Implications of New 10th Circuit Opinion On Oilfield Contamination Litigation

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The United States Court of Appeals for the Tenth Circuit has lowered the threshold level of evidence necessary to withstand summary judgment in oilfield pollution nuisance cases and held an Oklahoma regulation prohibiting pollution may be the foundation for a claim of negligence per se.

Lazy S Ranch Properties LLC v. Valero Terminaling and Distribution Company, --- F.4th ---, 2024 WL 564323 (10th Cir. February 13, 2024) (reversing 2022 WL 17553001 (E.D. Ok. December 7, 2022)).

Lazy S Ranch and Valero are litigating an oilfield pollution case in which the Ranch claims damages ranging from $13 million to more than $43 million. The Ranch's sole evidence of legal injury was the presence of an odor of refined hydrocarbons emanating from one place, a cave, on the 6,165-acre ranch. Two witnesses testified the odor in the cave was strong enough to give them headaches. The Ranch did not contest scientific testing evidence showing the trace amounts of contaminants found on the Ranch were not harmful or dangerous. The Ranch never notified a regulatory agency of the contamination, workers on the Ranch continue to drink the water through a filter, and cattle continue to graze on the property. No one ever told the Ranch that its water was unsafe to drink or sell. In addition, the Ranch presented no evidence of intentional trespass or breach of ordinary care by Valero or that Valero even knew there was a leak from its pipeline. The Ranch identified only one leak from Valero's pipeline – a visible drip from a mechanical union two miles south of the cave where the odor was found. There had been a substantial release in 2018 six miles away from the Ranch; however, the Ranch presented evidence from experts that the trace contaminants found were fresh and could be no more than three to six months old.

The United States District Court for the Eastern District granted summary judgment for Valero, finding there was no evidence to support a genuine issue of material fact to support any of the Ranch's claims, including not only the trespass, negligence, and constructive fraud claims, but also its claims for public nuisance, private nuisance, and negligence per se. On February 13, 2024, a Tenth Circuit three-judge panel, in a split decision, reversed and remanded the nuisance and negligence per se claims for trial. Judge Phillips dissented from the majority.

Oklahoma's Statutory and Regulatory Prohibitions on "Pollution."

Key to the majority's decision were two provisions - one a statute and the other a regulation, together with their respective underlying definitions of "pollution" - which it held supplied the foundation for the Ranch's nuisance and negligence per se claims.

> ***27A O.S. § 2-6-105(A):*** It shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state. Any such action is hereby declared to be a public nuisance.

> ***27A O.S. § 2-1-102(12):*** "Pollution" means the presence in the environment of any substance, contaminant or pollutant, or any other alteration of the physical, chemical or biological properties of the environment or the release of any liquid, gaseous or solid substance into the environment in quantities which are or will likely create a nuisance or which render or will likely render the environment harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, or to property.

Okla. Admin. Code § 165:10-7-5(a): **General.** Pollution is prohibited. All operators, contractors, drillers, service companies, pit operators, transporters, pipeline companies, or other persons shall at all times conduct their operations in a manner that will not cause pollution.

> ***Okla. Admin. Code § 165:10-1-2:*** **Definitions. "Pollution"** means the contamination of freshwater or soil, either surface or subsurface, by salt water, mineral brines, waste oil, oil, gas, and/or other deleterious substances produced from or obtained or used in connection with the drilling, development, producing, refining, transporting, or processing of oil or gas within the State of Oklahoma.

<u>Key Holdings</u>

(1) "Under 27A O.S. § 2-1-102(12), [a landowner] can "succeed by showing *either* pollution amounting to a nuisance *or* pollution rendering the environment harmful, detrimental, or injurious." (emphasis added) The landowner "need not show both."

(2) "The finding of a private nuisance based on the unlawful release of substances into the environment necessitates the finding of a public nuisance also."

(3) If a genuine issue of material fact exists as to nuisance in a pollution case based on 27A O.S. § 2-5-105(A), then it also exists as to a claim for negligence per se.

