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Appellate Court Applies Rules of Contract Interpretation to Underground Slurry Storage and Disposal Lease

BY JOHN H. HENDERSON

Court opinions construing and interpreting leases are often very fact specific. As one might expect, in *Campbell v. White Cnty. Coal, LLC*, 2023 IL App (5th) 220302U, the fifth district appellate court engaged in a very fact-specific analysis of an underground slurry storage and disposal lease and determined that "Slurry"[1]—as used in the lease—included

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Illinois Supreme Court Addresses Liability Based on Environmental Statutes and Regulations

BY CRAIG R. HEDIN

The Illinois Supreme Court recently issued an opinion in Case No. 2024 IL 129628. The case was styled *Laura E. Rice, et al vs Marathon Petroleum Corporation et al*. The opinion was filed on May 23, 2024. The opinion discusses whether there could be liability based upon a violation of the Illinois environmental statutes and regulations governing underground storage tanks. At issue is whether the statutes and regulations create a private right of action, either express or implied. The opinion

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both water and coal slurry, not water alone. The court further concluded and that the coal operator had elected to dispose of—rather than store—Slurry and thus was not required to make a perpetual slurry storage rental payment. *Id.* ¶ 1.

The Facts of the Case

On February 7, 2008, several White County landowners (the "Campbells") and an underground coal operator, White County Coal, LLC ("WCC"), entered in an "Underground Storage Lease." The lease contained several provisions central to the decisions of the circuit court and the appellate court.

First, a recital in the lease defined Slurry and identified the purpose that WCC, as coal operator, was entering into the lease.

> WHEREAS, Lessee wishes to inject, store and/or dispose of water and coal slurry ("Slurry") into the underground voids, passageways and corridors created by the mining and removal of the No. 6 seam of coal within the Pattiki I Mine Area (the "Voids"), … .

The granting clause further clarified the injection, storage, and disposal rights granted to WCC.

> Lessors do hereby lease, let and demise unto Lessee all of Lessors' right, title and interest in and to all Voids … together with the sole and exclusive right to utilize such Voids for the purpose of injecting, storing and disposing of Slurry, … .

Finally, the monthly rental clause established the monthly rental amount and specified when those rentals would be due.[2]

The Parties' Legal Positions

The Campbells filed a motion for summary judgment, which asserted they were entitled to monthly rental payments for those months that WCC injected solely water into the voids as well as for the months that WCC stored Slurry within the voids. *Id.* ¶ 7.

WCC filed a cross-motion for summary judgment, which countered that the lease did not provide that monthly rental payments would be owed for months in which only water—and not Slurry—was injected into the voids. WCC further argued that no payments were due for storage because WCC was not *storing* the Slurry in the Voids. Rather, WCC argued that it had *disposed* Slurry into the voids. *Id.* ¶ 8.

If the Campbells' interpretation were held to be correct—such that water alone constitutes Slurry under the terms of the lease—then any time water was injected into the voids, it would have been considered to be a Disposal Month and a rent payment would be due. If, however, WCC were correct—and the definition of Slurry required both water and coal slurry—then any injection of water alone would not qualify as a Disposal Month and no payment would be due. *Id.* ¶ 17.

Both parties argued that the lease language was clear and unambiguous.[3] Accordingly, each argued that the circuit court should make a determination regarding the construction of the lease. *Id.* ¶ 9

The Circuit Court Decision

The circuit court granted summary judgment to WCC. The court's order granting summary judgment held that Slurry required a combination of both water and coal slurry. *Id.* ¶ 10.

The circuit court also interpreted the clause "injecting, storing and disposing of Slurry" and found that WCC could inject Slurry into the voids for the purpose of storage or disposal. Whether Slurry would be stored or disposed was to be WCC's option. Further, because the evidence before the court showed that WCC had no intention of extracting it, the circuit court concluded Slurry had been disposed—rather than stored—in the voids.

