesive story.

Preparing for a deposition means not only preparing for the witness but also understanding the witness's role in the case and the legal context in which claims arise. Context takes on increased importance in the environmental arena because of the interlocking web of statutes, regulations, cleanup standards, health standards, chemicals, exposures pathways, and other elements that form the framework for these cases.

This article gives nine practical tips for taking an effective deposition in an environmental case. Every deposition is another learning experience, but the use of some of these tips may accelerate your movement up the learning curve.

1. Take Advantage of the Science and Regulatory Framework to Obtain Admissions

Many experienced litigators believe that depositions are all about obtaining admissions. But this is not always easy, as the well-prepared deponent will have been trained not to give admissions. Environmental law, however, is based more on science and regulations than many other fields and thus provides an opportunity to constrain the scope of the answer and to increase the frequency of admissions. For example, you may be defending a claim that PCB contamination is exposing some members of the public to a health

risk. Environmental and health regulations and technical studies exist that address the health effects of PCBs that could be put to use in the deposition. As an illustration, regulations under the Food and Drug Administration actually allow for a certain amount of PCBs in common foods, such as fish and milk. With these sorts of regulations, you can begin to construct a framework of admissions that might limit the overall impact of the PCB contamination in your case.

2. Ask Consulting Experts to Write Out Deposition Questions

I find that one of the best uses of a consulting expert in an environmental case is to assist with deposition questions, not only for other experts but also for the opposing side's fact witnesses as well. It is not uncommon for so-called fact witnesses, such as construction managers or facility supervisors, to be well versed in the technical issues that govern their business; in other words, they will likely know more about their business and regulatory requirements than you do. For example, suppose you are defending a landfill with a recurrent history of odor problems caused by a malfunctioning gas collection system. One question is whether the gas system failed because of its design or maintenance. The facility site foreman is likely to be highly skilled in maintaining the system and unless you are prepared to ask the right questions you may not gain the full extent of his knowledge. Having a consulting expert write out possible lines of questioning will make for a much more effective deposition as well as show the other side that you will be prepared to "go deep" into the technical issues if that's what it will take.

3. Understand the Elements of Both Sides of the Case and Determine Beforehand How a Witness Can Help You Defeat or Satisfy One or More of Them

Depositions serve the purpose of gaining evidence to support or defeat the elements of a claim or defense. Sometimes a witness will have knowledge to testify about all the elements; sometimes you can simply cross them off the list as someone with no knowledge or as a lead to someone with knowledge. But unless you know

the elements going into the case, you may waste a valuable opportunity to move the case forward.

This simple principle carries greater weight in an environmental case because of the interlocking nature of the regulatory programs that form the backdrop to the claim. I find it helpful to do a “proof outline” before scheduling depositions to understand what you will need to prove to support your case. For example, a building owner may claim that your client supplied defective wood for a construction project that caused an infestation of mold. In preparing for the deposition of the lumber supplier, it would help to know industry specifications for storage, mold content, and mold identification, among other factors. You may learn that all wood has mold and it is future handling and storage that affect the potential for mold growth. Knowing the technical and regulatory background to the expected testimony usually makes for a much more effective deposition.

4. Be Careful About Overeducating Your Opponent

I am usually heartened to find that my adversary, though perhaps an experienced trial lawyer, is not familiar with the nuances of the environmental laws in question. But most lawyers are smart people and quick studies. This is where understanding the larger context of the regulatory program pays dividends. In a deposition, you are trying to assemble the pieces to a puzzle but you have no obligation to tell the other side what the puzzle will look like when you are done. For example, an issue may be whether a customer of a solid waste handler generated a hazardous waste by mixing a chemical by-product with its normal waste stream. You know that mixing a listed hazardous waste with a solid waste yields a hazardous waste. But it may not be necessary to lay out the entire RCRA hazardous waste program to frame the question; you only need to know what the chemical is and how the company uses it to know if it is a listed waste.

5. Use General Outlines Peppared with Specific Questions

There is a wide variety of viewpoints on whether an examiner should go into a deposition with a detailed

outline, a rough outline, or simply a blank piece of paper. Fixating on a detailed outline may lead the examiner to lose the trail of the conversation and to miss witness cues that may steer the deposition in a fruitful direction. On the other hand, an overreliance upon instinct or feeling may cause the examiner to forget key points or to mangle a key question. I am in favor of general “flow” outlines (often drawn as pictures) that show how I plan the deposition to progress. The outline will generally map the regulatory program at issue and show how the witness fits into the picture. At the same time, I then make sure to have written out key specific questions that I will not end the deposition without getting an answer to. Another way to approach the situation is to prepare a draft of an affidavit for the witness that you would potentially use to support a summary judgment motion. Make sure you ask—and get answers to—all of the questions, even if the answer is “I don’t know.”

