

State Environmental Agency Must Pay Damages Resulting from Breach of Agreed Order

A Marion Superior Court has awarded Raybestos Products Company (“Raybestos”) an \$11.645 million judgment against the Indiana Department of Environmental Management (“IDEM”). The Court found IDEM breached its agreement that Raybestos could clean up contamination pursuant to an actual site-specific, risk-based evaluation rather than an arbitrary low cleanup number. Midway through the cleanup procedure, IDEM decided it no longer wanted to follow the agreement, and asked USEPA to force Raybestos to clean up to a level not based on any actual site-specific risk. The judgment may be supplemented by an additional \$4.8 million in future and other costs Raybestos has sought. IDEM has appealed.

In February 1997 IDEM and Raybestos entered into an Agreed Order. The Agreed Order governed investigation and cleanup of polychlorinated biphenals (“PCBs”) and lead in an area known as Shelly Ditch in Crawfordsville. The cleanup was supposed to be comprehensive. According to the Agreed Order, “the objective of the removal [was] to address human health concerns and bring the site to closure such that no further actions are required.”

The Agreed Order required Raybestos to complete certain sequential steps, obtaining approval from IDEM for each step. Raybestos was first required to evaluate the extent of the damage, prepare a Risk Assessment to evaluate the actual risk posed by the PCBs, prepare a Technical Memorandum defining cleanup goals based on the conclusions of the Risk Assessment and complete the cleanup. Raybestos prepared and filed the Risk Assessment. IDEM was required under the Agreed Order to approve or disapprove the Risk Assessment. On March 16, 1998, after 15 months of review both by its staff and an outside risk assessment contractor, IDEM approved Raybestos’ Risk Assessment. Raybestos then prepared and submitted a Technical Memorandum. IDEM’s staff suggested a “hot spot” cleanup and Raybestos agreed to remove all PCBs to a maximum remaining concentration of 238 ppm in the worst areas.

In 1998, IDEM experienced a change in top administration and a new Commissioner was appointed. In August 1998, the new Commissioner visited Crawfordsville and publicly promised residents that Shelly Ditch would be cleaned up promptly. Although the Agreed Order contained a dispute resolution mechanism to address any disagreements between IDEM and Raybestos as to the cleanup, IDEM did not invoke that process. That failure was crucial. Instead, on November 30, 1998 IDEM unilaterally “disapproved” Raybestos’ Technical Memorandum and “withdrew” its approval of the Risk Assessment.

Beginning at least as early as September 1998, IDEM also sought to involve EPA in the Shelly Ditch enforcement under numerous programs, including RCRA, TSCA, and CERCLA, as a means of requiring a cleanup different than the cleanup required by the Agreed Order. On October 25, 1999 IDEM sent a referral letter to EPA for “necessary enforcement action against Raybestos.” EPA accepted that referral on October 29. At a December 15, 1999 public meeting, IDEM and EPA told the public that EPA was getting involved in the Shelly Ditch cleanup because of IDEM’s request. Nearly a year later, on December 6, 2000, EPA issued a unilateral agreed order (“UAO”) requiring Raybestos to clean up Shelly Ditch.

In response to IDEM's actions, Raybestos went through the administrative appeal process. This process began in 1998 and ultimately resulted in a June 1, 2001 order from the Marion County Superior Court finding that IDEM arbitrarily withdrew approval of the Risk Assessment, though there was nothing wrong with that Risk Assessment, and that IDEM had improperly used that withdrawal as a basis to disapprove the Technical Memorandum. The court ordered IDEM to reinstate approval of the Risk Assessment and approve the Technical Memorandum. After a second order issued compelling IDEM to act, IDEM sent a September 10, 2001 letter purporting to comply with the June 1 Order. However, despite Raybestos' requests IDEM expressly declined to make any efforts to regain control of the Shelly Ditch cleanup from the EPA.

