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# Benzene & Emerging Toxic Torts

LITIGATION REPORT

May 2021

TRACKING CASE NEWS AND DEVELOPMENTS IN BENZENE AND EMERGING TOXIC TORT LITIGATION

## IN THIS ISSUE:

9<sup>th</sup> Circuit Affirms \$25 Million Verdict, Finds Damages Reduction Proper

Page 6

Wash. Federal Court Terminates Proceedings In Benzene Case

Page 7

Plaintiffs Support Remand of Benzene, TCE Claims

Page 8

Former Goodyear Employee Seeks to Amend Suit Against DuPont

Page 9

New York Court Creates Consolidated Docket for Baby Food Cases

Page 11

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## The Intersection of Religious Rights and Environmental Claims

*A Commentary by Jim Shelton of Phelps Dunbar LLP  
See Author Bio on Page 4*

In November 2020, the Adorers of the Blood of Christ, a religious order of Roman Catholic women (Sisters), filed a lawsuit in federal court in Pennsylvania against Transcontinental Gas Pipeline Company (Transco).<sup>1</sup> The Sisters allege that Transco violated their religious liberties by running a pipeline through property owned by the Sisters.

### Background

Under the Natural Gas Act, 15 U.S.C. § 717 *et seq.* (NGA), the Federal Energy Regulatory Commission (FERC) has the power to issue certificates that authorize private developers to construct, operate, and maintain interstate natural gas pipeline projects. *Adorers of the Blood of Christ v. Federal Energy Regulatory Commission*, 897 F.3d 187, 189 (3<sup>rd</sup> Cir. 2018), *citing* 15 U.S.C. § 717f(c). Before FERC can grant such a certificate, it must, in most circumstances, set the matter for a hearing and provide reasonable notice to interested parties. *Id.*, *citing* § 717f(c)(1)(B). If FERC ultimately

issues the certificate following the requisite hearing, any aggrieved person may seek judicial review of its decision – either in the Court of Appeals for the District of Columbia Circuit or the circuit where the natural gas company is located or has its principal place of business. *Id.*, *citing* § 717r(b). The statute provides that the chosen court of appeals then has “exclusive” jurisdiction “to affirm, modify, or set aside” FERC’s order. *Id.*, *citing* § 717r(b), (d)(1). But prior to seeking review in the relevant court of appeals, the aggrieved party must apply for rehearing before FERC within thirty days of the issuance of the certificate. *Id.*, *citing* § 717r(a). If the aggrieved party fails to first seek rehearing before FERC, then it is statutorily barred from later seeking judicial review. *Id.*

In 2015, Transco filed an application with FERC under the NGA to construct a pipeline called the Atlantic Sunrise Pipeline (Pipeline).<sup>2</sup> In February 2017, FERC issued an order which authorized Transco to construct

Continued on Page 3

# Table of Contents

## COMMENTARY

The Intersection of Religious Rights and Environmental Claims <i>A Commentary by Jim Shelton of Phelps Dunbar LLP</i>	1
--	---

## ROUNDUP EXPOSURE NEWS

9 <sup>th</sup> Circuit Affirms \$25 Million Roundup Verdict, Finds Reduction of Punitive Damages Proper <i>Hardeman v. Monsanto Co.</i> , No. 19-16636, 19-16708 (9th Cir.).	6
--	---

## TOXIC/BENZENE EXPOSURE NEWS

Wash. Federal Court Terminates Proceedings in Benzene Case After Parties Stipulate to Dismissal of Final Defendant <i>Hesterman, et al. v. RPM International Inc., et al.</i> , No. 18-01821 (W.D.Wash.).	7
--	---

N.Y. Court Dismisses Breach of Warranty Claim as Time-Barred in Benzene MDS Suit <i>Lotrean, et al. v. 3M Co., et al.</i> , No. 153361/2020 (N.Y. Sup. Ct., New York Cty.).	7
--	---

Plaintiffs Support Remand of Benzene, TCE Claims Pending Against Safety-Kleen <i>Pridgin v. Safety-Kleen Corp., et al.</i> , No. 21-00720 (N.D. Texas).	8
--	---