6. The “Do Not Forget” Page

On all too many occasions, the best questions come to the examiner *after* the deposition is over. This is a real problem if you have only one chance at the witness. To deal with this reality, I use a “do not forget” page in preparation and during the deposition. Typically, I will have the do-not-forget page tabbed in a small three-ring binder so that I can easily refer to it. Ever wary that I will forget an important question, I jot down the questions as they come to me during preparation and the deposition. Then, at the end of the deposition, I check the page to make sure I have asked all of the important questions. The more complicated the case, the greater the value of the do-not-forget page.

7. Use of Exhibits

Another important area of depositions is the use of exhibits. Because environmental cases typically produce a large number of exhibits, it is important to have a system that you have confidence in and that will allow you to make effective use of the key documents. Here again it seems that everyone has his or her own method, and in the end, you have to do what feels comfortable. I like to mark up the working exhibits with highlights and post-its and keep them close by. But the standard approach is to put working exhibits in

a separate file or in the same file as the deposition exhibits, and then put them in a box located in a secret location known only to the support staff. Or, if you mark up the exhibits how do you associate them with the actual exhibits during the deposition?

My solution here is very simple: I get two post-its and put the same letter or number on each post-it (it doesn't matter what sort of symbol is used, as long as they are the same); one post-it goes on my working copy and the other post-it goes on a file with the deposition exhibits. This allows me to mark up the working copy to my heart's content, and put them in a small file that I can keep with me. Depending on the flow of a deposition, I can then pull out any of my working exhibits and the actual exhibits with the same post-it code. It also helps to make a quick "key" identifying the exhibit with the code in the event some mix-up occurs or, heaven forbid, a post-it falls off.

8. Whether to Mark Regulations as Exhibits

Whether to mark regulations as exhibits may seem like an odd problem, and it is; most people think of exhibits as factual matter, not legal regulations.

This objection has merit, but on most occasions a regulatory program is front and center in an environmental case and an excerpt from the regulations, if nothing else, may help focus the testimony. For example, I was involved in a case where the question was whether a toxic characteristic hazardous waste mixed with a solid waste and disposed of in a landfill violated the facility's permit and required excavation. The landfill owner wanted to excavate the waste and back-charge the generator. When deposing the plaintiff's general counsel I found it productive to walk him through the regulations step by step to illustrate that the mixture was not a hazardous waste, and hence did not require excavation. Without the exhibit, there is no way I would have ever been able to obtain that admission.

9. It's the Transcript That Counts

One of the most challenging features of a deposition is separating your own ego, competitiveness, and

advocacy from the task at hand, which is to obtain testimony helpful to your case. Of the many uses of depositions, two of the most important are as support for a summary judgment motion and for cross-examination. In both of these instances, it is extremely important for the testimony to be as clean and crisp as possible. More precisely, it is important for the words typed on the transcript to be as clean as possible. The point here is that the theatrics that may occur in a deposition often detract from the overriding consideration that it is what appears on the transcript that matters. Listen closely to what the witness is saying and consider using real-time recording or take a look at the answer on the court reporter's screen to make sure you have the testimony in the right form. Many witnesses are coached not to give direct answers or to avoid the question. This will require you in some instances to ask the same question in different forms until it comes out right. If you leave the deposition without the testimony in the transcript, you may have lost a valuable opportunity to close out an issue. For example, I had a matter where the question was whether the plaintiff had any evidence that our client, an environmental consultant, acted willfully in failing to identify the scope of an environmental condition. I asked almost the same question about 10 times before I got the clean response I was looking for. We wound up prevailing on a summary judgment motion. This is even truer when depositions are used for cross-examination. When you pull out the deposition transcript to impeach the inconsistent witness, you are trying to show a stark contrast between the deposition and the trial testimony. If the deposition transcript is not clean, the trial impeachment will lose its force.

Philip Comella is the head of the *Environmental Practice Group* at *Seyfarth Shaw LLP*. He has been involved in a wide range of environmental litigation both as an in-house attorney and as an outside lawyer.

