Molloy issued final orders Jan. 21 and 22 on issues related to time allotted for oral argument, evidence, and expert witness testimony.

In June 2008 the U.S. Supreme Court denied a petition by the company to review a federal appeals court ruling allowing a charge of "knowing endangerment" against the defendants (23 TXLR 549, 6/26/08).

W.R. Grace is also the target of a class-action civil suit brought by property owners over its asbestos insulation materials. (See related story in this issue.)

'Knowing Endangerment.' In a February 2005 indictment, the U.S. government alleged the company knew about the dangers of its asbestos-contaminated vermiculite, yet withheld that knowledge from the government, its employees, and the public, thereby endangering the health of the residents of Libby, a small town in the northwestern part of the state, 65 miles south of the Canadian border.

The indictment also alleged the company obstructed the government's efforts to clean up the contamination. Other charges against the defendants include conspiracy, obstruction of justice, and fraud in connection with thousands of deaths and illnesses in Libby, where the company operated its mine and mill from 1963 to 1990. EPA designated Libby as a federal superfund site in 2002.

Molloy has directed lawyers on both sides of the criminal proceedings, including trial attorneys from the Justice Department and from Kirkland & Ellis, defense counsel, not to talk to reporters about the case.

Waiting Eagerly for Trial. Given the informal "gag order," attorneys with the state of Montana and the Environmental Protection Agency who are involved in the case also declined comment.

Phillip Erquiaga, spokesman for the Libby Community Advisory Group, a citizens' group, told BNA residents have been waiting for nearly four years for the criminal trial to begin.

"There's a certain amount of excitement," he said. "The community of Libby wants to see W.R. Grace and its officers get what they deserve," he added.

Erquiaga said it was frustrating that EPA is just beginning to conduct epidemiological tests and assessments of materials that came from the vermiculite mine. "Residents have been pushing for that since 1999," he said. "In my opinion these things should have been done at the outset. We're talking 10 years down the line now."

Not Listed in Clean Air Act. Attorneys for Grace have argued that the Clean Air Act's definition of "asbestos" does not include tremolite, a deadly form of asbestos contained in the vermiculite from the Grace mine. Grace should not be prosecuted for releasing the asbestos because the act does not list it as a regulated substance, they said.

Vermiculite is found in such products as insulation, sheet rock, and potting soil, Erquiaga said. Under former EPA Administrator Stephen Johnson, the agency was reluctant to characterize its release as a public health threat given how widespread its use is in products nationwide, Erquiaga said.

"In my opinion, EPA field personnel in Montana were told by higher-ups in Washington, 'We do that, we're going to have to start looking at every house in the United States,' " he said.

Erquiaga noted the hearing in October 2008 was attended by family members of people who died because their lungs had been damaged by asbestos. "The company continues to tell them the people of Libby could not possibly have been harmed by asbestos in the vermiculite ore," he said.

By Tripp Baltz

More background about the Libby, Mont., site is available from the EPA at http://www.epa.gov/region8/superfund/libby/background.html.

Clean Water Act

Enforcement

Judge Orders West Virginia to Explain How It Will Control Acid Mine Drainage

CINCINNATI—A federal judge on Jan. 20 ordered West Virginia's Department of Environmental Protection to explain by Feb. 16 how it plans to control acid drainage from abandoned coal mines, ruling that its stewardship of these sites violates the Clean Water Act (*West Virginia Highlands Conservancy v. Timmermeyer*, N.D.W. Va., No. 1:07cv87, *order* 1/20/09).

U.S. District Court Judge Irene Keeley ordered the department to submit briefs detailing how it plans to bring the 18 abandoned mining sites into compliance with the Clean Water Act by obtaining National Pollutant Discharge Elimination System (NPDES) permits.

Keeley's order follows her ruling Jan. 14 in a suit brought by the West Virginia Highlands Conservancy and the West Virginia Rivers Coalition. Keeley had granted the environmental groups' request for summary judgment against the state agency and injunctive relief compelling it to apply for and obtain NPDES permits.

Refusal to Obtain Permits Alleged. The two advocacy groups were represented by Public Justice, which argued that the state, saddled with the problem of reclaiming the abandoned sites and treating their contaminated runoff, tried to immunize itself from citizen enforcement actions by refusing to obtain NPDES permits and improperly citing sovereign immunity.

Sovereign immunity does not preclude private individuals from suing state officials for prospective injunctive relief to remedy an ongoing violation of federal law, Keeley said in her opinion. She held that the Department of Environmental Protection, as caretaker of the bond forfeiture sites, must apply for an NPDES permit for each site to comply with the Clean Water Act.

