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Table of Contents

Introduction.....	180
I. Legislative and Regulatory Developments.....	180
A. State Legislative Developments	180
1. Senate Bill 281	180
a) "Transitioning to Alternative Fuels"	180
B. Regulatory Developments.....	181

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II. Judicial Developments	181
A. Bluegrass Materials Company, LLC v. Freeman	182
1. “Paying Quantities as a Material Fact”	182
B. MRP Properties Company, LLC v. United States	182
1. “State Control Under CERCLA”	182

Introduction

This article summarizes notable oil and gas law developments in the Commonwealth of Kentucky from August 1, 2022, to July 31, 2023, and focuses on significant legislative and regulatory enactments and relevant developments in common law.

I. Legislative and Regulatory Developments

The Kentucky General Assembly’s regular session began on January 3, 2023, and ended on March 30, 2023. This update discusses the meaningful legislation relating to the oil and gas sector passed during the session.

A. State Legislative Developments

1. Senate Bill 281

a) “Transitioning to Alternative Fuels”

Senate Bill 281 (“SB 281”) amends a Kentucky “act relating to alternative fuels.”¹ The entirety of the revisions in SB 281 involves shifting language in KRS 45A.625² from the development stages of the Kentucky government motor vehicle fleet’s transition from fossil fuels to the implementation stage. Rather than containing language such as “[t]he Finance and Administration Cabinet shall *develop* a strategy,”³ “the cabinet shall report to the Legislative Research Commission: [t]he strategy for transitioning,”⁴ or “[t]he strategy for increased use of”⁵ alternative fuels, section 45A.625 now reads, “[t]he Finance and Administration Cabinet shall *implement* a strategy,”⁶ “the cabinet shall report to the Legislative Research Commission *on its progress in*: [t]ransitioning to”⁷ reduced

1. KY LEGIS 82 (2023), 2023 Kentucky Laws Ch. 82 (SB 281).
2. Ky. Rev. Stat. Ann. § 45A.625 (West 2023).
3. Ky. Rev. Stat. Ann. § 45A.625(1) (West 2022) (emphasis added).
4. *Id.* § 45A.625(2), (2)(a) (emphasis added).
5. *Id.* § 45A.625(2)(b) (emphasis added).
6. Ky. Rev. Stat. Ann. § 45A.625(1) (emphasis added).
7. *Id.* § 45A.625(2), (2)(a) (emphasis added).

emissions or alternative fuel motor vehicles, and “[i]ncreasing the use of”⁸ alternative fuels.

Also, it substantially amends section 45A.625 at one other point. Where the statute read, “[i]ncrease the use of ethanol, cellulosic ethanol, biodiesel, and other alternative transportation fuels as defined in KRS 152.715 to reduce state government’s dependence on petroleum-based transportation fuels, where possible,”⁹ it now reads, “[i]ncrease the use of ethanol, cellulosic ethanol, biodiesel, and other alternative transportation fuels as defined in KRS 152.715 to levels that are commensurate with the increase in vehicles managed by the Office of Fleet Management that are capable of utilizing those alternative transportation fuels.”¹⁰ The other changes to this statute are updates to deadlines related to its action provisions to reflect future dates.¹¹

The Governor of Kentucky signed SB 281 into law on March 23, 2023, becoming effective on June 29, 2023.

B. Regulatory Developments

There were no substantial regulatory developments involving oil and gas law in Kentucky from August 1, 2022, to July 31, 2023.

II. Judicial Developments

Two noteworthy cases in the research period involved oil and gas, both coming from the United States Court of Appeals for the Sixth Circuit. *Bluegrass Materials Co., LLC v. Freeman*¹² expounded on oil and gas law in motions for summary judgment. *MRP Properties Company, LLC v. United States*¹³ tested a novel theory that a refinery owner was entitled to contribution under CERCLA because of the federal government’s alleged control of the petroleum industry during World War II.

8. *Id.* § 45A.625(2)(b) (emphasis added).