Accordingly, under the royalty provision of the lease, WCC owed the Campbells a rental only for the month in which both water and coal slurry were injected into the voids. Moreover, WCC did not continue to

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OFFICE
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITOR
Craig R. Hedin

PUBLICATIONS MANAGER
Sara Anderson
sanderson@isba.org

owe a monthly fee for storage of Slurry in the voids in months when no injection was occurring. *Id.*

The Appellate Court Opinion

Rules of Contract Interpretation

The appellate court began its analysis of the issues with a discussion of the rules of contract interpretation. *Id.* ¶ 15. In *Thompson v. Gordon*, 241 Ill.2d 428 (2011), the Illinois Supreme Court described these rules:

> The basic rules of contract interpretation are well settled. In construing a contract, the primary objective is to give effect to the intention of the parties. A court will first look to the language of the contract itself to determine the parties' intent. A contract must be construed as a whole, viewing each provision in light of the other provisions. The parties' intent is not determined by viewing a clause or provision in isolation, or in looking at detached portions of the contract.
>
> If the words in the contract are clear and unambiguous, they must be given their plain, ordinary and popular meaning. However, if the language of the contract is susceptible to more than one meaning, it is ambiguous. If the contract language is ambiguous, a court can consider extrinsic evidence to determine the parties' intent.

Id. 241 Ill.2d at 441 (citations omitted).

Having stated the rules, the appellate court then addressed what constituted Slurry under the terms of the lease and whether WCC had stored Slurry in the voids or whether it had disposed of Slurry in the voids.

Definition of Slurry

The appellate court started its analysis with the definition of Slurry from the lease. ("Lessee wishes to inject, store and/or dispose of *water and coal slurry* ("*Slurry*") into the underground voids … ." (*emphasis added*)

The court observed that, throughout the lease, the term "Slurry" was used exclusively. There were no subsequent references to or use of the terms "water" or "coal slurry." Because the Illinois Supreme Court has defined "and" as meaning "in addition to," the court concluded that both water and coal slurry were required for there to be Slurry. "Water alone is not encompassed by the defined term 'Slurry.'" *Campbell* ¶ 18 (citing *In re M.M.*, 2016 IL 119932, ¶ 21).

Accordingly, injection by WCC of water only (and not coal slurry) did not qualify as a Disposal Month under the lease. For those months where water only was injected, no monthly rental payment was due to the Campbells.

Storage and/or Disposal

Under the Campbells' theory of the case, since Slurry—once injected into the voids—had not been removed, they were due rent for the storage of the Slurry. This reading could potentially require that a monthly rental be paid in perpetuity. Under WCC's view of the case, once Slurry was injected into the voids, it had been disposed—not stored—and no monthly rental was due. *Campbell* ¶ 20.

Turning again to the language quoted in the lease, the appellate court focused on the same clause quoted at the center of the definition of Slurry. (Lessee wishes to *inject, store and/or dispose* of water and coal slurry ("Slurry") into the underground voids … .) (*emphasis added*)

Under the rules of contract interpretation, the court applied the plain and ordinary meaning of "and/or," "which indicates that two words may be taken together or individually." *Id.* ¶ 21. Under the court's reading of the lease, WCC could elect to (i) store and dispose of Slurry, (ii) to store Slurry, or (iii) or to dispose of Slurry. *Id.*

The appellate court appeared to be troubled by the Campbells' position that rent would be owed under the lease until such time that either the Slurry was removed from the voids or the Lease terminated. Under the Campbells' view, rental payments would be owed from the first month that Slurry was injected into the voids and every subsequent calendar month until the Slurry was removed or the Lease terminated. Under that reading, however, the term "Disposal Month" would have been rendered meaningless. Under the principles set forth in *Thompson*, "A court will not interpret a contract in a manner that would nullify or render provisions meaningless, or in a way that is contrary to the plain and obvious meaning of the language used." *Thompson*, 241 Ill.2d at 442. Adopting the Campbell's position would have caused "Disposal Month" to be a meaningless term. The appellate court thus interpreted the lease as giving WCC the option either to store or dispose Slurry in the voids. *Campbell* ¶ 23.

Having determined how the lease was interpreted, the appellate court still had to determine whether WCC had elected to store or dispose Slurry. To resolve this question, the court observed that WCC had submitted an affidavit of a WCC mine engineer stating that coal slurry was a waste product without value. *Id.* ¶ 24. Because the Campbells had not submitted any counter-affidavits on this issue or challenged WCC's affidavit, the statements in the affidavit were not contradicted. The court therefore had no choice but to accept as true that the coal slurry was permanently disposed in the mine voids. Having concluded that WCC had elected to dispose the Slurry into the voids, WCC was obligated to pay rent only for the Disposal Months that Slurry was injected for the purpose of disposing it. *Id.* ¶ 25.

