Section of Environment, Energy, and Resources
AMERICAN BAR ASSOCIATION

Superfund and Natural Resource Damages Litigation Committee Newsletter

Vol. 11, No. 3 August 2016

MESSAGE FROM THE OUTGOING CHAIR

Russ Randle

Dear colleagues—ABA Committee chairs are term limited and mine expires July 31, 2016. It has been a pleasure to serve as your chair the last two years and to work with such able practitioners and colleagues. I will remain active with the committee and the section, and look forward to seeing more of you at future conferences. I am delighted with the ABA's choice of your new chair, John Gullace, who is able and enthusiastic for our work together. With all best wishes.

Russ Randle *is the outgoing chair of the Superfund and Natural Resource Damages Litigation Committee.*

MESSAGE FROM THE VICE CHAIRS

Kirk O'Reilly, Carolyn McIntosh, and Brian Ferrasci-O'Malley

We have been privileged to serve as the Superfund and Natural Resource Damages Litigation Committee Newsletter vice chairs for 2015–2016. In this, our last issue for the year, we wanted to thank all of the authors whose articles helped make the newsletter a success. We also would like to commend our committee chair, Russ Randle, for his leadership, hard work, and innovation. Russ developed the concept of regional reporters to report key rulings across the country on a nearly real-time basis. Russ enlisted reporters and engaged committee members Andrew Schulkin and Paul Brookner, vice chairs for Public Service and Electronic Media, and Mary Wilke and Roy Shelley, vice chairs for Social Media, to ensure that regional reports were posted, tweeted, and otherwise circulated. We want to recognize our 2015–2016 regional reporters: Kegan Brown, Region 1; Gary Gengel, Region 2; Kate Campbell, Region 3; Don Anderson, Region 4; Tom Lupo and Gregory DeGulis, Regions 5 and 6; Eric Weslander, Region 7; Stephen Smithson, Region 8; Patrick Paul, Region 9; and Elizabeth Black, Region 10. Thank you! Our last issue is packed with timely and useful information. The lead article briefly identifies why new TSCA legislation matters to Superfund practitioners. This is followed by an analysis of two recent opinions awarding oversight costs to two northwestern tribes. We then have an article focused on NRD allocation. The final article addresses what is currently known about EPA's hardrock mining financial assurance rulemaking. We round out the issue with a compilation of our recent regional reports. Enjoy!

Kirk O'Reilly, **Carolyn McIntosh**, *and* **Brian Ferrasci-O'Malley** *are committee newsletter vice chairs for the Superfund and Natural Resource Damages Litigation Committee.*

Superfund and Natural Resource Damages Litigation Committee Newsletter
Vol. 11, No. 3, August 2016
Brian Ferrasci-O'Malley, Kirk O'Reilly, and Carolyn McIntosh, Editors

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LANDMARK TSCA REFORM LEGISLATION BECOMES LAW, AS EPA BEGINS IMPLEMENTATION

Stephen A. Owens
Squire Patton Boggs (US) LLP

On June 22, 2016, President Barrack Obama signed into law the Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, the landmark legislation modernizing the decades-old Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 et seq. The Lautenberg Act is the first substantive update of TSCA since it was passed 40 years ago in 1976 and signed into law by President Gerald Ford. The Lautenberg Act was approved by large majorities in both houses of Congress: a 403-12 margin in the U.S. House on May 24, 2016, and by a unanimous voice vote in the U.S. Senate on June 7, 2016.

The Lautenberg Act makes a number of significant changes to TSCA, including:

- Requiring the Environmental Protection Agency (EPA) to evaluate chemicals (both new and existing chemicals) to determine whether they present an "unreasonable risk of injury to health or the environment under the conditions of use."
- Prohibiting consideration of costs or other non-risks factors in chemical evaluations.
- Requiring EPA to consider potentially exposed or susceptible subpopulations in evaluating chemicals.
- Requiring EPA to designate existing chemicals on the TSCA Inventory (the national list of chemicals in commerce) as either "active" or "inactive" (based on whether they have been manufactured, imported, or processed during the last 10 years).
- Requiring EPA to designate active chemicals as high priority or low priority and then conduct risk evaluations on the high-priority chemicals.
- Allowing chemical manufacturers to ask EPA to evaluate a chemical (instead of waiting for EPA to conduct a risk evaluation at the agency's initiation).
- Giving EPA authority to issue administrative orders to require testing of chemicals, instead of having to go through a difficult and time-consuming formal rulemaking process to require testing, as was required under the old TSCA.
- Requiring EPA to reduce the use of vertebrate animals in testing.
- Making it easier for EPA to restrict—or ban—chemicals by eliminating the "least burdensome" requirement for chemical regulations that was the basis for the decision in Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir. 1991), which overturned EPA's rules banning most uses of asbestos.
- Preempting state chemical regulations under certain conditions.
- Putting limits on confidential business information (CBI) claims and allowing EPA to share CBI with states.
- Allowing EPA to charge higher fees for chemical reviews.

The Lautenberg Act became effective immediately upon the president's signature, and EPA already is moving quickly to begin implementation of the act's provisions.

Shortly after President Obama signed the legislation, EPA issued a "First Year Implementation Plan" to guide the agency's efforts to meet the early deadlines in the new law, including (1) identifying an initial list of 10 chemicals for risk evaluations; (2) establishing a process and criteria for identifying high priority chemicals for risk evaluation; and (3) issuing a procedural rule that establishes EPA's process for evaluating risks from high-priority chemicals.

Significantly, EPA has emphasized that the "most immediate effects" from the new law "will be on the new chemicals review process." In contrast to the procedure under the old TSCA whereby EPA

could simply let the 90-day review period for reviewing a new chemical (or a significant new use of an existing chemical) expire without taking action, the Lautenberg Act requires EPA to make a formal affirmative determination that a new chemical (or a significant new use of an existing chemical) is "not likely to present an unreasonable risk of injury to health or the environment . . . under the conditions of use" before the chemical can be manufactured, imported, or processed in the United States.

Because this new requirement is now in effect, EPA announced that the Lautenberg Act "effectively resets the 90-day review period" for companies that submitted premanufacture notices (PMNs) for new chemicals (or significant new use notices (SNUNs) for a significant new use of an existing chemical) prior to the president's signature on the act. In other words, for PMNs and SNUNs submitted before June 22, the 90-day clock was restarted on that day. EPA also stated, however, that it "will make every effort to complete its review and make a determination within the remaining time under the original deadline."

Additionally, EPA has stated that over the next several weeks, it "plans to begin making information available on opportunities to learn more about the changes in the new law and how and when specific stakeholder engagement will begin to take place." The "opportunities for input" may include briefings, webinars, public meetings, and comment periods, according to EPA.

EPA's actions to interpret and implement the numerous new provisions and requirements in the Lautenberg Act in the months ahead will be critically important and will set the tone for EPA's long-term approach to the new law. EPA must soon begin work on several major rulemakings that must be completed within one year of the law's enactment (i.e., by June 22, 2017), as well a number of policies, procedures, and guidance documents that must be completed within two years of enactment (i.e., by June 22, 2018). EPA also must begin to develop early lists of existing chemicals for prioritization and risk evaluation, collect data on chemicals, and initiate risk evaluations on chemicals.

While TSCA and the Lautenberg Act are aimed primarily at regulating the manufacturing, importation, and processing of chemicals in the United States, EPA's implementation of the new law is relevant to issues under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in several ways.

For example, EPA now has both the authority—and the mandate—to evaluate chemicals for safety, and the Lautenberg Act makes it easier for EPA to take regulatory action on chemicals, including significantly limiting—or even banning—chemicals that EPA determines present an "unreasonable risk of injury to health or the environment." Having fewer unsafe chemicals in the marketplace that could adversely affect health or the environment will mean fewer chemicals that could cause health or environmental problems through contamination of our land, water, and air. Moreover, EPA likely will focus its early risk evaluations and regulatory efforts on chemicals that present the greatest risks to health and the environment.

Second, the Lautenberg Act requires EPA to determine whether chemicals are safe under their "conditions of use." The term "conditions of use" means "the circumstances, as defined by [EPA], under which a chemical substance is intended, known, or reasonably foreseen to be manufactured, processed, distributed in commerce, used or disposed of." As part of its evaluation of a chemical, EPA thus will be considering upfront the full range of pathways though which humans and the environment could be exposed to—and adversely affected by—the chemical, including its disposal.

Third, because the Lautenberg Act gives EPA the authority to issue administrative orders to require companies to conduct testing to determine the potential health and environmental effects

of chemicals (instead of having to go through a lengthy formal rulemaking process), more data will be collected on more chemicals more quickly by EPA. And because of the limitations that the Lautenberg Act places on confidential business information (CBI) claims, more data on chemicals will be more publicly available.

Fourth, EPA's implementation of the requirements of the Lautenberg Act could be informed (at least in part) by the agency's experience with CERCLA, especially the years of litigation over the application and interpretation of various key CERCLA provisions. Like the original CERCLA legislation enacted in 1980, the Lautenberg Act was passed by Congress without a formal conference committee process. As a result, like the 1980 CERCLA, there is no conference committee report to help guide EPA as it seeks to interpret and implement the numerous (and unique) provisions in the Lautenberg Act. The U.S. House and U.S. Senate each passed very different versions of TSCA reform legislation in 2015, and members of the House and Senate engaged in informal negotiations over several months in early 2016 to craft the final compromise legislation. While EPA will have the benefit of the reports issued in 2015 by the House Energy and Commerce Committee (H. Rept. 114-176) and the Senate Environment and Public Works Committee (S. Rept. 114-67) on their respective bills, some provisions and language in the Lautenberg Act are simply not addressed in either report. Moreover, statements in the Congressional Record by several members of Congress offer competing (and sometimes conflicting) interpretations of key provisions in the Lautenberg Act. See 162 Cong. Rec. H2989–H3031 (daily ed. May 24, 2016); 162 Cong. Rec. S3511–S3525 (daily ed. June 7, 2016). EPA will need to work closely with stakeholders as it strives to meet the June 22, 2017, deadline it faces for several major rulemakings, in order to avoid litigation that could impede implementation of the Lautenberg Act.