(4) Oklahoma Administrative Code § 165:10-7-5 applies to a claim for negligence per se arising from alleged oilfield contamination.

Based on these holdings, the majority found that Lazy S Ranch had established a genuine issue of material fact sufficient to support their claims of nuisance and negligence per se by presenting generalized evidence that one or two people felt a headache while near an odor of hydrocarbons in a cave. While agreeing "the law does not allow relief on the basis of an unsubstantiated phobia," the majority also pointed to other evidence in support of its reversal that would typically fall into that exact category:

(1) one witness testified that he feared igniting a lighter (and so he didn't);

(2) the Ranch owner decided to forego water sales and prohibit third parties from recreating on the property as a result of the cave odor, even though no one told him the water on the ranch was unsafe to drink or sell.

Analysis

I. The Lazy S Ranch decision dilutes the threshold requirement that a condition must be "substantial" to constitute a nuisance.

Oklahoma common law requires a plaintiff claiming nuisance to show "substantial interference with the use and enjoyment of real property." *Taylor v. Delaware Cnty. Solid Waste Tr. Auth.*, 2021 OK CIV APP 48, 503 P.3d 1216, 1221. Even the enactment of a statutory definition of nuisance to be an unlawful act or omission which "[a]nnoys, injures, or endangers the comfort, repose, health, or safety of others" has been deemed too generic to abrogate the requirement of "substantial interference." *Id.* Oklahoma courts have employed this "substantial interference" yardstick to differentiate between legally cognizable injury on one hand and "trifling annoyance, inconvenience, or discomfort" on the other. *See e.g., Laubenstein v. Bode Tower, L.L.C.,* 2016 OK 118, ¶ 11, 392 P.3d 706, 710 (collecting cases).

Cases meeting the "substantial interference" threshold included:

- Poisoned cattle from leaking hydrocarbons above safe levels;
- Saltwater pollution rendering a landowner's water well permanently unpotable;
- Physical damage to a landowner's premises from vibrations from the operation of an adjacent oil and gas well;
- Death of cattle and an uninhabitable home due to raw sewage flowing freely across a landowner's property from a malfunctioning septic system;
- Multiple homes rendered uninhabitable from pervasive noise, dust and emissions from nearby cotton oil mill and cotton gin;
- Neighbors suffering nausea, loss of appetite, and serious discomfort in their homes from noxious odors and green fly infestation resulting from multiple animal carcasses being left on the property of a desiccating plant.

In *Laubenstein*, the Oklahoma Supreme Court observed that in "each of the cases, plaintiffs faced either ***physical injury*** to their property or the offensive activity rendered their homes ***uninhabitable***." 2016 OK 118, ¶ 12, 392 P.3d 706, 711 (emphasis in original).

The Tenth Circuit's analysis in *Lazy S Ranch* dilutes the long-standing threshold of "substantial interference." The odor in *Lazy S Ranch* was found in only one location on a 6,150-acre ranch – a cave. The plaintiff's evidence of injury was scant and subjective, at best. No homes were uninhabitable. The Ranch workers continued drinking water, albeit through a filter plaintiff installed. Two people testified the odor in the cave gave them a headache – so they left the cave. One person feared igniting a lighter – so he didn't. Another witness, a spelunker, chose not to explore the cave due to the smell. The Ranch owner feared allowing others to buy the Ranch's water, even though no one told him the water was unsafe to drink or sell, so he unilaterally declined water sales. The Ranch never notified a regulatory agency of the contamination, and cattle continued to graze safely on every inch of the property.

The Lazy S Ranch decision emphasizes the headache testimony above all else. A decision that two headaches caused by strong odors found only in one cave on a 6,150-acre ranch can survive summary judgment on a claim for nuisance will make it much more difficult to avoid trial on future cases involving odors from alleged oilfield contamination.