Moreover, said Keeley, neither the act nor its accompanying regulations "create an exception to the NPDES permitting requirements for state entities charged with reclamation" under the Surface Mining Control and Reclamation Act.

In 2007, the Highlands Conservancy requested data from the Department of Environmental Protection on the water quality of streams adjacent to these sites; the group found that the levels of acid mine drainage being

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discharged into these streams exceeded federal effluent limits for iron, manganese, and aluminum.

'Off the Books.' Jim Hecker, Public Justice's environmental enforcement director and lead counsel in the case, said West Virginia "was running these sites 'off the books' to try to escape accountability for necessary water treatment." The court order will force the Department of Environmental Protection to obtain the required discharge permits, he said, and "to comply with the water quality standards it is now violating."

Co-counsel Joe Lovett of the Appalachian Center for the Economy and the Environment said the ruling will require the state agency "to stop protecting the coal industry from paying the full environmental costs of coal mining."

Lovett predicted that the state will have to substantially increase coal taxes to pay for pollution control improvements.

In action unrelated to this suit, an advisory panel that monitors West Virginia's mine reclamation fund has told state lawmakers that the coal tax used to support the fund should be increased from 14.4 cents per ton to 20.4 cents per ton.

The Department of Environmental Protection had no comment on the ruling.

By Bebe Raupe

The judge's 35-page opinion is available at http://www.publicjustice.net/briefs/WVminecleanup_decision_011409.pdf.

State Law

Indiana

Statute of Limitations Bars City's Claims Under Common Law, Not Indiana Statute

CHICAGO—An Indiana state statute of limitations bars a city's common-law claims against the owner of a contaminated property, but but not under the state Environmental Legal Action law, the Indiana Supreme Court ruled Jan. 22 (*Cooper Industries LLC v. City of South Bend, Ind.*, Ind., No. 49S04-0711-CV-541, 1/22/09).

Concluding that the statute of limitations had run on all of the city of South Bend's tort claims, the Supreme Court reversed the judgment granted by the Indiana Circuit Court, Marion County, with respect to the claims, but affirmed the trial court's findings that the ELA claim was timely and that Cooper Industries LLC is the rightful successor to the property's previous owner.

In acquiring parcels of the former Studebaker automobile manufacturing facilities in the mid-1980s, the city of South Bend discovered soil and ground water contamination that probably occurred during Studebaker's occupation of the land and buildings until 1963. Environmental consultants found "a source of hydrocarbons" on the site.

After spending years acquiring parcels of the site, South Bend in March 2009 sued McGraw-Edison Co., contending that it was a successor to the liability of Studebaker. The suit contended negligence, private nuisance, trespass, public nuisance, statutory illegal dumping, and an environmental legal action on behalf of McGraw. Cooper was later substituted as defendant.

Chain of Mergers Leads to Liability. The circuit court held that Studebaker's merger with Worthington Corp. in 1967, McGraw-Edison's acquisition of all Studebaker-Worthington shares in 1979, and McGraw-Edison's merger into Cooper Industries ultimately made Cooper Industries liable for environmental damage on the site.

The circuit court also declared that South Bend's environmental statute claim was timely because the city filed it less than six years after the ELA became effective.

Cooper appealed, and the Indiana Court of Appeals reversed, holding that the six-year statute of limitations for property injuries barred all of South Bend's claims.

The Indiana Supreme Court rejected South Bend's argument that its cause of action for damages to the Studebaker property did not accrue for statute of limitations purposes until the city became the owner of the property and had a right to commence the action. But the high court found that the city could proceed with the ELA claims.

Legislative Intent. "Indiana adheres to the rule that third parties are usually held accountable for the time running against their predecessors in interest," Chief Justice Randall T. Shepard wrote for the court. "Accepting South Bend's argument would have the practical effect of allowing the mere transfer of property to resurrect the claims of prior landowners and predecessors-in-interest who had actual knowledge of injuries to property. It seems much more likely that the General Assembly had the opposite in mind."

The General Assembly enacted the Environmental Legal Action statute (Ind. Code Sec. 12-30-9-2) in 1997 to provide for an environmental legal action to recover "reasonable" costs of a removal or remedial action involving hazardous substances or petroleum. The ELA is part of the Brownfield Revitalization Zone Tax Abatement—Environmental Revolving Loan Program bill enacted in 1997 to rescue and redevelop brownfields.

The trial court rejected Cooper Industries' contention, however, that South Bend could not bring an Environmental Legal Action claim because South Bend is not "the state" or a "private person." The court said instead that the city is a "person" as that term is used in the section of the law authorizing an ELA claim (Ind. Code Sec. 13-30-9-1).

By Thom Wilder

Text of this opinion is available at: http://www.in.gov/judiciary/opinions/pdf/01220901rts.doc.pdf.