Finally, the Lautenberg Act makes clear that it does not impact any legal actions (including any CERCLA actions) initiated prior to its enactment (i.e., before June 22, 2016). Concerns had been expressed that earlier versions of TSCA reform legislation arguably could have limited—or even precluded—certain legal actions, but the Lautenberg Act expressly states that "nothing in [the Act] shall be interpreted to apply retroactively to any State, Federal or maritime legal action filed before the date of enactment."

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U.S. DISTRICT COURTS IN OREGON AND WASHINGTON ALLOW INDIAN TRIBES TO RECOVER OVERSIGHT AND ENFORCEMENT COSTS UNDER CERCLA

Emerson Hilton and David C. Weber

Two recent federal court decisions have expanded the range of costs that Indian tribes may recover from potentially responsible parties (PRPs) under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). See Confederated Tribes and Bands of the Yakama Nation v. United States, No. 3:14-CV-01963, 2016 WL 406344 (D. Or. Feb. 1, 2016) and Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-256-LRS (E.D. Wash. Apr. 1, 2016) ("April 1 order"). These decisions, both involving contamination at sites along the Columbia River in the Pacific Northwest, clarify that Indian tribes are sovereign entities that need no special authority to recover either oversight or enforcement costs under 42 U.S.C. § 9607(a)(4)(A). The decisions offer new promise for tribes seeking to play a larger role in influencing CERCLA cleanups both within and outside of Indian country. They also represent increased financial exposure for PRPs at many contaminated sites.

Yakama Nation v. United States

In Yakama Nation, the U.S. District Court in Oregon held that CERCLA compelled the federal government to reimburse the Confederated Tribes and Bands of the Yakama Nation for past and future costs associated with overseeing cleanup of the Bradford Island Superfund site. The site is owned and operated by federal PRPs, including the U.S. Army Corps of Engineers. The Corps of Engineers began cleanup efforts in 1997.

In 2014, Yakama Nation sued the government for cost recovery under 42 U.S.C. § 9607(a)(4)(A). Yakama Nation sought to recover approximately $100,000 in response costs, including costs associated with what it characterized as "oversight of the response actions taken by the [government]." Specifically, Yakama Nation sought costs associated with meetings, correspondence, and communications with the government, as well as costs associated with reviewing and commenting on the government's cleanup planning documents. On cross motions for summary judgment, the district court largely adopted the magistrate judge's findings and recommendation (F&R), holding that Yakama Nation could recover past oversight costs. The district court also declared that the government was liable for future Yakama Nation oversight costs.

PRPs are liable for "all costs of removal or remedial action incurred by the United States Government or a state or an Indian tribe" at a facility, as long as those costs are "not inconsistent" with federal cleanup regulations known as the "National Oil and Hazardous Substances Pollution Contingency Plan" (NCP). See 42 U.S.C. § 9607(a)(4)(A). Consistency with the NCP is presumed, and PRPs carry the burden of demonstrating that federal, state, or tribal response costs are not consistent with those regulations. Wash. State Dep't of Transp. v. Wash. Natural Gas Co., PacifiCorp, 59 F.3d 793, 799–800 (9th Cir. 1995). Courts have repeatedly held that indirect costs of overseeing cleanup actions, when incurred by the federal government, are recoverable response costs under 42 U.S.C. § 9607(a)(4)(A). See U.S. v. E.I. DuPont De Nemours & Co. Inc., 432 F.3d 161, 166, 179 (3d Cir. 2005).

In this case, the government argued that Yakama Nation's oversight costs were not response costs because—unlike the federal government—Yakama Nation has no specific authority under CERCLA or the NCP to oversee cleanup actions conducted by other parties. The district court rejected this argument, adopting the magistrate's conclusion that CERCLA "does not contain an authority requirement." See F&R, slip op. at 8.

Pakootas v. Teck Cominco Metals

In the Pakootas case, the U.S. District Court for the Eastern District of Washington held that an Indian tribe could recover enforcement costs—including

attorneys' fees—related to its involvement in litigation at another contaminated stretch of the Columbia River.

This Pakootas decision is the latest of many twists in a long-running CERCLA case involving Teck's "Trail Smelter," which is located just across the border from Washington in Canada. The Confederated Tribes of the Colville Reservation (Colville Tribes) recently brought an action to recover more than $9 million in costs from Teck. The Colville Tribes' cost recovery claim primarily involved fees and expenses for consultants, testifying experts, and attorneys.

The district court initially granted partial summary judgment to Teck, holding that the Colville Tribes could not recover $750,000 in attorneys' fees it advanced to two individual tribal plaintiffs for a citizen suit seeking to enforce a unilateral administrative order issued by EPA. See Pakootas v. Teck Cominco Metals, Ltd., No. CV-04-256-lRS, slip op. at 21 (E.D. Wash. Nov. 16, 2015). In that opinion, the district court concluded that only the federal government could recover "enforcement costs"—defined by the court to mean "attorney's fees attributable to litigation"—under 42 U.S.C. § 9607(a)(4)(A). Id. at 11–12. The district court preserved claims for approximately $8.3 million in additional expenses, including non-litigation attorneys' fees, holding that the Colville Tribes could seek to prove at trial that those expenses were recoverable response costs rather than enforcement costs. See id. at 21.

After trial on the Colville Tribes' remaining expenses, the district court reconsidered and reversed its earlier partial summary judgment order sua sponte. April 1 order, slip op. at 2–3. In its new opinion, the district court noted that "[i]t is a fundamental undisputed proposition that the Tribes are a government, a sovereign entity, just like the federal government and a State," and that CERCLA "lumps these sovereigns together" for purposes of cost recovery claims. Id. at 6. Because tribes and states "are governmental entities with inherent enforcement authority, unlike private parties," the district court found it irrelevant that only the federal government has statutory enforcement authority under CERCLA. Id. at 8–10 (emphasis added).

Again, Indian tribes are entitled to recover "all costs of removal or remedial action" from PRPs, so long as those costs are not inconsistent with the NCP. 42 U.S.C. § 9607(a)(4)(A). The terms "removal" and "remedial action," as used in the statute, "include enforcement activities related thereto." 42 U.S.C. § 9601(25). Because the Colville Tribes have inherent enforcement authority as a sovereign entity, the district court in Pakootas held that they could recover all enforcement costs—including litigation-related attorneys' fees—under 42 U.S.C. § 9607(a)(4)(A). April 1 order at 11–12.

Plain Language, Unprecedented Outcomes

Both the Yakama Nation and Pakootas decisions are unprecedented. To the authors' knowledge, no court prior to Yakama Nation has explicitly awarded an Indian tribe oversight costs, like those typically awarded to the federal government, in an action under 42 U.S.C. § 9607(a)(4)(A). Neither party in that case identified such authority. Likewise, the Pakootas decision openly recognizes that "[n]o court, at least in any published decision," has ever before "determined that an Indian Tribe (or a State for that matter) is, like the federal government, entitled to recover response costs for 'enforcement activities' in a § 9607(a)(4)(A) cost recovery action." Id. at 5.

Despite breaking new ground, Yakama Nation and Pakootas are both ostensibly rooted in a straightforward application of plain statutory language. Both decisions principally cite CERCLA's provision authorizing "the United States Government or a State or an Indian tribe" to recover "all costs" of removal or remedial action not inconsistent with the NCP. 42 U.S.C. § 9607(a)(4)(A) (emphasis added). Strict reliance on the statutory text is consistent with the U.S. Supreme Court's approach to interpreting CERCLA. See

CTS Corp. v. Waldburger, __ U.S. __, 134 S. Ct. 2175, 2185 (2014) ("The Court of Appeals supported its interpretation of [CERCLA's discovery rule] by invoking the proposition that remedial statutes should be interpreted in a liberal manner. The Court of Appeals was in error when it treated this as a substitute for a conclusion grounded in the statute's text and structure."); see also Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 610 (2009); United States v. Atl. Research Corp., 551 U.S. 128, 141 (2007); Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 159 (2004).

The magistrate judge in Yakama Nation observed that "the policy underpinning CERCLA strongly suggests the statute permits Yakama Nation to engage in oversight response actions with respect to the Bradford Island cleanup." F&R, slip op. at 9. But it appears that what ultimately mattered most, in both Yakama Nation and Pakootas, is that CERCLA's statutory language puts Indian tribes on equal sovereign footing with the federal government and states when it comes to recovery of response costs from PRPs. See id. at 8 ("The text of CERCLA does not contain an authority requirement. . . .") (emphasis added); April 1 order at 10–12 & n.8 (citing F&R).

Implications and Open Questions

A key question raised by the Yakama Nation and Pakootas decisions is whether CERCLA permits recovery of tribal oversight and enforcement costs at contaminated sites located outside of Indian country. The Yakama reservation in Washington does not border the Bradford Island cleanup site or the Columbia River at all. The Colville Reservation, also in Washington, borders only a portion of the Upper Columbia River cleanup site at issue in the Pakootas case.

Neither decision addresses the question of territorial or jurisdictional limits on tribal involvement at contaminated sites. Without such limits, numerous tribes could conceivably seek to participate in the cleanup of any site. Large sites—particularly aquatic sites where contamination implicates treaty rights—can involve multiple tribes acting independently. Columbia River contamination could potentially affect the treaty rights of tribes other than the Yakama Nation and Colville Tribes. Indeed, Yakama Nation is one of six tribal entities involved in cleanup efforts at the Portland Harbor Superfund site, located on a tributary of the Columbia River. (Both Oregon and Washington, too, could theoretically claim an interest in the Columbia River as a key resource bordering both states.) Nevertheless, nothing in Yakama Nation or Pakootas necessarily ties cost recovery for oversight and enforcement costs to an established treaty right or any particular type of interest in a given cleanup.