II. The Lazy S Ranch Decision Creates a "Daisy Chain" of Liability Between Private Nuisance, Public Nuisance, and Negligence Per Se.

The Tenth Circuit's decision in *Lazy S Ranch* breaks new legal ground in Oklahoma. No court construing Oklahoma law had previously applied Oklahoma's statutory definitions of "pollution" to a private landowner's claim for negligence per se. The holding is significant because the court's reasoning appears to create a daisy chain of liability: if there is sufficient evidence of a *private* nuisance arising from alleged contamination, then there will automatically be sufficient evidence of a *public* nuisance and negligence per se.

The *Lazy S Ranch* court started by juxtaposing 27A O.S. § 2-6-105(A) and § 2-1-102(12). Under the former, "pollution of any waters of the state is a public nuisance." Under the latter, "pollution" is defined as the release of substances "into the environment in quantities which are or will likely create a nuisance." The court reasoned that the creation of a "private nuisance based on the unlawful release of substances into the environment necessitates the finding of a public nuisance also." Thus, in one fell swoop, the Tenth Circuit reasons a single release of contaminants will constitute both a public and a private nuisance if there is sufficient evidence for a trier of fact to determine that it "substantially interfered" with the "ordinary comforts of human existence." Though this may seem inconsequential at first glance, it effectively eliminates the statute-of-limitations defense with regard to claims of pollution. While a claim for private nuisance is subject to a two-year statute of limitations period, the Oklahoma legislature has mandated that "[n]o lapse of time can legalize a public nuisance." 50 O.S. § 7; *see also Blocker v. ConocoPhillips Co.*, 380 F. Supp. 3d 1178, 1187 (W.D. Okla. 2019) ("Oklahoma authority dictates that public nuisances are not subject to a limitations period."). Thus, *Lazy S*'s private-to-public leap potentially subjects operators to pollution claims stemming from injuries suffered decades earlier – even when those injuries affect only a small portion of a single landowner's property.

The Tenth Circuit majority then took the analysis further. The court reasoned that because the definition of pollution "requires a finding of a nuisance or environmental harm," it qualifies as a substitute standard for the common law duty of reasonable care and "applies for negligence per se purposes." In other words, if there is sufficient evidence of a private nuisance arising from contamination of the environment – of any quantity – then all three claims for private nuisance, public nuisance, and negligence per se must be submitted to a jury. And, as set forth above, testimony about two headaches occurring as a result of an odor found in a cave far from any residence on a 6,150-acre ranch now appears sufficient for a jury trial.

In subsequent litigation on this issue, defense counsel should work to limit the scope of this court's decision solely to cases involving waters of the state (i.e., 27A O.S. § 2-6-105(A)). Given the court's reasoning, it really makes no sense to extend the court's ruling beyond this particular provision.

III. The Lazy S Ranch Decision Allows For Negligence Per Se Based On A Regulatory Definition of Pollution That Employs A Strict Liability Concept.

The Tenth Circuit also held that Oklahoma Administrative Code § 165:10-7-5 applied to the Ranch's negligence pe se claim. This is particularly remarkable because that regulation does *not* require a finding of nuisance or environmental harm. In fact, the regulation does not contain *any* "positive objective standard." *Cf. Chartney v. City of Choctaw*, 2019 OK CIV APP 26, ¶ 11, 441 P.3d 173, 177

("A negligence per se instruction is not appropriate where the terms of the [regulation] do not impose positive objective standards." (citing *Smith v. Barker*, 2017 OK CIV APP 69, ¶ 29, 419 P.3d 327, 333).

The cited provision is part of a regulatory scheme that employs a concept of strict liability. Under OAC § 165:10-7-5, "[p]ollution is prohibited." Period. There is no threshold stated in the regulation, and the definition of "pollution" in § 165:10-1-2 also contains no express threshold or standard. Thus, any amount of contaminant released into the environment is defined as "pollution."