NEW STATE-LEVEL LEGISLATION ON LAWN FERTILIZER: A DOUBLE-EDGED SWORD FOR TOXIC TORT LITIGATION

Tzvi Levinson and Dario D. Hunter

Lawn fertilizer has recently caught the attention of legislators in certain states concerned about the aggregate effects its use may have on the environment, and those legislative developments may affect the future of related toxic tort litigation in those states. The issue typically addressed by this legislation is that two common fertilizer nutrients, nitrogen and phosphorus, which are transported via runoff and drainage waters, can cause damage to groundwater and surface waters. Phosphorus, for example, can lead to growth of algae and weeds (i.e., eutrophication) while nitrates can contaminate groundwater supplies. The resultant legislative efforts in numerous states reflect evolving ecological concerns, especially in states with fragile watershed ecosystems, about the impact of lawn fertilizers on water resources.

New legislation regulating lawn fertilizer that has recently been enacted in several states will have a “double-edged sword” effect on future toxic tort litigation in this area. On one hand, the new standards may establish a means for compliant manufacturers and distributors to rebut claims for toxic tort damages by asserting adherence to governmental standards. On the other hand, the new laws provide alternative civil remedies for plaintiffs that might not otherwise have legal recourse due to the burden of proof involved in mounting a toxic tort case.

Examples of Recent Legislation New Jersey

New Jersey’s new lawn fertilizer law is considered the toughest in the nation. Signed into law on January 5, 2011, the new act (2010 N.J. Laws ch. 112) requires that 20 percent of the nitrogen in all retail fertilizer products must be “slow release.” This form of water insoluble nitrogen is considered to be safer for the environment. The act requires further that fertilizer products sold at retail be mixed and labelled for use up to 0.7 lbs. (0.3 kg) of “fast release” (water soluble)

nitrogen and 0.9 lbs. (0.4 kg) of total nitrogen per application, per 1000 sq. ft. The annual limit is 3.2 lbs. (1.5 kg) of total nitrogen per 1000 sq. ft. per year. There is also a limited ban on phosphates in fertilizer and a requirement that labelling follow the Association of American Pesticide Control Officials (AAPCO) standard.

The content and labelling restrictions will take effect as of January 5, 2013. Retailers who sell prohibited fertilizer are subject to a \$500 fine for the first offense and up to \$1000 for the second and each subsequent offense. The law also provides that any violations may be pursued as a civil matter.

Maryland

On May 19, 2011, Maryland’s governor signed the Fertilizer Use Act of 2011 (2011 Md. Laws ch. 484) into law. The Maryland law requires that lawn fertilizer contain less than 5 percent of phosphorus. Like the New Jersey law, it also requires that lawn fertilizer contain no more than 0.7 lbs. (0.3 kg) per each 1000 sq. ft. application of water soluble nitrogen and no more than 0.9 lbs. (0.4 kg) of nitrogen in total. Twenty percent of the overall nitrogen content must be slow release. The Maryland law further states that the following label wording is required:

Do not apply near water, storm drains or drainage ditches. Do not apply if heavy rain is expected. Apply this product only to your lawn, and sweep any product that lands on the driveway, sidewalk, or street back onto your lawn.

The law mandates up to \$1000 for a first violation and up to \$2000 for subsequent violations. Like the New Jersey law, it treats violations as a civil offense. Content restrictions under this law will take effect on October 1, 2013.

Virginia

Virginia Senate Bill 1035 (2011 Va. Acts ch. 353), signed into law on March 22, 2011, prohibits the sale or distribution of lawn fertilizer with phosphates starting

on December 31, 2013. One feature that sets the Virginia legislation apart is that it requires product registration with the state. Anyone who distributes or has his or her name on specialty fertilizer distributed in Virginia must register his or her product. Labelling requirements and wording, similar to those of the Maryland law, are also specifically stated in the legislation.

While the Virginia law does not contain any specific, unique civil penalties or judicial standards in the event of violation of the chemical content or labelling restrictions, it does mandate a fine of \$50 for late registration of a regulated product.

Relevant Precedent and Emerging Litigation

A number of notable cases have indicated that where applicable governmental standards are tied to human health, adherence to such standards may prevent a plaintiff from recovering in toxic tort for alleged health impairment. In *Brooks v. E. I. du Pont de Nemours & Company*, 944 F. Supp. 448 (E.D.N.C. 1996), the court held that since the defendant met state groundwater standards, the plaintiff's tort claim did not present a viable cause of action. In granting the defendant's motion for summary judgment, the court referred to the state code's description of the standards as the "maximum allowable . . . concentration which may be tolerated without creating a threat to human health."

In *Thompson v. Southern Pacific Transportation Company*, 809 F.2d 1167 (5th Cir. 1988), the plaintiffs sought damages for injuries alleged to result from drinking wells contaminated with trichloroethane. In consideration of the fact that the concentration of trichloroethane in the wells was 8 ppb, well within the Environmental Protection Agency's recommended maximum of 200 ppb, the court found that there was insufficient proof of a causal relationship between the trichloroethane and the plaintiffs' alleged damages. This was despite the presentation of expert testimony alleging a relationship between the trichloroethane in the wells and the plaintiffs' impaired health.