Of course, a tribe or state seeking to enforce CERCLA through litigation would have to satisfy Article III standing requirements to bring an enforcement action. But, Article III standing would not necessarily hinder a cost recovery claim once a tribe has in fact incurred enforcement costs. As for oversight costs, the NCP provides that tribes can be treated like states for purposes of cleanup actions only if, among other things, they have "jurisdiction" over a site. 40 C.F.R. §§ 300.5, 300.515(b). Yakama Nation implicitly suggests, however, that this language does not preclude tribes from seeking to recover response costs incurred at any site in an action under 42 U.S.C. § 9607(a)(4)(A).

Taken at face value, neither Yakama Nation nor Pakootas limits the possibility that multiple tribes and states might engage in overlapping or even duplicative oversight and enforcement efforts and each seek to recover the costs of that work from PRPs. The decisions here suggest that PRPs could face multiple cost recovery claims from multiple tribal and state parties at any given site. Those costs, and the costs of defending one or more cost recovery claims, represent an area of significant financial exposure for PRPs. For tribes, on the other hand, Yakama Nation and Pakootas offer new opportunities to participate in and influence cleanup actions at contaminated sites governed by CERCLA.

Considerations Going Forward

After Yakama Nation, PRPs facing claims for recovery of tribal oversight costs should focus their defense efforts on the substantive nature of the specific costs for which recovery is sought. Regardless of the policy or legal presumptions in favor of allowing tribes and states to recover response costs, such costs must actually be "costs of removal or remedial action" in the first place. 42 U.S.C. § 9607(a)(4)(A). That is, even if tribal "oversight costs" are generally considered response costs, it is possible that specific tribal oversight costs can be attacked as outside the statutory scope of removal and remedial action. Indeed, the district court in Yakama Nation specifically noted that while the government would be liable for any future tribal oversight costs at the Bradford Island site, Yakama Nation "will still be required, in any future action, to demonstrate that the actions for which it is seeking its costs are response actions under CERCLA." 2016 WL 406344, at *2 (internal quotation marks omitted). This may be an onerous task for PRPs, but both Yakama Nation and Pakootas appear to foreclose any argument that tribes are inherently limited to recovering a narrower range of response costs than the federal government.

Both Yakama Nation and Pakootas also highlight how negotiated agreements can help PRPs control and minimize liability for tribal oversight and enforcement costs. PRPs should consider actively engaging with tribes, together with states and the federal government, and agreeing at the outset to fund certain tribal activities at a cleanup. This is not necessarily a novel approach, as PRPs sometimes currently agree to private cost-sharing arrangements and even formal consent decrees under which tribes recover oversight costs. But there is now added incentive for PRPs to minimize future exposure to cost recovery claims deriving from independent tribal oversight and enforcement activities. In exchange for increased funding under an agreement, tribes may be willing to waive future cost recovery claims for expenses that exceed agreed-upon funding amounts.

Similarly, PRPs may be able to avoid paying tribes' enforcement costs by folding tribal parties into initial administrative orders with EPA, or via separate commitments made in PRP–tribal funding agreements. PRPs face uncertainty identifying those tribes from whom they may face future cost recovery claims, however, because neither Yakama Nation nor Pakootas limits tribal cost recovery claims to work related specifically to contamination at sites in Indian country.

Conclusion

For Indian tribes, Yakama Nation is important because it increases the financial feasibility of participating in cleanups, regardless of whether the lead agency is a tribe or even whether the cleanup is in Indian country. Similarly, the latest Pakootas decision reduces financial disincentive for a tribe to take independent legal action to enforce CERCLA. For PRPs, these decisions likely represent an expansion of financial exposure in CERCLA cleanups and litigation, particularly where more than one tribe—or perhaps more than one state, too—becomes involved at a site together with the federal government.

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ALLOCATING NATURAL RESOURCE DAMAGES

Richard W. Dunford

Consider a hypothetical site being remediated under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Suppose that there are six potentially responsible parties (PRPs) for the site and they retained an expert who developed an allocation among them for remediation costs. Will the allocation for natural resource damages (NRD) at the site differ from the allocation for remediation costs? If so, under what circumstances would a separate NRD allocation study be warranted? This article addresses those questions.

Unique Elements of Remediation and NRD Processes

The remediation and NRD processes have unique elements that may drive a wedge between the allocation shares of PRPs for remediation costs and NRD. For example, the remediation process focuses on reducing risks to human health and the environment to acceptable levels. This often involves removing or capping contaminants at the site. In contrast, the goal of the NRD process is to compensate the public for natural resource injuries and service losses that are not addressed by remediation. This goal is achieved through the implementation of restoration projects, which often are off-site. So, the remediation and NRD processes have different goals and different outcomes.

Federal and state agencies and Indian tribes lead the NRD process in their role as trustees on behalf of the public for the injured natural resources. The Environmental Protection Agency (EPA) is the lead agency for remediation in the CERCLA process, but EPA is usually not a trustee in the NRD process. Consequently, different agencies are involved in the remediation and NRD processes.

NRD includes damages prior to the start of remediation, damages that occur during remediation, and any damages that remain after the completion of remediation. So, the time frame covered by NRD may be much longer than the remediation time frame. Annual NRD are converted into their present value through discounting, while the timing of releases into the environment does not affect remediation costs in general.

Finally, trustees may seek nonuse damages in some NRD cases, which are damages unrelated to any direct use of natural resources by the public. For example, trustees may seek nonuse damages for injuries to threatened or endangered species. There is no counterpart to nonuse damages in the remediation process.

Given all of these differences in the remediation and NRD processes, it is not surprising that allocations may differ among the PRPs for the two processes. Furthermore, individual PRPs may take actions that will affect their NRD allocations, as described below.

Actions Potentially Affecting NRD Allocations

Trustees in NRD cases are required to invite PRPs to participate in the NRD assessment. Some PRPs may accept the invitation to participate in a cooperative NRD assessment while other PRPs may choose to not participate. The participants in the cooperative assessment may have an opportunity to settle their NRD liability on more favorable terms than non-participants. This implies a potential reduction in the allocation of NRD liability for the cooperative assessment participants. Furthermore, cooperative assessment participants may incur lower assessment costs than non-participating PRPs who later litigate the trustees' NRD claim(s). Since assessment costs are part of NRD liability, differences in transaction costs will affect allocations of NRD liability.

Sometimes PRPs will have property that is potentially suitable for compensatory restoration actions in the NRD process. Providing that property as part of a settlement, instead of

providing funds for the trustees to buy other property, may affect the PRPs' allocation. Similarly, some PRPs may be able to implement a compensatory restoration project at a much lower cost than paying the trustees to implement the project. In that situation the allocation share of the PRP implementing the project will fall.

Decision Criterion for Separate NRD Allocation

Suppose that at least one of the six PRPs at our hypothetical site suspects that its NRD allocation differs from its allocation for remediation costs. Under what circumstances should a PRP undertake a separate NRD allocation study?

Obviously, a PRP who suspects that its NRD liability is higher than its allocation for remediation costs will have no incentive to implement a separate NRD allocation study. Similarly, a PRP who believes that its allocation of NRD liability is about the same as its remediation cost allocation will not want to incur the cost of developing a separate NRD allocation, which may involve collecting additional information and then analyzing the existing and newly collected information. So, only PRPs who suspect that their NRD allocation is substantially lower than their remediation cost allocation will have an incentive to implement a separate NRD allocation study. In fact, the incremental cost of a separate NRD allocation study needs to be less than the largest reduction in NRD liability for any PRP in order to justify a separate NRD allocation study. For example, if the incremental cost of implementing a separate NRD allocation is $400,000 and the resulting allocation lowers the NRD liability of one of the PRPs by $2 million, then the separate NRD allocation study would be justified from a cost-benefit perspective. However, if implementing a separate NRD allocation study lowers the NRD liability of any PRPs by a maximum of $300,000, then the separate NRD allocation study would not be justified.

Of course, a substantial reduction in NRD liability for one or more PRPs implies an offsetting increase in NRD liability for other PRPs. Those PRPs will favor applying the allocations for remedial costs to the NRD liability, which also eliminates the time and cost required to determine different NRD allocations. In the end it may be best for the PRPs whose NRD liability decreases after developing separate NRD allocations to share the incremental cost of the allocation study. In that situation the PRPs who experience an increase in their NRD liability are not also incurring the transaction cost that leads to the higher liability.

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FEDERAL FINANCIAL ASSURANCE RULES: THEY MAY BE REQUIRED, BUT ARE THEY NECESSARY?

Carolyn L. McIntosh

Section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9608(b), lay dormant for 31 years. Even if best left that way, the U.S. Environmental Protection Agency (EPA) is now under court order to propose financial assurance rules for the hardrock mining industry and consider financial assurance rulemakings for three additional industry sectors: chemical manufacturing; petroleum and coal products manufacturing; and electric power generation, transmission, and distribution industries by December 2016. This paper describes the road to the first financial assurance rulemaking, presents current information about its likely scope, and examines policy implications of a proposed rule.

Background of the Rules

When Congress adopted CERCLA in 1980, it included section 108, requiring the president to develop financial responsibility rules. Specifically:

> Beginning not earlier than five years after [December 11, 1980], the President shall promulgate requirements . . . that classes of facilities establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances. Not later than three years after [December 11, 1980], the President shall identify those classes for which requirements will be first developed and publish notice of such identification in the Federal Register. Priority . . . shall be accorded to those classes of facilities, owners, and operators which the President determines present the highest level of risk.

CERCLA § 108(b)(1), 42 U.S.C. § 9608(b)(1). The provision is mandatory ("the President shall promulgate . . ."), but is unusual in its vague timing (e.g. "not earlier than five years after [December 11, 1980] . . ."). Whether it was the absence of a date certain or some other factor, EPA (by presidential delegation) has yet to comply with this congressional directive.

