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Rocque v. Biafore, No. CV000800791S, 2003 Conn. Super. LEXIS 1323 (Conn. Super. Ct. Apr. 21, 2003)

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of the springs; however, like Vought, it failed to put others on notice until it filed its application for a conditional water rights decree on October 6, 2000. Therefore, the court held Stucker Mesa did not satisfy all of the elements of the “first step” requirement until October 6, 2000.

The court then addressed the second step in obtaining a conditional water right in Colorado, the “can and will” requirement. The “can and will” test requires an applicant to prove that he or she will not only diligently complete an appropriation, but also put water to a beneficial use within a reasonable amount of time. Vought challenged Stucker Mesa’s ability to satisfy the “can and will” requirement because he never gave the company a right of access onto his property. However, since Stucker Mesa proved that it possessed the need and the ability to construct the necessary equipment for water appropriation, the court invoked the right of private condemnation, which gives water rights owners a right-of-way through the lands which lie between the point of diversion and point of use. Therefore, the court held Stucker Mesa fulfilled the “can and will” test by invoking the right of private condemnation over Vought’s land.

Finally, Vought contended that the court should dismiss Stucker Mesa’s application due to Stucker Mesa’s alleged trespass onto Vought’s land. However, the court found that there was no basis for the trespass claim, and dismissed the argument. Thus, the Colorado Supreme Court concluded that while Vought and Stucker Mesa both satisfied all of the requirements for obtaining a conditional water right decree for the springs, Stucker Mesa satisfied the requirements earlier than Vought.

Brett Johnson

CONNECTICUT

Rocque v. Biafore, No. CV000800791S, 2003 Conn. Super. LEXIS 1323 (Conn. Super. Ct. Apr. 21, 2003) (holding that property owners who did not cause contamination are nonetheless strictly liable and therefore subject to both injunctive and civil penalties under the Connecticut Water Pollution Control Act for discharges of hazardous materials from owner’s property into state waters).

Arthur Rocque (“Rocque”), Commissioner of the Connecticut Department of Environmental Protection (“DEP”), sued Joseph Biafore, Jr., Nicholas Biafore, and companies they owned and controlled (“Biafore”) for violations of the Connecticut Water Pollution Control Act (“Act”). The six-count complaint alleged property owner Biafore was responsible for discharging polychlorinated biphenyls (“PCBs”) without a permit into state waters from their property located in Stratford, Connecticut (“site”). Rocque

sought an injunction restraining Biafore from further discharges and requiring remediation of the site. He also sought monetary penalties. The Superior Court of Connecticut, Judicial District of Hartford found Biafore was strictly liable for all claims and awarded the injunctive and civil penalties sought by Rocque.

Biafore leased property to a foundry where a fire occurred in May 1993. Fire officials responding to the site notified DEP of environmental concerns. The DEP noted the presence of transformers and other potential PCB-containing equipment. Biafore and DEP separately investigated the site following the fire and detected PCB contamination levels exceeding state standards. These site investigations indicated that releases of PCBs to the soils contaminated the ground water and threatened to contaminate nearby surface water.

DEP issued a Notice of Violation ("NOV") to Biafore requiring remediation of the PCB contamination. Biafore undertook further site investigations in response to the NOV, and found extremely high levels of PCB contamination in site soils and ground water. Subsequently, Biafore refused to conduct remedial activities at the site, claiming a lack of economic ability. Because Biafore failed to comply with the remediation terms of the NOV, Rocque filed suit against Biafore under the Act.

Under the Act, property owners are responsible for contamination and associated releases from their property even if they themselves did not cause the pollution. The court separately evaluated liability for the Biafores as individual site owners and Joseph Biafore's corporate officer role in managing site activities. First, the court analyzed the liability of Joseph and Nicholas Biafore as individuals. The court found PCB contamination existed on the Biafore-owned property and noted Biafore did not remediate the contamination as ordered. Because the Act imposes strict liability for any violation, these findings were sufficient to demonstrate Biafore's individual liability.

Next, the court applied the responsible corporate officer doctrine in analyzing Joseph Biafore's liability for PCBs released from property owned by a Biafore-held company. According to the doctrine, a corporate officer may be liable under the Act when: "(1) the officer is in a position to influence corporate policies and activities; (2) there is a nexus between the officer's actions and the violation; and (3) the officer's actions resulted in the violation." The court found Joseph Biafore was in a position to address environmental compliance issues; he was in charge of regulatory contacts and had authority to make financial decisions. Therefore, applying the corporate officer doctrine, the court found Joseph Biafore liable for violations of the Act. The court granted injunctive relief to prevent further releases of PCBs based on its findings of liability against Biafore and the serious threat to human health posed by ongoing discharges from the site.

Rocque also asked the court to impose civil penalties of \$55,000 as allowed under the Act. The court applied seven factors used by the Connecticut Supreme Court in its analysis of civil penalties of this type:

(1) the size of the business, (2) the effect of the penalty, (3) the gravity of the violation, (4) good faith efforts to comply with regulations, (5) the economic benefit, (6) the deterrence effect, and (7) the fair and equitable treatment of the regulated community. The court found reasonable a penalty for violations of the Act in the amount sought.

In summary, the court found the property owners liable in their capacity as individuals and as a corporate officer for violations of the Act. The court then awarded injunctive relief and civil penalties for \$55,000.

Chris Wittenbrink

IDAHO

Asarco Inc. v. State, 69 P.3d 139 (Idaho 2003) (holding Idaho's Department of Environmental Quality total maximum daily load standard constituted a rule where the limitation had wide coverage, general and uniform applicability, prospective application, dictated a legal standard or directive not provided by the enabling statute, stated agency policy not stated before, and interpreted law).

Asarco Inc. ("Asarco") and two other mining companies filed a complaint in the Kootenai District Court against Idaho's Department of Environmental Quality ("DEQ"). Asarco claimed that DEQ failed to follow the formal rule-making requirements of the Idaho Administrative Procedure Act ("IAPA") when DEQ established the total maximum daily load ("TMDL") standard for the Coeur D'Alene River Basin. The TMDL determines the maximum amount of a pollutant that may be deposited into a body of water. The federal Clean Water Act and the state's counterpart require DEQ to regulate water quality within the state. Both the federal and state acts require DEQ to take three steps to control water quality: (1) DEQ must develop water quality standards, (2) DEQ must identify water bodies that fail to meet these standards, and (3) DEQ must establish the TMDL standard for those bodies of water that do not meet the established water quality standards. The Coeur D'Alene TMDLs, established by DEQ, caused a modification in two of the mining companies' NPDES permits. These companies sought judicial review and declaratory relief in district court to void the rule because DEQ did not follow the IAPA rule-making procedures. DEQ moved for dismissal claiming the district court lacked subject matter jurisdiction because Asarco failed to exhaust its administrative remedies. Asarco opposed and moved for summary judgment. The district court ruled in favor of Asarco and voided the TMDL standards. The court also held that it possessed subject matter jurisdiction, and DEQ violated the IAPA because it did not follow the required rule-making procedure. DEQ appealed directly to the Idaho Supreme Court.