The court's application of a regulation imposing a "strict liability" schema for regulatory purposes to a claim for negligence per se is unprecedented in Oklahoma law. The court cited to *Farris v. Masquelier*, 2022 OK 91, ¶ 20, 524 P.3d 942, 950, *reh'g denied* (Jan. 17, 2023) for the proposition that "the Oklahoma Supreme Court has seemingly approved the application of the Oklahoma Administrative Code for negligence per se purposes." However, the code cited in *Farris* contained detailed requirements for operation of minimum outlet conduits in dams in order to prevent interference with natural streamflow. There were "positive objective standards" for dam construction, which lay at the heart of the plaintiffs' claim in *Farris*. In Lazy S Ranch, the cited regulation contains no such positive, objective standards. Oklahoma law requires that a regulation impose "positive, objective standards" before it can serve as a foundation for a claim of negligence per se. *See, Smith v. Barker*, 2017 OK CIV APP 69, ¶ 29, 419 P.3d 327, 333; *Chartney v. City of Choctaw*, 2019 OK CIV APP 26, ¶ 11, 441 P.3d 173, 177.

Advice for Industry

The Tenth Circuit's decision will likely make it more difficult to obtain summary judgment in oilfield contamination cases. Despite developing very favorable scientific evidence establishing that any hydrocarbon contamination was well within safe standards, Valero's legal arguments were derailed by two witnesses who testified they got headaches while standing in a cave that smelled like diesel fuel. This relaxation of objective, standards-based evidence for pollution cases will lead to more litigation and result in more trials.

So what should industry participants consider doing to further protect themselves?

Before Litigation:

1. ***Use contracts such as surface use agreements to preemptively address pollution risks:*** To promote good relations with surface estate owners, consider incorporating pollution provisions into land use agreements such as easements and surface use agreements that proactively address pollution liability and remediation obligations.

2. ***Increase your environmental monitoring.*** Your best defense is to minimize releases of any contaminants. While a zero-release target may not be feasible, a culture of active monitoring can prevent undetected releases, result in swift remediation, and lower the risk of claimed injuries. Reach out to environmental professionals who can help you design effective liquids and waste management systems and promote a culture that lowers your risk.

3. ***Consider your third-party vendor risks.*** You are only as strong as your weakest link. If your vendors do not share your culture of minimizing releases and active monitoring, then their pollution-risk becomes your pollution-risk. Some companies fail to ensure their vendors are handling potential contaminants in an environmentally safe manner because they want to avoid the appearance of active supervision that may erode independent contractor status and lead to vicarious liability. There are ways to handle both, such that requiring contractors to observe environmentally sound practices will not be considered evidence of "employment."

Furthermore, ensure that all third-party vendor contracts contain appropriate indemnities and you are verifying your vendors' insurance coverage with you as an additional insured and a waiver of subrogation. Reach out to experienced legal counsel to help you navigate these risks.

4. ***Implement a regular cycle for environmental auditing.*** Well-designed systems and strong cultures can weaken over time. Equipment ages; slowly developing issues can be overlooked during daily or weekly observations. Environmental audits reveal valuable information that can be remedied before they become problems, and they are entitled to a self-audit privilege under Oklahoma law. Experienced legal counsel and environmental consultants can help you.

5. ***Perform your due diligence when acquiring new assets.*** Under Oklahoma law, every successive owner of property who neglects to abate a continuing nuisance upon, or in the use of such property, created by a former owner, is liable therefor in the same manner as the one who first created it. 50 O.S. § 5. Thus, whether before you buy or after, you should consider an environmental audit of the new asset.

6. ***Ensure you have adequate pollution coverage.*** Most general liability and property policies have limited coverage for damage caused by pollution. Even when some pollution coverage exists, it is generally limited to "sudden and accidental" pollution. Review your insurance coverage to ensure that if a claim is made against you for pollution from an asset you operate, there will be coverage to protect you. Simply looking at your policy limits isn't enough. You need to understand the exclusions, conditions, and notice requirements in your policy.