Industry has not objected to the delay given that section 108 will be costly and likely trigger a new wave of CERCLA litigation. Congress included certain parameters in section 108(b)(2) and guidance about information EPA should consider, namely, payment experience of (1) the hazardous substance Superfund; (2) commercial insurers; (3) court settlements and judgments; and (4) voluntary claims satisfaction. Congress also directed the president to consult and cooperate with the commercial insurance industry in developing the rule. The president can specify policy or contract terms and conditions. Congress identified insurance, guarantees, surety bonds, letters of credit, and self-insurance demonstration as appropriate means of establishing financial responsibility. Id. § 9608(b)(2). Once promulgated, industry is to have four (4) years to come into compliance. Id. § 9608(b)(3). In the event of a release or threatened release from a facility, if those liable under CERCLA section 107 are bankrupt or beyond the reach of federal jurisdiction, then "direct action" against the guarantor providing financial responsibility is authorized. Id. § 9608(c). The guarantor's direct action liability is limited to the amount of the financial responsibility instrument. Id. § 9608(d)(1). However, the guarantor's liability is still subject to any other contractual or common law liability of the guarantor, including bad faith. Id. § 9608(d)(2).

Impatient with EPA's failure to develop financial assurance, the Sierra Club and other non-governmental organizations (NGOs) filed suit in 2009 to require EPA to promulgate the CERCLA section 108(b) financial responsibility rules. Sierra Club v. Johnson, No. C 08-01409 WHA, 2009 WL 482248, at *7–10 (N.D. Cal. Feb. 25, 2009). In response, EPA issued a "Priority Notice" identifying the hardrock mining industry

as the first class of facilities for which it would develop CERCLA financial assurance rules. Identification of Priority Classes of Facilities for Development of CERCLA Section 108(b) Financial Responsibility Requirements, 74 Fed. Reg. 37,213 (July 28, 2009) ("Priority Notice"). The rule will likely be expansive if adopted; at present EPA has only identified three classes of mining facilities it intends to exclude (certain placer mines, exploration mines, and mines less than five (5) acres in size). See Memorandum to the Record, Mining Classes Not Included in Identified Hardrock Mining Classes of Facilities (June 29, 2009) (Docket ID: EPA-HQ-SFUND-2009-0265-0033).

In the Priority Notice, EPA defined hardrock mining as "the extraction, beneficiation or processing of metals (e.g., copper, gold, iron, lead, magnesium, molybdenum, silver, uranium, and zinc) and non-metallic, non-fuel minerals (e.g., asbestos, gypsum, phosphate rock, and sulfur)." 74 Fed. Reg. at 37,215. In identifying the hardrock mining industry as its first financial responsibility rulemaking priority, EPA focused on risk, based on these factors: "(1) annual amounts of hazardous substances released to the environment; (2) the number of facilities in active operation and production; (3) the physical size of the operation; (4) the extent of environmental contamination; (5) the number of sites on the CERCLA site inventory (including both National Priority List (NPL) sites and non-NPL sites); (6) government expenditures; (7) projected clean-up expenditures; and (8) corporate structure and bankruptcy potential." 74 Fed. Reg. at 37,218. In 2009, EPA estimated remediation costs at "all hardrock mining facilities is between $20 and $54 billion." 74 Fed. Reg. at 37,217.

Early the following year, EPA issued an advanced notice of proposed rulemaking (ANPRM) identifying three additional industries for which it may develop financial assurance provisions: chemical manufacturing; petroleum and coal products manufacturing; and electric power generation, transmission, and distribution. See Identification of Additional Classes of Facilities for Development of Financial Responsibility Requirements Under CERCLA Section 108(b), 75 Fed. Reg. 815 (Jan. 6, 2010). However, at the close of the extended comment period on the ANPRM, EPA took no further action and dropped the issue from its regulatory agenda in 2011. See In Re: Idaho Conservation League, et al., 811 F.3d 502, 507 (D.C. Cir. Jan. 29, 2016).

Accordingly, on August 11, 2014, six NGOs petitioned the D.C. Circuit Court of Appeals for a writ of mandamus requiring EPA to finalize financial assurance rules for all four industries by January 1, 2016. Id. After a hearing on May 12, 2015, in which EPA advised the court it had developed a framework for the hardrock rulemaking, the D.C. Circuit ordered EPA to file the "Framework." Id. Recognizing that the January 1, 2016, deadline was not feasible, the court ordered the parties to identify the date by which EPA will publish proposed and final financial assurance rules for the hardrock mining industry, the date by which EPA will determine whether to issue a notice of proposed rulemaking for the other three industries and the timeline for promulgating proposed and final rules for those industries. In Re: Idaho Conservation League, et al., Case No. 14-1149 (D.C. Cir. May 19, 2015). Based on that order, EPA filed the Framework on August 31, 2015. Id., Doc. No. 1570544 (Aug. 31, 2015). EPA and the petitioners then sought an order on consent requiring EPA to begin the hardrock mining rulemaking process by December 1, 2016, and publish its notice of final action by December 1, 2017. The parties also agreed that EPA would decide by December 1, 2016, whether it would proceed with a rulemaking for any of the other three industries. The agreement was approved and the consent order (Consent Order) issued by the D.C. Circuit Court. In Re: Idaho Conservation League, et al., 811 F.3d at 516.

Under the Consent Order, EPA is required to "sign for publication" in the Federal Register a notice of proposed rulemaking on financial assurance requirements for the hardrock mining industry by

December 1, 2016. Id. The deadline recognizes EPA does not control Federal Register publication; the deadline relates to EPA's submittal date, not the publication date. Id. Within one year of proposing the hardrock mining rule, EPA is required to sign for publication in the Federal Register a notice of its "final action" on the hardrock mining financial assurance rule. Id. Technically, EPA is not required to issue a financial assurance rule—it simply must take "final action"—but all indications are that it will issue a rule.

Also by December 1, 2016, EPA must decide whether it will issue a notice of proposed rulemaking on financial assurance requirements for the chemical manufacturing; petroleum and coal products manufacturing; and electric power generation, transmission, and distribution industries. Id. Last, the Consent Order specifies that if EPA engages in rulemaking for any of the three additional industries, it must propose its first additional rulemaking by July 2, 2019, finalize that rule by December 2, 2020, propose its second rulemaking by December 4, 2019, finalize that rule by December 1, 2021, propose the third rulemaking by December 1, 2022, and finalize that rule by December 4, 2024. Id.

The Framework and Likely Scope of the Hardrock Mining Rule

Given that EPA will not propose its hardrock mining rule until December 1, 2016, EPA has not specified what the proposal will entail. However, due to the D.C. Circuit's order that EPA file the Framework and, in view of intense scrutiny regarding the rule, the public has more information about the likely content of the proposed rule than is typical at this stage of rule development. This section presents the broad contours of the proposed rule EPA has described in the Framework and a May 17, 2016, webinar—starting with costs. The May 17 presentation included three different mine scenarios. It estimated that 108(b) financial assurance would cost between $1 million and $19 million per year, based on the type and size of mining operation.

EPA reports it has established a Small Business Advocacy Review panel to consult with small business. As required by section 108(b)(2), EPA has also initiated consultation with the commercial insurance industry and instrument providers. And, in light of the potential for overlap between new financial assurance rules and existing state, tribal, and federal land management agencies reclamation and closure bond requirements, EPA will also consult with these agencies. The proposed rule will likely vary from the Framework EPA has shared to date.

EPA emphasizes that the proposed rule will not include technical requirements regulating operation, closure, or reclamation of hardrock mines nor financial assurance requirements for reclamation or closure under a permit. Moreover, the rule will not constitute a determination that a given mine requires CERCLA remediation. The Framework describes what the rule will contain in five major components, outlined below: (1) the universe of facilities to be regulated; (2) the flow of funds from the financial responsibility instrument to the CERCLA cleanup; (3) financial responsibility scope and amount; (4) the relationship of section 108(b) financial responsibility to state, tribal, and local government law; and (5) the relationship of section 108(b) financial responsibility to other federal law.

Regarding the universe of facilities to be regulated, EPA explains that it will include the full gamut of mining, processing, and beneficiation facilities. See 74 Fed. Reg. at 37,214. EPA has only identified three classes of mining facilities that will be excluded: certain placer mines; exploration mines; and mines less than five acres in size. Importantly, EPA proposes to include primary processing activities located at or near the mine site that are under the same control as a regulated mine. And, there has been significant discussion about whether abandoned mining features within a property footprint will be included. Information currently issued by EPA does not squarely address these rule expansion concerns.

In the flow-of-funds Framework discussion, EPA explains that it will continue to use existing Superfund enforcement processes first, but will require that financial assurance instruments be directly payable into a special CERCLA account for settlement after a court finding of CERCLA liability or into a trust fund established pursuant to administrative order. "[O]ther federal agencies, the states, tribes, [and] the public" could also make claims against a covered owner or operator—payable from the financial assurance instrument. Per section108(c), EPA and these parties can also bring a "direct action" against the instrument provider.

As to the financial responsibility scope and amount, the Framework would require owners and operators to establish and maintain financial responsibility instruments to cover all section 107 liabilities—response costs, natural resource damages, and covered health assessment costs—at their facilities. To determine the amount for a given facility, EPA is developing a model taking into account the specific types of units at the facility (e.g., tailings impoundment, open pits, waste rock piles, process water management), site conditions (e.g., size, presence of underground mine, distance to nearest surface water source), other risk factors, and the degree to which the facility applies "best practices" or engineered controls. Facility-specific inputs will be used to set a baseline amount of financial responsibility, to be reduced by engineered controls. EPA believes the rule will incent a facility owner/operator to engage in "sound mining practices." EPA is considering a fixed amount of financial responsibility, not a formula, for health assessment costs and a fixed percent for natural resource damages, that would be required at all facilities. Interestingly, EPA would not restrict the use of financial assurance funds; rather, the total amount of funds would be available for any future response action, natural resource damages, or health assessment.