## WATER CONTAMINATION EXPOSURE NEWS

Former Goodyear Employee Seeks to Amend Suit Against DuPont in Ortho-Toluidine Exposure Case <i>Casten v. DuPont de Nemours Inc., et al.</i> , No. 21-00004 (W.D. N.Y.).	9
---	---

Crum & Forster Specialty Insurance Co. Moves for Summary Judgment in PFOA Coverage Lawsuit <i>Crum &amp; Forster Specialty Insurance Company v. Chemicals, Inc.</i> , No. 20-03493 (S.D. Texas).	10
---	----

## FLAVORINGS EXPOSURE NEWS

Iowa Court Holds Status Conference in Flavorings Case Filed by ConAgra Brands Employees <i>Smith, et al. v. Givaudan Flavors Corp., et al.</i> , No. 19-00026 (S.D. Iowa).	10
---	----

## BABY FOOD LITIGATION NEWS

New York Court Creates Consolidated Docket for Baby Food Cases Pending Against Hain Celestial <i>In Re: Hain Celestial Heavy Metals Baby Food Litigation</i> , No. 21-0678 (E.D. N.Y.).	11
--	----

## TALCUM POWDER EXPOSURE NEWS

Canadian Government Releases Report Finding Talc May be Harmful to Human Health	11
---	----

Court Reverses \$117 Million Asbestos Talc Verdict, Cites Failure of Trial Court to Perform Gatekeeping Function <i>Lanzo v. Cyprus Amax Minerals Co., et al.</i> , No. A-5711-17, A-5717-17 (N.J. Super. Ct., App. Div.).	12
---	----

## VERDICT REPORT

A Listing of the Benzene and Toxic Tort Verdicts Reported on by HarrisMartin	12
--	----

## DOCUMENT

<i>Crum &amp; Forster Specialty Insurance Company v. Chemicals, Inc.</i> ; S.D. Texas; Motion	22
---	----

## The Intersection of Religious Rights and Environmental Claims

Continued from Page 1

and operate the Pipeline. *Adorers of the Blood of Christ*, 897 F.3d at 192.

The order granted Transco the right to take private property for the Pipeline by eminent domain. *Id.* The Sisters refused to grant Transco an easement, so Transco began condemnation proceedings against them. *Id.* The Sisters did not answer Transco's complaint and Transco obtained an injunction which granted Transco access to and rights of way on the Sisters' land. *Id.* The Sisters did not object, appeal, or seek rehearing regarding the condemnation proceedings. *Id.*

The Sisters then sued FERC and Transco, alleging that FERC violated their religious rights under the Religious Freedom Restoration Act (RFRA), 42 U.S.C., § 2000bb-1, and seeking to enjoin the Pipeline from running across their land. *Id.* Broadly speaking, RFRA prohibits the government from substantially burdening a person's exercise of religion, even if the burden results from a rule of general

applicability, unless the government demonstrates that the burden is the least restrictive means to further a compelling government interest. *Id.* at 194, citing 42 U.S.C. § 2000bb-1(a)-(b). The district court dismissed the Sisters' complaint and the Sisters' appealed. *Id.* at 193.

On appeal to the 3<sup>rd</sup> Circuit U.S. Court of Appeals, the Sisters claimed that RFRA and the NGA conflict, and so the NGA must yield to RFRA. *Id.* The 3<sup>rd</sup> Circuit disagreed, finding that the NGA provides the exclusive procedure for challenging a FERC order. *Id.* at 193-95. "[T]he NGA is the exclusive remedy for matters relating to the construction of interstate natural gas pipelines. It forms the paradigm by which FERC operates in matters related to interstate natural gas pipelines. By failing to avail themselves of the protections thereunder, the [Sisters] have foreclosed judicial review of their substantive RFRA claims." *Id.* at 195.

However, the 3<sup>rd</sup> Circuit left the Sisters an opening. The 3<sup>rd</sup> Circuit found that the Sisters could not challenge FERC's approvals for the Pipeline, but it did not address whether the Sisters had a claim for damages under RFRA. *Id.* at n. 11 and 12.

