April 18, 2011

Connecticut Supreme Court Upholds Trial Court on Federal Preemption, Standing

In a decision to be officially released April 19, 2011, the Connecticut Supreme Court affirms the trial court's dismissal of a three-count complaint seeking to prevent a nuclear generating facility from implementing an increase in power generating capacity (the "Uprate"). In *Burton v. Dominion Nuclear Connecticut, Inc.*, S.C. 18603, the Court holds that (1) the doctrine of preemption barred the plaintiff's claims related to radiological impacts; (2) the plaintiff lacked standing under the Connecticut Environmental Protection Act ("CEPA") to claim unreasonable pollution from nonradiological impacts; (3) the plaintiff lacked standing to bring a public nuisance claim; and (4) the plaintiff lacked standing to bring a claim under the Connecticut Unfair Trade Practices Act ("CUTPA"). The Court further opines that there was no classical aggrievement.

Background

The plaintiff, Nancy Burton, filed her complaint on October 23, 2008, alleging that the Uprate at the Millstone Power Station facility in Waterford, Connecticut, would release increased levels of toxic, radioactive and thermal contaminants to the environment. She sought an injunction under CEPA along with damages pursuant to the common law of public nuisance and CUTPA.

On November 3, 2008, Dominion Nuclear Connecticut, Inc. ("DNC") moved to dismiss the plaintiff's three-count complaint and accompanying Application for Temporary Restraining Order for lack of subject matter jurisdiction. On January 7, 2009, the trial court issued its decision granting DNC's Motion to Dismiss all three counts. The trial court found that Ms. Burton had failed to adequately allege either statutory standing or classical aggrievement. The trial court further held that the doctrines of preemption and primary jurisdiction provided additional grounds for dismissal of the plaintiff's action. The plaintiff appealed the trial court's dismissal on March 9, 2009, to the Appellate Court. On April 20, 2010, the Supreme Court transferred the appeal to itself and subsequently held oral argument on the appeal on December 6, 2010.

Discussion

Concluding that the federal government has expressly preempted state authority "over radiation hazards and safety as well as radiological discharges from nuclear power plants," the Supreme Court affirms the trial court's dismissal of the plaintiff's radiological claims. As part of its finding of federal preemption, the Court rejects the plaintiff's common law public nuisance claim relating to radiological discharges, holding that under the federal Price-Anderson Act such claims can be pursued, if at all, only in federal court.

Regarding the plaintiff's claim that she had statutory standing to bring a Section 22a-16 action under CEPA, the Supreme Court, addressing a body of CEPA case law that has been in a state of constant flux and confusion, finds that the plaintiff's allegations "merely state in the most generic terms that the uprate...will cause harm to the environment. In other words, the plaintiff's allegations are without the kind of *substantive heft* required" to advance a colorable claim of unreasonable pollution under CEPA (emphasis added). The Court distinguishes the allegations in the underlying complaint related to increases in the temperature of the plant's cooling water released into the environment from those that led the Court, in *Burton v. Commissioner of Environmental Protection*, 291 Conn. 789 (2009), to find standing under CEPA. The Supreme Court finds that the plaintiff's reliance on that earlier case was "misplaced" because her complaint lacked any allegation of "impropriety

relating to the permit renewal proceeding or a violation of any other part of the regulatory scheme under which the defendant operates the facility... ."

The Supreme Court further concludes that the plaintiff failed to satisfy the elements needed to sustain a public nuisance or CUTPA claim and to make the requisite showing necessary to demonstrate that she was classically aggrieved. Much like its conclusion that the plaintiff's allegations lacked the "heft" necessary to confer standing under CEPA, the Court finds the allegations in the complaint insufficient to grant standing as to each such cause of action.