9. Ky. Rev. Stat. Ann. § 45A.625(1)(b) (2022) (emphasis added).

10. Ky. Rev. Stat. Ann. § 45A.625(1)(b) (emphasis added).

11. Ky. Rev. Stat. Ann. § 45A.625(1)(a), (2).

12. *Bluegrass Materials Co., LLC v. Freeman*, 54 F.4th 364 (6th Cir. 2022).

13. *MRP Properties Co., LLC v. United States*, 72 F.4th 166 (6th Cir. 2023), reh’g denied, No. 22-1789, 2023 WL 5498748 (6th Cir. July 26, 2023).

*A. Bluegrass Materials Company, LLC v. Freeman*¹⁴

1. “Paying Quantities as a Material Fact”

In *Freeman*, Bluegrass, a landowner, tried to obtain a declaratory judgment by the court that the oil and gas lease between Bluegrass and the Freemans had terminated because the Freemans failed to produce oil in paying quantities, amounting to ceasing oil production under the habendum clause in their lease.¹⁵ The trial court granted summary judgment to the Freemans, holding that the termination of the lease was improper.¹⁶

The appellate court held that the definition of paying quantities is a matter of fact for a trier of fact to decide. The Freemans’ expert testified that they produced oil in paying quantities so long as the revenues, after royalty payments, exceeded operating costs.¹⁷ However, the trial court did not find that the Freemans had produced paying quantities of oil by any meaningful definition; instead, it was satisfied that the Freemans operated at “modest levels.”¹⁸ The appellate court further opined that the Freemans’ cease in production was not ipso facto termination but was a material dispute for a factfinder.¹⁹ Whether the cessation was unreasonable must be decided by a trier of fact. The court did not find the cessation in production as determinative because there is disputed evidence that there may have been marketing of existing production over the cessation such that the oil was still in paying quantities.²⁰

The United States Court of Appeals for the Sixth Circuit reversed and remanded the trial court’s order granting the Freemans’ motion for summary judgment.

*B. MRP Properties Company, LLC v. United States*²¹

1. “State Control Under CERCLA”

In *MRP*, Valero, among other plaintiffs, sought contribution from the federal government for cleanup costs, under a theory that the United States was an “operator” of World War II oil refineries because of its absolute

14. *Bluegrass Materials Co., LLC v. Freeman*, 54 F.4th 364 (6th Cir. 2022).

15. *Id.*

16. *Id.* at 367.

17. *Id.* at 372. The appellate court appears to endorse this as the correct test.

18. *Id.*

19. *Id.*

20. *Id.*

21. *MRP Properties Co., LLC v. United States*, 72 F.4th 166 (6th Cir. 2023), reh’g denied, No. 22-1789, 2023 WL 5498748 (6th Cir. July 26, 2023).

“production directives, rationing schemes, and wartime inspections.”²² The trial court granted partial summary judgment to Valero, holding that the United States' control over what and how much refineries would produce was absolute such that “any reasonable juror would find that the United States operated each site during the war.”²³ The appellate court granted the United States an interlocutory appeal.

The court held that the United States was not an operator. An operator, under CERCLA²⁴, is an entity that manages, directs, or conducts operations, specifically related to pollution. Control over waste disposal qualifies an entity as an operator.²⁵ The appellate court held that the government was in consultation with oil refinery companies and that the relationship was one where refineries made internal strategic decisions with the help of the United States.²⁶ The pressing demand from the government, the restrictions on petroleum because of a wartime economy, and mandated governmental inspections did nothing to change this relationship.²⁷ Despite the government rationing materials necessary for oil refinement and forcing refineries to shift focus toward government production, the appellate court was unconvinced.²⁸ The United States imposed regulations on oil refineries, some stricter than normal because of wartime demand, but the court held that this did not make the United States an operator.²⁹

The United States Court of Appeals for the Sixth Circuit reversed the trial court's order granting Valero's motion for partial summary judgment.

22. *Id.* at 170.

23. *Id.*

24. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–75.

25. *MRP*, 72 F.4th at 170–71.

26. *Id.* at 172.

27. *See generally id.*

28. *See generally id.*

29. *Id.* at 174.