Final Thought

Several years ago, in *Mitchell/Roberts P'ship v. Williamson Energy, LLC*, 2020 IL App (5th) 190339-U, 164 N.E.3d 77, 444 Ill. Dec. 452 (Ill. App. 2020), the fifth district appellate court provided a lengthy analysis of a deed conveying coal rights. In *Campbell v. White Cnty. Coal, LLC*, the same appellate court provided a similar analysis of a slurry lease.

In the *Mitchell/Roberts P'ship* decision, the court observed that a deed interpretation in a given case is "largely irrelevant" to another deed or another case because each transaction and each deed is presented in a different factual situation or context. However, the court's opinion does provide a structure under which deeds and other instruments should be analyzed to determine the intent of the parties and the effect of provision in those instruments.

Similarly, the determination of the meaning of Slurry or whether Slurry had been stored or disposed under the *Campbell* decision will likely be similarly irrelevant to construction of another lease because another lease will almost necessarily involve

a different factual situation or context. However, the appellate court's opinion does remind us of the rules to be applied when interpreting contracts. Accordingly, both the *Mitchell/Roberts P'ship* decision and the *Campbell* decision will likely be cited by attorneys and courts as future Illinois cases turn on issues interpreting deeds and other agreements.■

1. Slurry, when capitalized herein, refers to the term "Slurry"—as defined and used in the lease at issue in *Campbell*—and not the lay definition of "coal slurry."
2. 2. (a) As rental for the rights granted hereunder (the "Monthly Rental"), Lessee shall pay to Lessors, in the proportions set forth on Exhibit 'C attached hereto and incorporated herein by reference, the following sums:
i. Beginning on January 1, 2008 and extending through and including the twelfth (12) Disposal Month (as defined below), the sum of $25,000.00 per month for each month during the term of this Lease in which Lessee, at any time during such month, injects, stores and/or disposes of Slurry in any Voids within the Pattiki I Mine Area (each such month a "Disposal Month"), same to be payable on or before the 15th day of the month following such Disposal Month;
ii. Beginning in the thirteenth (13th) Disposal Month and extending through and including the twenty-fourth (24th) Disposal Month, the sum of $20,833.33 per Disposal Month, same to be payable on or before the 15th day of the month following such Disposal Month;
iii. Beginning in the twenty-fifth (25th) Disposal Month, and extending until the expiration or termination of this Lease, the sum of $10,000 per Disposal Month, same to be payable on or before the 15th day of the month following such Disposal Month."...
3. The lease had been prepared by attorneys for both parties, so the court did not need to address whether the lease should be construed against the party who had drafted it.

Illinois Supreme Court Addresses Liability Based on Environmental Statutes and Regulations

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could have relevance in conjunction with any asserted liability based upon statutes and regulation pertaining to environmental issues associated with oil and gas operations.

The case arose when the plaintiff, who is the appellant in the appeal, was injured while she was laundering her clothes in her condominium complex. The appellant died during the course of the litigation and the case was continued by a special representative. The defendants, who are the appellees for purposes of the appeal, were owners and operators of a gas station more than a mile from the plaintiff's condominium. The defendants stored gasoline in a leaking underground storage tank. The defendants were the gas station, the gas station manager, and the gas station owner. The gas station was connected to a common sanitary sewer system by way of a sanitary sewer line on the gas station premises that was routed to a reclamation district sanitary sewer. A storm sewer system managed by DuPage County was located under a portion of the gas station. Both sewer systems were identified as existing and potential migration pathways that could be adversely affected by a release from the gas station's underground storage tank system.

A high water warning system was triggered which resulted in monitoring of specific storage tanks. The monitoring indicated a release or displacement of gasoline from the tank into the surrounding area and environment. The defendants were not aware of the release or displacement. The gasoline migrated through soil and entered the sanitary sewer system with the result that the gasoline and associated vapors were transported away from the gas station and in the direction of the plaintiff's condominium.