Raybestos filed suit in July 2002 seeking declaratory relief and damages for the increased cost of the EPA-mandated cleanup. On July 6, 2004, Judge Robyn Moberly granted partial summary judgment to Raybestos finding that the "Agreed Order is a settlement agreement, a contract"; IDEM's requests for EPA intervention were a breach of contract as a matter of law; IDEM had a legal duty to abide by its agreement with Raybestos and to take no actions contrary thereto; and "IDEM's statutory ability, and obligation at times, to seek the intervention of the EPA was not a justification for its breach of the Agreed Order." The court reserved for trial the question of whether IDEM's requests to EPA were a substantial factor in bringing about EPA's involvement in the Shelly Ditch cleanup and, ultimately, its issuance of the UAO to Raybestos requiring a much more expensive cleanup.

Following a six-day trial in late 2005, the court entered findings of fact outlining IDEM's repeated efforts to involve EPA in the Shelly Ditch cleanup, efforts the court described as "a planned, organized, persistent campaign to use EPA to force a different cleanup." The court found that "IDEM was actively soliciting, encouraging and insisting upon EPA involvement" and that, while Raybestos may have accepted the risk that EPA would over-file when it entered the Agreed Order with IDEM, Raybestos did not accept the "risk" that IDEM would "instigate, encourage facilitate and insist upon the EPA over-filing." The court found that IDEM's repeated requests to EPA in breach of the Agreed Order were a least a substantial cause, and most likely the direct cause, of EPA's involvement in the Shelly Ditch cleanup. In closing, the court explained:

Indiana citizens deserve to have government honor the agreements it enters with them. If IDEM is not required to abide by the agreements it enters, Indiana's citizens will have no incentive to enter such agreements and IDEM's ability to achieve cleanup of environmental problems will be substantially impaired.

Public policy considerations weigh in favor of encouraging voluntary cleanup of Indiana's environmental problems. Citizens like Raybestos should be encouraged to enter agreements with IDEM for appropriate cleanup rather than spending time and money litigating whether they are ultimately responsible. Where disagreements develop during the course of cleanups, IDEM can, and should, pursue dispute resolution through the provisions it includes in its agreements. While this judgment includes a substantial cost which ultimately is borne by our

taxpayers, the damages involved are the consequence of IDEM's actions, and all our citizens have an interest in the government abiding by its promises. Hopefully such an award will prompt more careful adherence to IDEM's obligations. Sometimes, substantial awards against public entities are necessary to effect careful attention to keeping promises; other courts have awarded such damages in similar cases. *E.g.*, *Entergy Arkansas, Inc. v. State of Nebraska*, 226 F. Supp. 2d 1047, 1161 (D. Neb. 2002) *Aff'd* 358 F.3d 528 (8th Cir. 2004); *reh'g and reh'g en banc denied* 366 F.3d 688 (8th Cir. 2004). Ultimately, Indiana's citizens will benefit from encouraging responsible action from its public agencies.

The June 12 judgment left unresolved Raybestos' claims for attorney fees under an exception to the American Rule for third-party litigation resulting from the breach of contract. Raybestos sought to recover the fees it incurred in defending against the EPA enforcement actions and overseeing the EPA-mandated cleanup of Shelly Ditch. In addition, Raybestos and IDEM stipulated prior to trial that they would try the case as to IDEM's liability for Raybestos' damages through September 20, 2003 and address post-September 20, 2003 damages after the court entered judgment on Raybestos' initial claim. The court heard evidence on both of these issues on September 8, 2006. Raybestos is seeking an additional \$4.8 million dollars, including approximately \$520,000 in attorney fees. The court's judgment on these additional costs is pending.

Every citizen has an interest in the State adhering to the agreements it makes, not subverting them. This case may reaffirm that principle in Indiana.

[The case is *Raybestos Products Company v. The Indiana Department of Environmental Management*, Marion Superior Court, Cause No. 49D12-0209-PL-001553. Please contact George Plews (gplews@psrb.com) or Brett Nelson (bnelson@psrb.com) at Plews Shadley Racher and Braun with questions or to request a copy of the decision.]