As noted above, in its May 17 webinar, EPA provided some cost examples:

1. Scenario 1 is a gold mine with an open pit of approximately 200 acres, a 700-acre waste rock pile, and a 400-acre tailings impoundment. Operations include water treatment with a capacity of 500 gallons per minute (gpm) and the geographic area has an annual net evaporation rate of up to 25". Scenario 1 includes "best practices" of open pit alkaline amendments and waste rock segregation. The mine has annual revenues of between $50 and $100 million, with 1500 employees. EPA assesses an annual financial assurance requirement of $75 million, but provides a 42 percent credit for best practices. Assuming a BBB credit rating and the mine's purchase of an insurance policy covering known liabilities, EPA assumes that the annual cost of financial assurance under its new rule will be approximately $4 million.

2. Scenario 2 is an underground precious metals mine with a tailings impoundment of approximately 100 acres. The mine includes a water treatment facility with the capacity to treat 100 gpm. It is located in a geographic area that has an annual net evaporation rate of up to 25". Best practices include alkaline amendments to the tailings facility and paste or filtered tailings deposition. The mine is roughly the same size as the Scenario 1 mine, generating annual revenues of between $50 and $100 million, with 1500 employees. EPA assesses an annual financial assurance requirement of $25 million and provides an 80 percent credit for best practices. Assuming a B+ credit rating and the mine's purchase of an insurance policy, EPA assumes that the annual cost of 108(b) financial assurance will be approximately $1 million.

3. Scenario 3 is an open pit copper mine with a 1000-acre pit, 2000 acres in waste rock dumps, and a 700-acre tailings impoundment. The mine is equipped with a water treatment facility with a treatment capacity of 1000 gpm. Its location experiences a net evaporation rate of 75" to 100". EPA cites wet tailings deposition as best

practices. The mine has annual revenues of approximately $1 billion and 1500 employees. EPA assesses an annual financial assurance requirement of $525 million, provides a 24 percent credit for best practices, and assumes a BB credit rating. EPA assumes the lowest cost financial assurance instrument is a trust fund and estimates the annual cost of financial assurance at approximately $19 million.

The Framework states that EPA is considering the following financial responsibility instruments: (1) letter of credit; (2) insurance; (3) trust fund; (4) surety bond; and (5) credit rating-based financial test/corporate guarantee. EPA has met with representatives of the insurance, surety, and banking industries with financial responsibility program experience, specifically to discuss three "novel" aspects of the statute: (1) payout of the instrument under the direct action provision; (2) the scope of coverage; and (3) payout to multiple claimants. EPA reports it is considering the financial industry's feedback as it develops the instruments.

As to the final two components of the Framework, EPA's position is that existing state, tribal, and federal reclamation and closure financial assurance and bond requirements are for different purposes and the section 108(b) requirements will be supplementary. Noting some states' concern that under CERCLA section 114(d), EPA could preempt state requirements, EPA has attempted to reassure state regulators. In the Framework, EPA stated that its analysis of state law financial responsibility requirements to date indicates that many are designed to assure compliance with state regulatory requirements and thus are not "in connection with liability for the release of a hazardous substance" under CERCLA section 114(d). The Framework also states that EPA intends the section 108(b) financial responsibility amount to account for environmentally protective practices already in place, but the issue of duplicative requirements remains a concern of industry and other agencies.

Policy Implications of CERCLA Financial Assurance Rules

First, the potential duplicative and burdensome cost of CERCLA financial assurance rules is a very real and practical concern. Many states with mining or extractive industries developed closure, reclamation, corrective action, or other environmental bonding requirements during the 30-plus years of EPA inaction. Specifically, after Congress enacted the Resource Conservation and Recovery Act with its closure and post-closure financial assurance requirements, many states expanded the financial assurance notion to other heavy industries, including mining and oil and gas development. Similarly, the Bureau of Land Management (BLM) adopted Part 3809 regulations (43 C.F.R. Part 3809) and the Forest Service enacted Part 228 regulations (36 C.F.R. Part 228) for mining on federal lands; both include reclamation financial responsibility requirements.

In its 2009 Priority Notice, EPA acknowledged these existing financial demonstration requirements ("the Agency will consider whether hardrock mining facilities which have a RCRA Part B permit or are subject to interim status . . . and already are subject to RCRA financial assurance and facility-wide corrective action requirements need to also be subject to . . . Section 108(b) of CERCLA. In addition, EPA . . . will consider . . . [the] Part 3809 . . . and [] Part 228 regulations. . . ."). 74 Fed. Reg. at 37,219. In contrast, the Framework now states that EPA believes these existing state and federal financial assurance obligations serve different purposes. In short, while EPA may take engineering controls into account to reduce the CERCLA financial assurance price tag, EPA does not consider the new rules duplicative. Yet, posting an annual bond of $1 million to $19 million (as in EPA's illustrative examples) is a real cost and will be in addition to the reclamation, closure, and other bond requirements already imposed on mining operations today. The additional cost seems disproportionately burdensome when taking into consideration EPA's pronouncement that the rule does not mean that a given regulated facility will

ever trigger CERCLA remediation or enforcement action. Moreover, with the current depressed commodities market, these are costs that will result in job losses, mine closures, and adverse community impacts.

Second, in its 35-year history, CERCLA has spawned a generation of environmental litigators. Various issues have been addressed in numerous district courts, appellate courts, and a disproportionate number of CERCLA cases have been decided by the Supreme Court. Multi-party sites have resulted in multiple layers of litigation. Many CERCLA cases seem to have given birth to progeny. Against that experience backdrop, the section 108(c) direct action provision sends chills in the underwriter community (and possibly thrills in the plaintiffs' bar). CERCLA has already seen its share of speculative litigation; direct action is likely to incent more such fortune seekers. Very little of the anticipated direct action litigation will result in more cleanups or a cleaner, healthier environment.

Third, financial assurance instruments may not be available at an affordable cost. EPA reported during its May 17, 2016, webinar that it is conducting a study to "assess the capacity of third party markets" to underwrite section 108(b) financial responsibility instruments. In the author's conversations with representatives from insurance and surety industries that have historically unwritten mining operations, most have indicated their business model does not include expansion in this market. Most in the underwriting industry have also expressed very serious reservations about section 108(c) direct action.

Fourth, any new financial assurance is not likely to address a current top-of-mind issue—abandoned mine sites. The BLM reports that there are "estimates of as many as 500,000 abandoned mines in our nation." See Bureau of Land Management, Abandoned Mine Lands Portal, http://www.abandonedmines.gov/ep.html (last visited June 10, 2016). According to Navajo Nation counsel, there are over 500 abandoned uranium mine claims in Navajo Nation country alone. These, or the vast majority of these, will not be addressed by the financial assurance rule, yet are the largest source of metals contamination of fish and wildlife, acid mine drainage, and related surface and groundwater contamination. Even EPA's suggestion that it may include primary processing activities located at or near a mine site and under the same operational control—an expansion of statutory requirements—will not address abandoned mines. The prospect of including abandoned mine features within the financial assurance obligations of nearby current or prospective mining operations is well beyond the statutory authority. Moreover, it will disincentivize mining companies from remediating by mining or reprocessing tailings using new, more effective technologies.

The hardrock mining industry is anxiously waiting for the proposed rule because it will mean substantially more cost to operate a mine, more litigation, and the prospect of enforcement actions if required coverage is simply not available at a rational price. If the objective is to dramatically reduce mining activities, precipitate job losses, and cut state and federal severance tax income, the new financial assurance rule may well accomplish those objectives. And the rule will not just affect the mining sector, it will have ripple effects. Specifically, those in the financial sectors of insurance, surety, and bonds that venture into underwriting for the rule, may well find themselves stuck with unfavorable provisions, including policies they cannot cancel or non-renew. Moreover, the hardrock mining rule will likely serve as a model for any of the other three industries sectors for which EPA develops rules. In conclusion, even though CERCLA required development of financial assurance rules, EPA's effort is ill timed, it will duplicate existing laws, and not fit well with current mining-related risks.

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SUPERFUND LITIGATION UPDATE

The Superfund and NRD Litigation Committee regularly posts updates about current cases and issues on our website. Many of these are written by committee co-chairs assigned to each Environmental Protection Agency region. Due to the focus on litigation, this article is organized by circuit and includes posts from the first half of 2016. If you are interested in serving as a regional reporter, please contact the committee chair.

SECOND CIRCUIT

Gary P. Gengel and Kegan A. Brown

Next Millennium Realty, LLC v. Adchem Corp.

On March 23, 2016, the U.S. District Court for the Eastern District of New York held in a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) action that a dissolved corporation that has wound up its affairs lacks the capacity to be sued. Plaintiffs, the current owner of property on Long Island, asserted that Lincoln Processing Corp. (Lincoln), a bonding and laminating company that operated at the property from 1966 through 1973, was liable for response costs associated with perchloroethylene (PCE) contamination at the property. Lincoln was dissolved in 1977 or 1978 and alleged that the wind-up process was completed by 1979; plaintiffs filed their CERCLA claim against Lincoln in 2003.

Lincoln filed a motion for a determination that, as a dissolved corporation, it lacked the capacity to be sued under CERCLA. Construing Lincoln's motion as one for summary judgment, the court, relying on Marsh v. Rosenbloom, 499 F.3d 165 (2d Cir. 2007), noted that "CERCLA does not pre-empt state statutes that limit a party's capacity to be sued." Prior to Marsh, several district courts held that CERCLA preempts state statutes that limited the capacity of dissolved corporations to be sued. The Second Circuit overruled those district court decisions in Marsh. Thus, the relevant question was whether, under the law governing Lincoln—the New York Business Corporation Law (BCL)—a dissolved corporation can be sued and held liable under CERCLA. Resolution of this question hinged on whether Lincoln had "wound up" its operations, as the BCL prevents corporations from being sued for pre-dissolution events if the corporation's affairs are "fully adjusted and wound up."