Transco brought a separate action in Pennsylvania federal district court for a determination of what amount of money represented just compensation for Transco's taking of the Sister's property. The Sisters attempted to assert a counterclaim in the compensation proceeding for money damages due to the alleged violation of their rights under RFRA. The district court found that the Sisters could not bring their RFRA claim in the limited context of a condemnation action, but did not foreclose the Sister's right to pursue such damages in a separate action. The district court found that "RFRA provides that an aggrieved party may bring an action for damages under [RFRA] in a judicial proceeding. Accordingly, the [Sisters] are free to raise their RFRA claim for monetary damages in a separate action."<sup>3</sup>

## The Sisters' File a Complaint in a Separate Action

In 2018, Transco constructed the Pipeline across multiple states. The Pipeline ran directly through the Sisters' property. In November 2020, the Sisters filed a new complaint in a separate action in federal court in Pennsylvania. The Sisters "believe that God calls humans to treasure land as a gift of beauty and sustenance that should not be used in an excessive or harmful way."<sup>4</sup> The Sisters allege that their religious practice is "to protect, preserve and treasure the land that [they own], recognizing the interconnectedness and oneness that humans have with creation."<sup>5</sup>

The Sisters allege that Transco knew they opposed their land being used for a pipeline because doing so violated their deeply-held religious beliefs, but that Transco nonetheless condemned



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their property and proceeded to construct the Pipeline across their property.<sup>6</sup> According to the Sisters, “Transco’s actions to force the Sisters to use land that [they] own in fee simple to accommodate and facilitate a fossil fuel pipeline in perpetuity is antithetical to the deeply-held religious beliefs and convictions of the [Sisters]. It places a substantial burden on the [Sisters’] exercise of religion by taking land owned by the [Sisters] that [they] seek to protect and preserve as part of their faith and, instead, uses it in a manner and for a purpose that actually places the Earth and their property at serious risk.”<sup>7</sup>

The only claim the Sisters asserted is that Transco violated RFRA. The Sisters seek compensatory and punitive damages, prejudgment interest, attorney’s fees, and costs.<sup>8</sup>

## What’s Next?

The text of RFRA applies to the “government,” and appears to foreclose lawsuits between private parties. *See, e.g., General Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 409-11 (6th Cir. 2010); *Mathis v. Christian Heating & Air Conditioning, Inc.*, 158 F.Supp.3d 317, 325-28 (E.D. Penn. 2016). The Sisters appear to be relying on the cases cited above which stated the Sisters could file a separate action. Even so, the Sisters’ lawsuit raises several interesting questions, including the availability of RFRA to sue private, non-governmental parties, and the availability of money damages, if any, against such parties. It should be monitored to see if it is a one-off case or if it will generate additional lawsuits asserting environmental and toxic tort claims based on alleged violations of RFRA, especially since several states have passed state-law versions of RFRA.

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## Endnotes

<sup>1</sup> Adorers of the Blood of Christ v. Transcontinental Gas Pipeline Company, in the United States District Court for the Eastern Division of Pennsylvania, Case No. 2:20-cv-05627.

<sup>2</sup> Sisters’ Complaint, ¶ 67.

<sup>3</sup> Transcontinental Gas Pipe Line Co. LLC v. Permanent Easement for 1.02 Acres, the United States District for the Eastern District of Pennsylvania, Civil Action No. 17-1725 (Document 48), <https://www.docketbird.com/court-documents/Transcontinental-Gas-Pipe-Line-Company-LLC-v-Permanent-Easement-For-1-02-Acres-and-Temporary-Easements-For-1-65-Acres-in-West-Hempfield-Township-Lancaster-County-Pennsylvania-Tax-Parcel-Number-3000462100000-et-al/MEMORANDUM-OPINION-SIGNED-BY-HONORABLE-JEF->

FREY-L-SCHMEHL-ON-6-25-20-6-25-20-ENTERED-AND-COPIES-NOT-MAILED-TO-ATTORNEY-AND-E-MAILED/paed-5:2017-cv-01725-00048.

<sup>4</sup> Sisters’ Complaint, ¶ 1.

<sup>5</sup> Sisters’ Complaint, ¶ 1.

<sup>6</sup> Sisters’ Complaint, ¶ 2.

<sup>7</sup> Sisters’ Complaint, ¶ 2.

<sup>8</sup> Sisters’ Complaint, 118-129.

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