



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

Environmental Litigation/Common Law: Does the Use of TCE and VOC By a Ball Bearing Plant Constitute An Abnormally Dangerous Activity?

Arkansas Environmental, Energy, and Water Law Blog

03/16/2016

The United States District Court (Western District Missouri) addressed in a March 9th opinion a plaintiff's common law claim that:

... the operation of the plant by Defendants FAG and Allison entailed the use, storage, and disposal of large quantities of TCE and VOCs, which constituted an *abnormally dangerous* activity.

See *Jodelle L. Kirk v. Schaeffler Group USA, Inc., et al.*, 2016 WL 928721.

The parties in the common law environmental damage litigation filed cross-motions for judgment as a matter of law.

Defendants in the environmental litigation argued against Plaintiff's claim for strict liability contending operating a ball bearing plant using TCE is, as a matter of law, not an abnormally dangerous activity under Missouri law.

The court reviewed a decision from the Eastern District of Missouri involving a Superfund site which outlines the various factors courts consider to determine whether an activity is abnormally dangerous. That court rejected an argument that land disturbing activities were abnormally dangerous even though they involved excavation of a known Superfund site without the installation of erosion control measures and stockpiling of contaminants near a ravine. The court noted that:

... Plaintiffs' true complaint is with the *manner* in which Fronabarger conducted its activity, and not the activity itself. Plaintiffs' claim that Fronabarger excavated the land *in such a manner* that led to increased erosion of their property. Plaintiffs have not shown Fronabarger's excavation to be akin to activities involving blasting and nuclear emissions, where the risk of harm simply cannot be lessened by additional precautions and care. Plaintiffs' claim is one of negligence, not strict liability.

See *Wilson Rd. Dev. Corp v. Fronabarger Concreters, Inc.*, 971 F. Supp. 2d 896, 916-17 (E.D. Mo. 2013).

The *Kirk* decision cites the *Wilson Rd.* opinion finding it a similar situation. The court determined Plaintiffs' claim was not directed at an activity, but rather goes to the *manner* in which FAG Bearings engaged in the activity of operating a ball bearing plant using TCE. The court also applied the factors for determining abnormally dangerous activities to the operation of a ball bearing plant using TCE as a solvent and reached the conclusion that it did not constitute an abnormally dangerous activity.

The remainder of the opinion addressed Plaintiff's negligence per se claim. The court held as a matter of law that the elements of negligence per se claim were not present.

[Click here to download a copy of the opinion.](#)