Here, Lincoln asserted that its affairs were fully adjusted and wound up in or around 1979. Nevertheless, plaintiffs argued that because the BCL does not include a time limit for winding up a dissolved corporation's affairs, the period to wind up is indefinite and, by logical extension, Lincoln still can be sued under CERCLA. The court disagreed, finding that because the BCL is silent on the period of winding up, it should apply a reasonable period of time. The court then concluded that "one cannot reasonably credit the notion that a corporation that dissolved in the mid-1970s has not completed winding up by the mid-2000s." Thus, the court held that Lincoln had wound up its affairs and did not have the capacity to be sued under CERCLA.

The Next Millennium case needs to be considered in light of the Supreme Court's decision in United States v. Bestfoods, 524 U.S. 51 (1998). Bestfoods held that CERCLA does not preempt bedrock corporate law principles (e.g., that absent a basis to pierce the corporate veil, a parent corporation will not be liable for the torts of its subsidiary). Next Millennium applies both this Bestfoods holding and the holding from Marsh (that CERCLA does not preempt state statutes that limit a party's capacity to be sued) in finding that Lincoln could not be sued under CERCLA.

DMJ Assocs. v. Capasso (E.D.N.Y. Mar. 31, 2016)

On March 31, 2016, the U.S. District Court for the Eastern District of New York held that a terminated administrative consent order with the New York State Department of Environmental Conservation (NYSDEC) does not "resolve" a party's CERCLA liability, and therefore does not trigger a party's right to assert a section 113 contribution claim

(leaving that party with an ability to assert a section 107 cost recovery claim). See https://cases.justia.com/federal/district-courts/new-york/nyedce/1:1997cv07285/159733/1608/0.pdf?ts=1459600189.

In the underlying action, plaintiff DMJ Associates, LLC (DMJ) brought a cost recovery claim against various defendants, including Exxon Mobil (Exxon) and Quanta Resources Corp. (Quanta). During the pendency of that action, in 2002, Exxon and Quanta (and others) entered into an administrative order on consent (AOC) with NYSDEC. The AOC required Exxon and Quanta (and others) to remediate the sites at issue, and provided that their liability would be resolved once the sites were remediated to NYSDEC's satisfaction.

In November 2004, Exxon and Quanta asserted CERCLA cost recovery and contribution claims against certain third parties (the "third-party defendants"). In June 2005, Exxon and Quanta settled the litigation with DMJ, which required in part that DMJ apply to have the sites placed in the NYSDEC's Brownfield Cleanup Program (BCP). Upon approval of DMJ's BCP application in September 2005, NYSDEC terminated the AOC with, among others, Exxon and Quanta.

After further amendment of the claims against the third-party defendants, the third-party defendants filed a motion for partial summary judgment, arguing that because Exxon and Quanta were sued by DMJ and then entered into an AOC with NYSDEC, they were precluded from asserting a section 107 cost recovery claim and relegated to a section 113 contribution claim (which does not result in joint and several liability). In response, Exxon and Quanta argued that they could assert a cost recovery claim because, since the AOC with NYSDEC was terminated, they did not "resolve" their liability as required by section 113; they therefore did not have a section 113 contribution claim; and as a result, they may assert a section 107 cost recovery claim.

In deciding the third-party defendants' motion, the court relied on Bernstein v. Bankert, 733 F.3d 190 (7th Cir. 2013), which held that a party does not "resolve" its liability in an administrative settlement agreement if, under the terms of that agreement, the resolution of liability is contingent on some future event that does not occur. Here, because the AOC was terminated by NYSDEC before Exxon and Quanta remediated the sites to the agency's satisfaction, the AOC did not resolve their liability for purposes of section 113. Thus, Exxon and Quanta did not have a section 113 contribution claim, leaving them with a section 107 claim for costs incurred pursuant to the AOC. Notably, the court disagreed with the third-party defendants' argument that because Exxon and Quanta had been sued under section 107, they were limited to a section 113 contribution claim. Instead, the court's analysis focused on whether the AOC met the statutory requirements to trigger a section 113 contribution claim.

Finally, the court held that Exxon and Quanta may pursue both section 107 and section 113 claims, as the costs sought fell into four different categories: (1) directly incurred response costs, (2) costs paid to reimburse third parties pursuant to a settlement agreement, (3) costs incurred as a result of DMJ's claims, and (4) costs incurred pursuant to the terminated AOC with NYSDEC. However, despite the ability to assert both section 107 and 113 claims, the court made clear that "none of the listed costs are recoverable under both sections simultaneously."

This decision is a further example of district courts' efforts to grapple with the interplay between CERCLA cost recovery and contribution claims, particularly when administrative orders are entered but subsequently terminated.

New York v. Next Millennium Realty, LLC

On February 9, 2016, the U.S. District Court for the Eastern District of New York ruled on the state of New York's and defendants' competing motions for summary judgment concerning volatile organic compound contamination at and emanating from the New Cassel industrial area in North Hempstead, N.Y. (the "site"). See http://www.lawandenvironment.com/wp-content/uploads/sites/5/2016/02/Bloomberg-Law-Document-New-York-v.-Next-Millennium-Realty-LLC-No.-06-CV-1133-SJFAYS-2016-BL-35748-E.D.N.Y.-Feb.

pdf. The state had asserted both cost recovery and natural resource damages (NRD) claims against defendants under CERCLA.

In resolving the parties' motions, the court held that the state had proven all of the elements required to hold defendants liable under section 107 of CERCLA. Certain defendants then argued that, under Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599 (2009), defendants' CERCLA liability was capable of being apportioned and should not be joint and several, primarily based on environmental data and figures that depicted three distinct groundwater plumes at the site. The state, however, argued that the groundwater plumes were commingled, and defendants' reliance on certain environmental figures was misplaced. Given the parties' competing positions, the court held that a genuine issue of material fact existed on the issue of apportionment and denied the motion for summary judgment.

The court also rejected defendants' argument that the state's NRD claim was time barred. Defendants argued that section 113(g)(1) of CERCLA requires that NRD claims be asserted "within 3 years after the later of" either the "date of the discovery of the loss and its connection with the release in question" or "the date on which [the natural resource damage assessment] regulations are promulgated," and that the state's claim was untimely because the contamination was discovered in 1986, the natural resource damage assessment regulations were promulgated in 1987, and the litigation was filed in 2006. 42 U.S.C. § 9613(g)(1); California v. Montrose Chem. Corp., 104 F.3d 1507 (9th Cir. 1997). The state countered, and the court agreed, that once the site was listed on the National Priorities List (NPL) (which occurred in 2011), the limitations period was reset to "within 3 years after the completion of the remedial action (excluding operation and maintenance activities)". 42 U.S.C. § 9613(g)(1); U.S. v. ASARCO Inc., 28 F. Supp. 2d 1170, 1179–80 (D. Idaho 1998). The court explained that the plain language of CERCLA compels this conclusion because "[w]ith respect to any facility listed on the NPL . . . an action for damages under this Act must be commenced within 3 years after completion of the remedial action . . . *in lieu of*" the two other limitations periods for NRD claims in section 113(g)(1). 42 U.S.C. § 9613(g)(1) (emphasis added). Consequently, once a site is listed on the NPL, the limitations period for an NRD claim is replaced by a "virtually unlimited duration because it does not begin to run until EPA has completed its remedial action."

The court's ruling reinforces the difficulty of obtaining an apportionment ruling (at least at the summary judgment stage) and the ability of NRD trustees to assert otherwise time-barred NRD claims at older sites so long as the site is listed on the NPL.

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THIRD CIRCUIT

Kate Campbell

Pennsylvania District Court Addresses Several Key Issues in Litigation of CERCLA Contribution Claims and Allocation of Response Costs (Posted 04/22/2016)

The U.S. District Court for the Western District of Pennsylvania issued a lengthy allocation opinion last month that addresses a number of key issues that frequently arise in litigation of CERCLA contribution actions.

In Trinity Industries, Inc. v. Greenlease Holding Co., the plaintiffs sought contribution under section 113 of CERCLA for costs plaintiffs incurred to remediate hazardous wastes generated in connection with railcar manufacturing operations at a facility previously owned by defendant. Following the court's decision on summary judgment that defendant was a liable party, the court then conducted a bench trial to determine the equitable allocation of response costs incurred by plaintiffs.

Before allocating costs, though, the court addressed several threshold issues. First, the court addressed the burden of proof on contribution claims,

confirming that the plaintiffs have the "ultimate burden of proof" to establish the "facts upon which the allocation of response costs" against the defendant is based. The court also noted, however, that to the extent the defendant proposed different allocations, the defendant must likewise prove any fact upon which it bases its proposed allocations.

The court then addressed how to handle the orphan share. While recognizing that the orphan share could be equitably allocated among the liable parties, plaintiffs failed to prove that any of the alleged orphan parties were unknown, insolvent, or otherwise immune from suit, and did not attempt to join those parties to the case. Therefore, the court held that it would not allocate to defendant any costs incurred to address contamination not caused by the defendant, including contamination caused by the alleged orphan parties.

Finally, the court addressed an argument raised by the defendant that the costs plaintiffs incurred were not "reasonable and necessary" because plaintiffs used a standard action level as its cleanup standard, rather than a standard that would have resulted in a less expensive cleanup. The court rejected this argument, however, relying in large part on the fact that the state agency approved a standard action level pursuant to the consent order under which plaintiffs were conducting the work.