An odor resembling nail polish remover and a high lower explosive limit of unknown origin was detected in apartments just east of the plaintiff's condominium. The apartment was about 1.5 miles from the gas station. The day after the odor and explosive limit were detected, the plaintiff was laundering her clothes in the residential laundry room of the condominium. When the plaintiff activated the clothes dryer, a spark from the dryer ignited gasoline vapors and caused an explosion. The plaintiff suffered second degree burns over at least 10 percent of her body along with other injuries. Several other explosions and fires occurred on the same day. The plaintiff's residence was significantly damaged and she was unable to return to her home for over a year while the damage was remediated.

Prior to the explosion, the Village of Willowbrook Public Works Division had traced a source of the odors and vapors to the gasoline released from the gas station.

Litigation was commenced by the plaintiff against the defendants. The complaint alleged liability based upon negligence and strict liability. The defendants filed a motion to dismiss the counts based upon strict liability arguing that the counts were duplicative of actions brought by the Attorney General on behalf of the State of Illinois and also on the basis that the plaintiff lacked standing to bring an action for private remedies under the Illinois Environmental Protection Act (Act). The trial court granted the motion to dismiss the counts pertaining to strict liability for failing to state a claim upon which relief could be granted. The trial court concluded that the Act did not provide a private right of action for plaintiff's requested remedies.

The Appellate Court affirmed the dismissal of the counts based upon strict liability. It concluded that the plaintiff did not have a private right of action, express or implied, under the leaking underground storage provisions of the Act. The complaint did not cite any language in the Act that directly stated third parties may bring a private action to recover for personal injuries. The Appellate Court then applied the four factors to determine whether a private right of action was implied. The Appellate Court concluded that the action was not implied.

The Supreme Court discussed the statute that created the Leaking Underground Storage Tank program and related environmental statutes and regulations. The court reviewed the Resource Conservation and Recovery Act of 1976 (RCRA), the Leaking Underground Storage Tank program (LUST), and the Gasoline Storage Act. The plaintiff contended that these statutes and the

related regulations form an interconnected regulatory scheme to govern underground storage tanks in Illinois and that they together anticipate private remedies.

The Supreme Court held that there is no express private right of action under the LUST program provisions of the Act. If the legislature had intended to create an express private right of action, it clearly knows how to do so and in this instance, the legislature did not provide for any such express private right of action. In parroting the Appellate Court, the Supreme Court stated that plaintiff's strained interpretation underscores that a private right of action is not clearly and unmistakably communicated in the statute.

The Supreme Court next considered whether or not such a private right of action could be implied under the Act. The court stated that an extraordinary step may be taken to imply a private cause of action in a statute where none is expressly provided only when it is clearly needed to advance the statutory purpose and when the statute would be ineffective as a practical matter unless a private right of action were implied. The court reviewed the four factors to consider when determining if a statute implies a private right of action and implication is appropriate when (1) the plaintiff is a member of a class for whose benefit the statute was enacted; (2) the plaintiff's injury is one the statute was designed to prevent; (3) a private right of action is consistent with the underlying purpose of the statute; and (4) implying a private right of action is necessary to provide an adequate remedy for violations of the statute. Plaintiff asserted that all four factors had been met while the defendants contended that none of the factors has been established. The court found that the plaintiff was not a member of a class that the LUST program under the Act was primarily intended to protect and personal injuries are not the type that the program was designed to prevent. The court further found that implying a private right of action for third parties to recover for personal injuries it not necessary to provide an adequate remedy for violations of the program. The purpose of the Act and its associated regulations is to protect the environment and to minimize environmental damage. The Act was intended to protect resources and not to protect third parties injured by leaking underground storage tanks or to provide them with a cause of action for personal injuries.

The availability and threat of a common law remedy such as a negligence action effectively implements the public policy behind the LUST program of the Act. That remedy, combined with governmental enforcement provisions and the threat of common law liability make it unnecessary to imply a private right of action. The common law negligence action gives effect to the LUST program and the negligence claim, based on the same acts and omissions as plaintiff alleges to have violated the LUST program, is a sufficient remedy and therefor it is not necessary to imply a private right of action. The plaintiff did not prove a clear need for an implied private right of action.■

USEPA Finalizes New Methane Regulations

BY CRAIG R. HEDIN

The USEPA (herein "EPA") published its methane regulations in the Federal Register on March 8. There is concern that the new oil and gas methane emission regulations will jeopardize the continued existence of marginal wells which have minimum production. A large part of Illinois is comprised of marginal wells.