7. ***React swiftly when incidents occur, or complaints are made.*** Do you have incident response plans? Do they include not only active incidents, such as a well control incident or pipeline release, but also response to discovery of a legacy release or a landowner complaint? Many of the same principles apply: swift identification of scope, mitigation, remediation, and prevention of regulatory and litigation risks. Take reports of contamination seriously, react swiftly, and put your best foot forward with reporting to landowners and regulators.

When Litigation Arises:

1. **Consider the appropriate jurisdiction and forum for pollution issues:** Under Oklahoma law, the Oklahoma Corporation Commission (OCC) has "exclusive jurisdiction" over "the handling, transportation, storage, and disposition of saltwater, mineral brines, waste oil, and other deleterious substances," including "the construction and operation of pipelines" and "site remediation" associated with oilfield related pollution. *E.g.*, 17 O.S. § 52(A); 52 O.S. § 139(A) and (B). Moreover, the OCC has a Conservation Division with a Manager of Pollution Abatement and staff with specialized knowledge who enforce "the rules, regulations and orders relating to . . . the prevention of pollution." 52 O.S. § 149(8); *see also* 52 O.S. § 153. Oklahoma courts have recognized the OCC's exclusive and otherwise primary jurisdiction to address oilfield-related pollution, and therefore it may be prudent to engage the OCC to investigate nuisance claims related to oilfield pollution in order to determine the source of the pollution and develop an appropriate risk-based remediation plan. Oklahoma law supports a stay of litigation pending exercise of the OCC's jurisdiction, and assuming the OCC identifies the source and responsible parties and develops a remediation plan that will abate the nuisance, such exercise may greatly affect the remedies available to private litigants.

2. ***Don't lose sight of the non-scientific evidence.*** As in the *Lazy S Ranch* case, oilfield contamination litigation routinely involves scientific testing to determine the presence and levels of contaminants and a battle of experts on causal factors such as hydrologically connected groundwater pathways, plume migration, and alternative sources of contaminants.

Those are important and often unavoidable. Valero developed objective scientific evidence in its favor, and the Ranch's generalized and subjective testimony about "headaches" appears to have been presented in the summary judgment response briefing as more of an afterthought. The dissent and the district court described this evidence as buried in deposition transcripts. The Ranch's response brief on summary judgment mentioned the word "headaches" only once. Yet the Tenth Circuit's reversal hinges on this evidence, reminding all trial lawyers: don't lose sight of non-scientific evidence during depositions and written discovery.

3. ***On Summary Judgment, Cover The Alternatives.*** This decision confirms nuisance is an alternative basis for pollution liability. Under the three-judge panel's reasoning, a plaintiff need not show the pollution was actually harmful to the environment, only that it created a nuisance. So, even when Valero closed the door to evidence of any actual harm from contamination, the Ranch was able to pivot to generalized nuisance evidence. In this way, the decision must serve as a reminder to defendants seeking summary judgment: all essential elements of a cause of action must be addressed, not just one of the alternatives. Defendants must extend their defense strategy beyond showing scientific evidence that contaminants were not harmful to also showing there was no "substantial interference" with the "ordinary comforts of human existence."

4. ***Differentiate generalized discomfort evidence from "substantial interference."*** While this decision erodes the standard of showing "substantial interference" to support a nuisance claim, it does not appear to have been fully briefed by the parties. The appellate majority pulled the evidence of multiple headaches from transcripts buried in the summary judgment evidence. When defending an environmental contamination case with a nuisance claim, spend time in discovery and briefing to differentiate generalized discomfort evidence from the "substantial interference" typically required under Oklahoma law.

GableGotwals attorneys have deep experience in these areas. Our lawyers have helped clients avoid litigation through proactive counseling on environmental management strategies and practices, leading environmental audits, preparing incident response plans, exercising incident response drills, providing insurance coverage reviews, and participating in active incident response in the field. We also have successfully litigated numerous oilfield contamination cases through trial and appeal.


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