The court then performed its allocation using a number of factors, including (1) cause of contamination; (2) overall allocation of responsibility based upon major remediation activity; (3) cooperation; (4) ability to pay; (5) contractual indemnity provisions between the parties; and (6) value of the property post-remediation. Some of the key findings in the court's allocation include:

- reduction of the defendant's share by 6 percent to reflect an amount attributable to a predecessor owner (which the court needed to estimate because the plaintiffs failed to introduce evidence of the amount of response costs attributable to that party);
- no reduction of the defendant's share due to an inability to pay despite its limited assets, because there was evidence of insurance potentially covering any liabilities resulting from the litigation;
- reduction of the defendant's share by 5 percent in recognition of the parties' purchase and sale agreement, which provided that the defendant would have no obligation to indemnify the plaintiffs for any liabilities more than three years following the date of closing; and
- reduction of the defendant's share by 10 percent to account for the benefit accorded the plaintiffs because the remediation of the property increased its value and made it eligible for reuse and resale.

In the end, the court allocated the defendant a 62 percent share of all response costs incurred by the plaintiffs for the cleanup.

The decision can be found at Trinity Industries, Inc. v. Greenlease Holding Co., 2016 U.S. Dist. LEXIS 40367 (W.D. Pa. Mar. 28, 2016).

Cost of Bottled Water Insufficient to Maintain CERCLA Cost Recovery Claim Where Filter System Reduced Contaminants in Groundwater to Below Applicable Standards

On January 19, 2016, the U.S. District Court for the Eastern District of Pennsylvania dismissed at the pleadings stage a lawsuit filed by two homeowners whose groundwater was impacted by trichloroethylene (TCE) that allegedly migrated from an adjacent Superfund site. The plaintiffs filed claims against the current and former owners of the Superfund site under CERCLA and the Resource Conservation and Recovery Act (RCRA), and also asserted various state law claims.

Addressing first the plaintiffs' CERCLA claims, the court held that the claims failed as a matter of law because the plaintiffs' only alleged response cost—purchasing bottled water—was not a "necessary" cost of response, as required under section 107 of CERCLA, 42 U.S.C. § 9607(a)(4)(B). On this point, the court relied heavily on reports obtained from the Pennsylvania Department of Environmental Protection (PADEP), which the court agreed to consider at the Rule 12(b)(6)

stage as matters of public record. Those records established both that (1) a point-of-entry treatment system had been installed at the plaintiffs' home; and (2) constituents detected in post-filter sample results were consistently below the applicable drinking water standards. Because the filter system effectively treated the water, the plaintiffs' purchase of bottled water was not "necessary."

Of particular note to Superfund practitioners, the court also suggested (in dicta) that purchasing bottled water, even if "necessary," may not be a recoverable response cost under CERCLA. The court explained while the definition of "remedial action" under CERCLA does include "the provision of alternative water supplies," those supplies must be necessary "to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment." See 42 U.S.C. § 9601(24). The court also stated that it was unaware of any cases that support the assertion that purchasing bottled water is itself a recoverable response cost.

Plaintiffs' RCRA claim suffered a similar fate. The plaintiffs brought that claim under the citizen suit provision of RCRA, which requires the presence of an "imminent and substantial endangerment to health or the environment." See 42 U.S.C. § 6972(a)(1)(B). But because the PADEP records established that the plaintiffs' water supply had been successfully treated, the court concluded that the plaintiffs could not establish an "imminent and substantial endangerment" to their health. Further, because certain of the defendants were conducting remedial work under a PADEP consent order, the court found that there was no basis for the plaintiffs to seek injunctive relief under RCRA.

Finally, having dismissed the federal CERCLA and RCRA claims with prejudice, the court declined to exercise supplemental jurisdiction over the state law claims, and dismissed those claims without prejudice.

The decision can be found at Warren v. Johnson Matthey, Inc., 2016 U.S. Dist. Lexis 6065 (E.D. Pa. Jan. 19, 2016).

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SIXTH CIRCUIT

Greg DeGulis

Garrett Day LLC, et al. v. International Paper Co., et al.

Case No. 3:15-cv-36 (S.D. Ohio Feb. 11, 2016)
2016-WL-613005
Plaintiffs Garrett Day LLC and Ohio Development Services Agency (hereafter "Garrett") seeks to recover over $1.7 million dollars under CERCLA, 42 U.S.C. §§ 9607(a) and 9613(f) and the Ohio Voluntary Action Program (VAP) for the remediation of a former paper mill site in Dayton, Ohio (hereafter the "site"). One of the defendants, Badger Paper Mills, Inc. and its alleged successor-in-interest, BPM Paper, Inc. (BPM) operated a paper mill on the site from 1992 to 1993 before the company dissolved in 2010. Garrett asserts BPM is the successor corporation of Badger Paper Mills and therefore is liable for cost recovery under CERCLA. See Flaugher v. Cone Auto Machine, 30 Ohio St. 3d at 62 (Ohio 1993).

In a recent motion to dismiss, BPM asserted Garrett's de facto merger claim against BPM should be dismissed pursuant to Federal Rules of Civil Procedure 12(b)(6) (Fed. R. Civ. P. 12(b)(6)). BPM asserted that the required factual information is entirely missing from Garrett's complaint in that "[p]laintiffs have made only conclusory allegations that BPM Paper is a successor-in-interest to Badger Paper Mills and BPM."

Judge Rice's decision ultimately granting BPM's motion to dismiss hinged upon two Supreme court decisions examining grounds for dismissal of a claim pursuant to Fed. R. Civ. P. 12(b)(6). See Bell Atlantic Corp. v. Twombly, 125 S. Ct. 1955 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009). The Rule 12(b)(6) motion to dismiss purpose "is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged the complaint is true." See

Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993). The Twombly and Iqbal decisions held that a complaint should contain more than simple "labels or conclusions" in order to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). See Tombly at 555. Rather, a complaint's factual information must clearly cross "the line from conceivable to plausible" allegations and not regurgitate "a formulaic recitation of the elements of a cause of action." Id. at 555, 570. "Legal conclusions 'must be supported by factual allegations' that give rise to an inference that the defendant is, in fact liable for the misconduct alleged." See Iqbal at 679.

To support its argument, BPM disclosed its corporate lineage with Badger Paper Mills through the BPM November 14, 2005, Asset Purchase Agreement (APA) for Badger Paper Mills and a Marinette County, Wisconsin Circuit Court order of approval to assert Garrett's "conclusory allegations" were incorrect.

Garrett responded to BPM's motion to dismiss by serendipitously concluding the APA complemented the complaint's sufficient factual information that a "clear continuity of business" did occur between Badger Paper Mills and BPM, despite the "lack of continuity of corporate personnel."

Under Ohio law, "a de facto merger is a transaction that results in the dissolution of the predecessor corporation and is in the nature of a total absorption of the previous business into the successor." See Welco Indus., Inc. v. Applied Cos., 617 N.E.2d at 1134 (Ohio 1993). A de facto merger must demonstrate at least one of the following requirements: "1) a continuation of the previous business activity and corporate personnel; 2) a continuity of shareholders resulting from a sale of assets in exchange for stock; 3) the immediate or rapid dissolution of the predecessor corporation; and 4) the assumption by the purchasing corporation of all liabilities and obligations ordinarily necessary to continue the predecessor's business operations." See Welco, 617 N.E. 2d at 1134. "No single factor is determinative, and a de facto merger may be found even if not all requirements are present." See Cytec Indus., Inc. v. B.F. Goodrich Co., 196 F. Supp. 2d 644, 658 (S.D. Ohio 2002).

BPM employed necessary staff to continue business at the paper mill, but Judge Rice concluded BPM did not hire "any of Badger Paper Mills' former officers or directors." Garrett relied on Bondex International, Inc. v. Harford Accident and Indemnity Co., No. 1:03-cv-1322, 2009 WL 8632648, to argue the absorption of corporate personal is not necessary if "there is clear continuity of business activity." In the case of Bondex, however, Judge Rice concluded the predecessor in Bondex became a division of the successor corporation and "there was no such relationship" between BPM and Badger Paper Mills.

The continuity of shareholders is "deemed to be of considerable importance" to prove a de facto merger occurred. Garrett asserted common stock, the second requirement of a de facto merger, is not an "absolute requirement" if a "nexus" existed between the two corporate entities. See Cytec at 659. Judge Rice concluded Badger Paper Mills' shareholders did not receive BPM stock. Furthermore, Judge Rice concluded that the one common shareholder who existed between BPM and Badger Paper Mills "owned only a 25.04% interest in Badger Paper Mills." To Judge Rice, the one shareholder is not a compelling "nexus." See Kemper v Saline Lectronics, 366 F. Supp. 2d 550, 555–56 (N.D. Ohio 2005) (concluding no de facto merger occurred where two stockholders of a purchasing corporation owned 22 percent of a selling corporation).

Garrett finally asserted Badger Paper Mills existed simply as a "shell corporation, devoid of any assets," which complies with the third requirement of a de facto merger. Judge Rice concluded Badger Paper Mills did not "rapidly dissolve" because it took five years for Badger Paper Mills to dissolve completely. Furthermore, Badger Paper Mills entered into a receivership proceeding "to liquidate corporate assets . . . to pay outstanding corporate debts." Judge Rice agreed with BPM that if a receivership situation like BPM's could be interpreted as a de facto merger, the judgment "would chill acquisition of corporate assets in the context of receivership proceedings." See also Anthony Wayne Corp. v. Elco Fastening Systems LLC, 2016 WL 687887 (N.D. Ind. Feb. 19,

2016) (corporation certificate of dissolution was a bar to recovery).

"Congress did not intend for corporations to 'evade their responsibility by dying paper deaths, only to rise phoenix-like from the ashes, transformed, but free of their former liabilities." See United States v. Mexico Feed and Seed Co., Inc., 980 F.2d. 487 (8th Cir. 1992). Judge Rice concluded this was not the case for BPM. Ultimately, no common "nexus," no common corporate connection, and a slow dissolution overwhelmed the inkling of evidence that BPM did assume Badger Paper Mills' liabilities. Judge Rice granted BPM's motion to dismiss with prejudice.

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SEVENTH CIRCUIT

Erin M. McDevitt-Frantz

Valbruna Slater Steel Corporation and Fort Wayne Steel Corporation v. Joslyn Manufacturing Company, et al., 2015 WL 8055999 (N.D. Ind. Dec. 4, 2015).