The new regulations will impose strict new standards on releases of methane by the industry including emissions from existing sources. Once the rule takes effect, the regulations will ban flaring of natural gas that is produced by new wells, require companies to monitor for leaks from well sites and compressor stations, and implement reductions to emissions from high emitting equipment like controllers, pumps, and storage tanks.

It is estimated that the new regulations will lead to the shut down of 300,000 of the nation's 750,000 low production wells.

The new EPA regulation creates a 40 CFR Part 60, Subparts OOOO(b) and OOOO(c). New Subpart OOOO(b) applies to oil and gas facilities that were constructed, reconstructed, or modified after December 6, 2022, and requirements under this subpart became effective on May 7, 2024. Subpart OOOO(b) is enforced directly by the EPA.

New Subpart OOOO(c) contains "presumptive standards" that states must implement to govern oil and gas facilities constructed on or before December 6, 2022. These subparts impose monitoring requirements and restrictions concerning associated gas from oil and gas wells. In March of 2024, states were to begin a 24-month planning process for the subpart requirements. In 2026, the states are to submit the subpart implementation plans and begin a three-year period for compliance with the plans. In 2029 the oil and gas industry must comply with the subpart requirements.

Subparts OOOO(b) and OOOO(c) mandate fugitive emissions monitoring requirements for different types of well sites. For Single Wellhead Only Well Sites and Small Well Sites, quarterly Audio, Visual and Olfactory (AVO) monitoring requirements are required and for Multi Wellhead Only Well Sites (two or more wellheads), AVO monitoring requirements are required as well as monitoring and repair mandates based on more expensive semi-annual optical gas imaging. Also imposed are bi-monthly AVO

monitoring requirements together with monitoring and repair mandates for "Well Sites With Major Production and Processing Equipment and Centralized Production Facilities" subject to OOOO(b) and "Well Sites and Centralized Production Facilities" subject to OOOO(c). The regulations rely on several aspects of the equipment associated with a well site to determine whether or not it is small or major.

The new regulation imposes restrictions concerning associated gas and requires that well owners and operators either (1) route associated gas to a sales line, use it for other useful purposes, or recover and reinject into a well; or (2) route the gas to a flare that achieves at least a 95% reduction in methane and volatile organic compound emissions.

Litigation has been commenced in the United States Court of Appeals for the District of Columbia Circuit in Case No 24-1101. In the case, the Michigan Oil and Gas Association and Miller Energy Company II, LLC, are petitioners and the EPA together with Michael S. Regan, Administrator, and others are respondents. A motion has been filed in the proceedings to stay the enforcement of the regulations.

Other cases have also been commenced challenging the proposed regulation. One case is the Independent Petroleum Association of America together with various state oil and gas associations, including the Illinois Oil and Gas Association, which case is versus the EPA and others. This case is No. 24-1103. The lead case among the cases that have been filed is the *State of Texas et al vs EPA Etal* being Case No. 24-1054. Case Nos. 24-1101 and 1103 have been consolidated with Case No. 24-1054. All of the cases are pending in the United States Court of Appeals, District of Columbia Circuit. The following comments pertain to the arguments presented in Case Nos. 24-1101 ad 1103.

In support of the stay, the petitioners contend that the EPA regulations are constrained by the Clean Air Act pursuant to the Act's plain language and by rule making standards. On promulgating standards of performance, the EPA must take into account the cost of achieving any emission reduction and the non-air quality, health and environmental impact, and energy requirements. The EPA must determine that such standards have been adequately demonstrated.

The petitioners contend that the standards of performance provisions prevent the EPA from mandating measures that impose exorbitant, unreasonable, or excessive costs. Furthermore, the EPA cannot cause expense greater than the industry could bear and survive. The methods promulgated must be reasonably reliable, reasonably efficient, and reasonably expected to serve the interests of pollution control without becoming exorbitantly costly in an economic or environmental way. The petitioners contend that these standards are not met and that the regulation requirements will impose exorbitant and unreasonable costs on the oil and gas industry.