The new legislation on lawn fertilizer presents a new set of standards that may be invoked by compliant manufacturers or distributors in toxic tort claims. It is possible that a defendant in such a claim may succeed in a motion for summary judgment and/or prevent recovery by pointing to its compliance with established content and/or labelling standards. However, it must be noted that in the *Brooks* and *Thompson* cases, that the standards at issue were tied to human health. The ability to relate the standards for lawn fertilizer to considerations of human health and/or environmental protection will be a central aspect of successfully invoking adherence to those standards as a defense. In this effort, references to the purpose of the standards contained in the text of the law itself as well as possibly in the legislative history of the law will be of primary importance.

In a toxic tort case, the plaintiff must establish a causal relationship between the hazard allegedly created by the defendant and the injury upon which the claim is based. In cases where the burden of proof for a toxic tort case may prove insurmountable, plaintiffs may turn to a number of alternative means of civil remedy, such as product liability. In a recent case in Oregon, *J.R.T. Nurseries, Inc. v. Sun Gro Horticulture Distrib., Inc.*, No. 100202929 (Or. Cir. 4th Dist. Feb. 15, 2012), the plaintiffs claimed that the defendants' fertilizer was recklessly mixed without testing and turned out to be "quick release" (i.e., in terms of the release of nutrients) despite being marketed as "controlled release." The resulting death of millions of blueberry, azalea, maple, and rhododendron plants caused considerable financial loss for the plaintiffs. An Oregon circuit court granted J.R.T. Nurseries an award of \$38 million dollars, including direct losses, compensation for loss of customers, and interest. The holding in this case hinged upon the defendants' sale of a product that was not fit for its marketed use, as opposed to a "pure" toxic tort case in which the focus would be on the supposed causal relationship between the substance or product and the actual damage alleged.

The *J.R.T.* case is a part of a new wave of cases against fertilizer companies that assert product liability claims, sometimes based on noncompliance with

product regulations, for what might alternatively be pursued as a toxic tort claim. In one recent case, the city of Lindsay, California, brought suit against Sociedad Quimica y Minera de Chile S.A. (SQMC), a Chilean fertilizer manufacturer whose products have allegedly contributed to perchlorate levels in local well water that exceed California's regulatory standards. *City of Lindsay v. Sociedad Quimica*, 2011 WL 2516159 (E.D. Cal. June 21, 2011). Among other things, the city of Lindsay alleges that SQMC failed to warn or provide adequate notice of the fertilizer product's perchlorate content. California's perchlorate best management practices (BMP) regulations, adopted in 2005, require labelling for fertilizer products that contain perchlorate (22 CCR § 67384.4 (a)). The city of Pomona, California, is also mounting a similar case against SQMC. The Lindsay case has been stayed pending the outcome of the Pomona case.

Much of the new state-level fertilizer legislation anticipates potential civil remedies for a failure to label or market the fertilizer product properly. For example, Wyoming's fertilizer law, which took effect well before the current spate of fertilizer legislation, provides that in a civil case for damages due to deficient or "misbranded" fertilizer, "all results of the department samplings, inspections or laboratory analyses shall be competent evidence before any court where such civil action is pending." Wyoming Fertilizer Law of 2009, ch. 115.

Conclusion

Based on the recent growth of legislation in this area, it is expected that further state-level legislation regulating the labelling and chemical content of lawn fertilizers will be enacted in the next few years. States that have already enacted such laws have employed a variety of approaches regarding the regulation of labelling and chemical content for lawn fertilizers. Insofar as these approaches relate to considerations of human health or environmental protection, they may also contribute to a variety of approaches in toxic tort litigation in this area. Different states may formulate different ideas on how and why to regulate (i.e., health/environmental reasons), providing different standards that may be invoked defensively by a toxic tort claim defendant.

Manufacturers, distributors, and others involved in the supply chain should also be mindful of the civil penalties directly imposed for violation of the new regulations which, though perhaps not directly onerous, may prove costly in terms of damage to the brand and public goodwill.

Tzvi Levinson is a partner with the Levinson Environmental Law Firm in Haifa, Israel, who specializes in counseling clients on drinking water regulations and international chemical laws.

Dario Hunter is an attorney with the Levinson Environmental Law Firm in Haifa, Israel, who specializes in international environmental legislation and compliance, including (but not limited to) U.S., EU, Canadian, and UK law.

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