Following Seventh Circuit precedent, the U.S. District Court for the Northern District of Indiana concluded that involvement of a public agency in a remediation is sufficient to meet the public participation requirement of the National Contingency Plan (NCP). Specifically, the plaintiffs Valbruna Slater Steel Corporation and Fort Wayne Steel Corporation (collectively, Valbruna) seek recovery of cleanup costs associated with a steel-processing site formerly owned by Joslyn Manufacturing Company (Joslyn). After five years of litigation, including resolution of two summary judgment motions filed by Joslyn, the parties filed a round of summary judgment motions on the remaining CERCLA claims.

As an initial matter, the court rejected Joslyn's motions for summary judgment on claim preclusion and the statute of limitations, which had been previously litigated in Joslyn's original summary judgment motions.

Valbruna sought summary judgment under section 107(a) of CERCLA, which "permits cost recovery (as distinct from contribution) by a private party that has itself incurred cleanup costs." United States v. Atl. Research Corp., 551 U.S. 128, 139 (2007). The court rejected Joslyn's contention that its counterclaim turned the suit into a contribution claim, which implicates consideration of equitable factors. With respect to the section 107(a) analysis, Joslyn only contested whether Valbruna incurred costs "responding to the release that were 'necessary' and 'consistent with the national contingency plan.'" Forest Park Nat'l Bank & Trust v. Ditchfield, 881 F. Supp. 2d 949, 977 (N.D. Ill. 2012), citing 42 U.S.C. § 9607(a)(4)(B); G.J. Leasing Co. v. Union Elec. Co., 54 F.3d 379, 386 (7th Cir.1995); NutraSweet Co. v. X-L Eng'g Co., 227 F.3d 776, 791 (7th Cir. 2000).

First, the court concluded that the response costs incurred by Valbruna were "necessary" based upon the "ample uncontested evidence that Valbruna spent at least some amount of money to eliminate contamination that posed a threat to public health."

Next, the court addressed whether Valbruna's response costs were "consistent with the NCP," which requires public participation in private party response actions, among other things. 40 C.F.R. § 300.700(c)(6). Relying upon NutraSweet, supra, which "suggests strongly that government agency involvement . . . can provide an adequate substitute for public notice and comment," Norfolk S. Ry. Co. v. Gee Co., 158 F. Supp. 2d 878, 883 (N.D. Ill. 2001), the court held that sufficiently substantial state agency involvement can fulfill the public participation requirement of the NCP. The court did not define "sufficiently substantial involvement," but provided examples indicating that the agency must have approval, monitoring, or oversight authority such that its instructions are followed.

Joslyn also challenged the adequacy of the Indiana Department of Environmental Management's (IDEM) involvement based upon its approval of the remediation plan recommending electrical resistance heating (ERH) without adequately comparing potential alternatives as required by the NCP. The court explained that "[t]he inquiry is

whether IDEM was substantially involved in the remediation effort, not whether its choices were prudent." Furthermore, according to the court, "sufficiently substantial involvement" does not require a certificate of completion or other final approval by the state agency. The court concluded that IDEM was substantially involved; therefore Valbruna's costs were consistent with the NCP.

Based upon the foregoing, the court granted Valbruna's motion for summary judgment finding that Joslyn is jointly and severally liable for Valbruna's response costs, including its future costs; the court deferred deciding those costs.
See also, Bedford Affiliates v. Sills, 156 F.3d 416, 428 (2d Cir. 1998) (holding "extensive involvement" of a state agency was sufficient substitute for public comment); VME Americas, Inc. v. Hein-Werner Corp., 946 F. Supp. 683, 692 (E.D. Wis. 1996); compare, City of Oakland v. Nestle USA, Inc., 2000 WL 1130066, *5 (N.D. Cal. 2000) (". . . the notification of the regulatory authorities about the cleanup was not enough to obviate the need for public comment because the evidence presented does not show these agencies' input to be 'comprehensive'").

Certain courts that have held governmental agency involvement can satisfy the NCP's public comment requirement focus upon the fact that the agency's process involved opportunities for public input and involvement. Estes v. Scotsman Group, Inc., 16 F. Supp. 2d 983, 991 (C.D. Ill. 1998).

Other courts that recognize this rule focus on the degree of similarity between the environmental requirements being administered by the state agency and the NCP. Public Service Co. of Colorado v. Gates Rubber Co., 175 F.3d 1177, 1184 (10th Cir. 1999); American Color & Chemical Corp. v. Tenneco Polymers, Inc., 918 F. Supp. 945, 957 (D.S.C. 1995) (noting that there was meaningful public comment and that the consent order requirements were "substantially equivalent" to the 1990 NCP requirements).

Yet, other courts have held that the involvement of a public agency other than EPA does not substitute for compliance with the public notice/comment requirements of the NCP. See, Aviall Services, Inc. v. Cooper Industries, LLC, 572 F. Supp. 2d 676, 693 (N.D. Tex. 2008) (concluding "that for a party to substantially comply with the public participation requirement [of the NCP], (1) there must be sufficient oversight—either by the public or by a government agency charged with protecting the public environmental interest . . .; and (2) parties who might foreseeably be affected by the private party's decisions must be given a meaningful opportunity to participate in them"); Carson Harbor Vill., Ltd. v. Unocal Corp., 287 F. Supp. 2d 1118, 1167 (C.D. Cal. 2003) ("[I]t is appropriate, however, to allow for such a substitution only when the record reveals 'extensive' or 'comprehensive' agency involvement in the cleanup, some evidence that the agency was applying standards that were identical to or consistent with the NCP, and some evidence that the agency's procedures allowed for public comment or involvement); Waste Management of Alameda County, Inc. v. East Bay Regional Park Dist., 135 F. Supp. 2d 1071, 1102 (N.D. Cal. 2001); Union Pacific Railroad Co. v. Reilly Industries, Inc., 215 F.3d 830, 839 (8th Cir. 2000) ("extensive state involvement is not a per se substitute for substantial compliance with the public participation and comment requirements of the NCP"); Public Service Co. of Colorado v. Gates Rubber Co., 175 F.3d 1177, 1185 & n.13 (10th Cir. 1999); County Line Investment Co. v. Tinney, 933 F.2d 1508, 1512 (10th Cir. 1991); Sherwin-Williams Co. v. City of Hamtramck, 840 F. Supp. 470, 477 (E.D. Mich. 1993).

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EIGHTH CIRCUIT
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Divided Eighth Circuit Panel Addresses Scope of Arranger Liability

In its December 10, 2015, decision in U.S. v. Dico, Inc., No. 14-2762, a panel of the Eighth Circuit

reversed the U.S. District Court for the Southern District of Iowa's award of summary judgment in favor of the United States as to the CERCLA arranger liability of defendant Dico, Inc. The panel upheld the imposition of $1.62 million in penalties against Dico for violation of an EPA order. The action was based on Dico's sale of buildings containing PCB-contaminated material to a third party, Southern Iowa Mechanical (SIM). The buildings, which were located in Des Moines, Iowa, had first come to the attention of EPA in the mid-1970s because of TCE contamination in the groundwater around them, and were covered under a 1994 EPA order governing their use. After purchasing the buildings in 2007 from a Dico affiliate, SIM tore the buildings down and stored them in an open field where PCB contamination was later found.

The panel's opinion as to CERCLA liability, authored by Judge Kermit E. Bye with Judge James B. Loken concurring and Judge Jane Kelly dissenting, held that there were genuine issues of material fact as to whether Dico intended to "arrange" for disposal of hazardous materials when it sold the buildings to SIM. The panel held the trial court incorrectly concluded that Dico's sale of the buildings was an arrangement for disposal of hazardous substances as a matter of law, agreeing with Dico's argument that "the buildings had at least some commercial value based on which a fact finder may find Dico did not intend to dispose of the PCBs" through the sale. Judge Bye wrote that under the Supreme Court's current interpretation of the term "arrange," as articulated in Burlington Northern & Santa Fe Railway Co. v. United States, 556 U.S. 599, 610–11 (2009), "a seller's knowledge of eventual disposal alone is insufficient to find liability as a matter of law." The panel distinguished the case before it from the so-called battery-cracking cases on which the trial court relied, in that the batteries in those cases were clearly "junk." "Where, however, the sale product has some commercial value and was part of a legitimate sale, even if the seller knows disposal will result, it is more difficult to hold that no reasonable juror could find the seller did not actually intend to sell the product but merely intended to discard the hazardous substance," Judge Bye explained.

While it reversed the trial court's arranger liability ruling, the court upheld the award of $1.62 million in civil penalties—$10,000 per day over a 162-day period—against Dico because it had violated a 1994 EPA order governing the use of the buildings. The order required Dico to ensure "long term maintenance of all interior surface sealing" and "encapsulation of all building insulation"—a provision that the court agreed was violated because Dico "breached the interior surface sealing and failed to keep the building insulation encapsulated during the entire 162-day building teardown." The panel also held that Dico had violated a paragraph of the EPA order requiring it to "immediately take all appropriate action" and "immediately notify" EPA in the event of a change to on-site conditions causing or threatening the release of hazardous substances from the property. Judge Kelly joined Judge Bye's opinion on this issue, and Judge Loken dissented.

Finally, Judges Bye and Loken agreed to reverse the trial court's imposition of CERCLA punitive damages against Dico for failing, without sufficient cause, to provide removal or remedial action at the site where the disassembled buildings had been transferred. Judge Kelly dissented. Judge Bye wrote that because the EPA incurred cleanup costs at the site where the buildings were moved following their sale—as opposed to the buildings' former location where the violation of the EPA order took place—the EPA's costs were not incurred "as a result of" Dico's violation of the EPA order. The opinion noted that Dico might ultimately be found liable as an arranger for disposal at the site where the buildings were deposited, but that because summary judgment on that topic was not warranted, Dico could not yet be held liable for punitive damages based on cleanup costs at that site.

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