The motion for stay contends that courts must consider four factors in deciding whether or not to grant the stay. It is asserted that the factors are met and that the petitioners are likely to succeed because: the EPA failed its statutory duties by not adequately accounting for the methane rules impacts on marginal wells; the Clean Air Act requires the EPA to conduct a cost benefit analysis that balance both sides of the equation in setting new source performance standards; petitioners will suffer irreparable harm without a stay in the form of compliance costs that will be immediately imposed; and the stay will substantially injure other interested parties and that the public interest favors a stay.

The motion to stay requests that the regulations be held in abeyance until the petitioners' petition for review can be considered and acted upon by the court. Oral arguments will be scheduled on the motions to stay with a court decision to follow.

The regulation will have a considerable effect on the Illinois oil and gas industry. Production in Illinois is primarily comprised of marginal wells. The cost involved for regulatory compliance will be expensive and in all likelihood result in the plugging of a large number of wells.■

Oil and Gas Advisory Board

BY CRAIG R. HEDIN

The Oil and Gas Advisory Board had its quarterly meeting on May 2, 2024. The following issues were discussed:

- The Department is proposing the elimination of the rule that authorizes a permittee to conduct a fluid level test without the presence of a Department representative as to inactive production wells (Section 240.1130) and inactive Class II UIC wells (Section 240.1132). A proposed rule would allow the Department to assess and collect annual fees of $100 per well for each well that is in temporary abandonment status. Pursuant to a further proposed rule, the Department will also grant temporary abandonment status for injection wells for successive periods in accordance with Section 240.1132 if the well remains in compliance and the permittee submits detailed geological engineering or economical evidence that based on industry standards the well remains viable for future oil and gas development purposes. This same provision already exists for production wells.
- Sections 240.905, 1205, and 1900 are in the process of rule promulgation. These rules pertain to a revision of fees for waste transportation system, test wells, and conversions.
- Section 240.1305 pertaining to permits in a coal mining area now allows for notice to the coal company by utilizing an authorized agent by a national courier service or by personally delivering a notice to the coal company or its authorized agent. Previously, notice could only be given by registered mail.
- Section 240.360 as to the Area of Review on an application for a Class UIC Well now allows the Department to consider expert opinions as to geological and engineering conditions in determining whether or not there is adequate amount of cement to protect the freshwater zone.
- An update was given on the plugging of orphan wells pursuant to the grant from the U. S. Department of Interior as to the Infrastructure Investment and Jobs Act. Since the beginning of 2024, 77 wells have been plugged with a total of 426 wells now having been plugged pursuant to the program. There are 54 work orders in process. The sum of $18.3 million has been spent to plug the 426 wells. The initial grant was approximately $20 million. The Department is working with the Department of Interior for a second round of funding in the amount of $36 million. The initial grant will be in the range of $20 to $25 million with the intent to continuously receive $9 to $10 million for each fiscal year for plugging contracts. The Department is also attempting to obtain additional state funding for plugging in the amount of $30 million.
- A report was given on the grant from the U. S. Department of Energy and the USEPA for mitigating emissions for marginal conventional wells. The amount of $17 million has been awarded with $14 million going for the plugging of wells. The Department is currently finalizing the accounting procedures with the Department of Energy. The Department will be working with the ISGS for implementation of the program. Currently 300 to 350 wells have been identified a being qualified for plugging.
- The Advisory Board continues to discuss a regulation as to the designation of drilling units when prior wells have been drilled on a boundary line of two or more drilling units or less than 10 feet from the drilling unit boundary. The Department has prepared a proposed form OG-10A entitled Request for Permit Amendment to Designate Drilling Unit for Previously Permitted Oil Production Well. The rule will allow an operator to designate the 10-acre drilling unit for such a well which will then open up other acreage for designation as drilling units. Without this ability, an entire quarter-quarter section can be sterilized because a single well would be considered on multiple drilling units.
- The Board discussed a proposal by the Department to Section 240.1130(d)(3) which provides for the setting of a cast iron plug if a fluid level test indicates fluid higher than 100 feet below the base of the fresh water. At issue is whether cement could be utilized in lieu of a bridge plug. The Department proposed that cement could not be utilized because it would indicate more absence of permanency of use of the well which would be contrary to the temporary abandonment purpose. Board members countered the Department's position by stating that cement and bridge plugs can both be easily removed and that there is not any difference between the two situations. The Department indicated that it would take the comments in consideration in making any final decision for a rule amendment.■