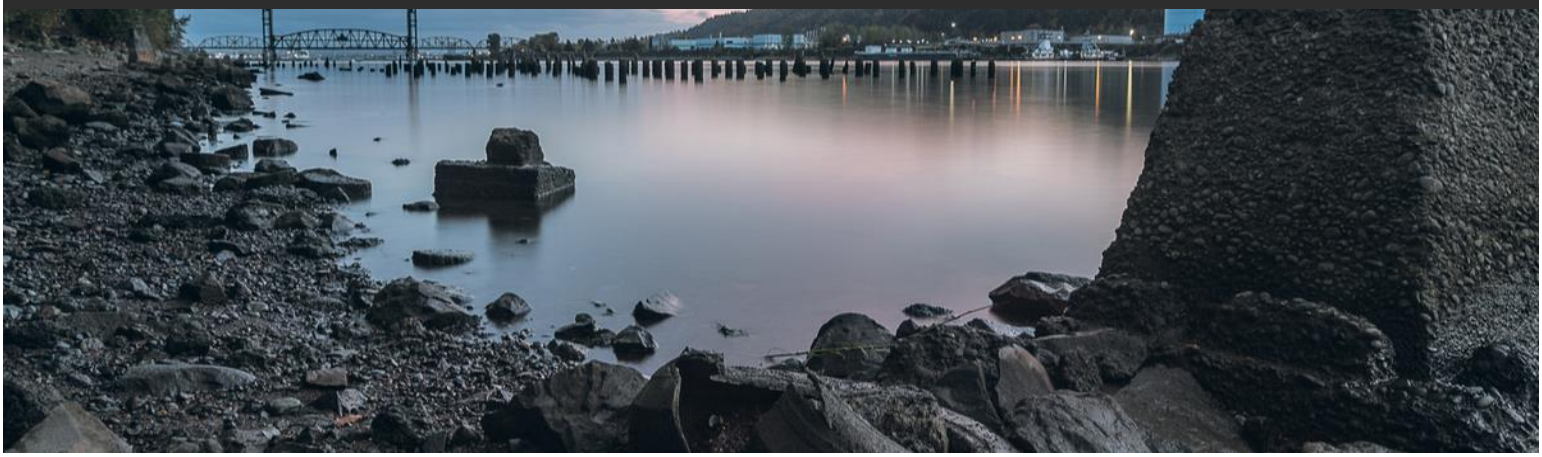
The Last Year in CERCLA: Practitioners Should Take Note



By David G. Mandelbaum | October 19, 2023 | The Legal Intelligencer

I was asked earlier this month to condense into an eight-minute presentation what a particular group of senior environmental lawyers "ought to know about developments in Superfund since October 2022 had they been paying attention." It was, of necessity, an incomplete survey. This is my effort to record a slightly modified version.

Practitioners may want to take note of three subject areas and clusters of issues.

PFAS and Reopeners

As is familiar, "forever chemicals"—per- and polyfluoroalkyl substances—have been the subject of attention under a number of programs and of a great deal of litigation. The Environmental Protection Agency proposed to list two PFAS chemicals—PFOA and PFOS—as "hazardous substances" under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. Sections 9601-75. 87 Fed. Reg. 54,415 (Sept. 6, 2022). If listed, costs incurred in response to a release of PFOA or PFOS would be recoverable under CERCLA, and the government would have certain spending and enforcement authorities. In addition, the EPA has issued a much broader advanced notice of proposed rulemaking on "Addressing PFAS in the Environment." 88 Fed. Reg. 22,399 (Apr. 13, 2023).

Several states have taken their own regulatory steps to address the presence of PFAS in groundwater, soil, and even surface water. Pennsylvania has adopted drinking water standards —that is, "maximum

contaminant levels" and "maximum contaminant level goals"—for PFOA and PFOS. 53 Pa. Bull. 333 (Jan. 13, 2023). The MCL then serves as a cleanup standard under Pennsylvania cleanup programs and, presumptively, an "applicable or relevant and appropriate regulatory standard" under CERCLA.

That has led to the demand by the regulators to analyze groundwater or other media for PFAS at Superfund sites, including in Pennsylvania. Those demands have come initially at old co-disposal landfill sites, the sorts of Superfund site addressed in the 1980s and 1990s, many of them well beyond remedy completion and deletion from the National Priorities List. PFAS are ubiquitous and the regulators have expressed concern about concentrations in the part-per-trillion range, so if you look for them you will likely find them.

The government has selected its original remedial action for a closed site based upon an administrative process not focused on PFAS. Presumably, the remedial investigation, feasibility study, and record of decision did not predicate the selection of the remedy on a release of PFAS. The government then obtained remedial action and resolved private responsibility at old, closed sites under settlement agreements, administrative orders, or judgments developed without any reference to PFAS. The arrangements among responsible parties to fund work— PRP agreements, settlements, or judgments— similarly allocated financial obligations without regard to PFAS.

Indeed, if a site has been deleted from the NPL, one might say that EPA would have to start all over with a new listing decision based upon an observed release of PFAS and whatever hazardous substances remained at the site after the original remedial action.

In each case, one would have to determine whether any of the legal arrangements selecting a remedy, imposing an obligation to implement or to fund the remedy on responsible parties, or the arrangements allocating that obligation among the responsible parties cover a new demand by the government for additional work—especially costly work—directed to the presence of PFAS.

By way of analogy, consider *GP Vincent II v. Estate of Beard*, No. 21-16555 (9th Cir. May 17, 2023). GP Vincent was the third in a chain of title to a facility that experienced a spill of chlorinated solvent. The prior owners and the owner of a neighboring senior living development reached a settlement over responsibility to clean up that neighboring property. That settlement did not bar an action to allocate the costs of cleaning up the facility differently. Would a similar principal apply to new costs arising not from a new parcel of real estate, but a new contaminant?

Allocation

One would ordinarily say that an equitable allocation of responsibility among responsible parties under Section 113(f) of CERCLA, 42 U.S.C. Section 9613(f), ought to follow any contractual arrangements among

those parties. However, courts sometimes disagree. In *Columbia Falls Aluminum v. Atlantic Richfield*, No. 21-36042 (9th Cir. Jan. 31, 2023)(unreported), ARCO sold a smelter to CFAC for $1 and the district court found that the parties intended CFAC to bear 100 percent of the responsibility for the property. However, the district court did not enforce that contract, considered some but not all of the Gore factors, leaned heavily on the economic benefit that each of the parties received from operation, and allocated only 65% to CFAC and 35% to ARCO. The court of appeals affirmed.

The same court of appeals treated an allocation of responsibility under Section 113(f) as if it were an apportionment and allowed the United States—a party responsible for benzol wastes but not any other wastes—to sue for recovery of costs above the 6.25% of the total attributable to benzol wastes. See *United States v. Union Oil*, No. 21-55320 (9th Cir. Nov. 27, 2022)(unreported). On the other hand, parties actually attempting to obtain apportionment (that is, assignment of partial shares rather than joint and several liability) have not had great success. See, e.g., *California Department Toxic Substances Control v. NL Industries*, No. 2:20-cv-11293-SVW-JPR (C.D. Cal. Aug. 18, 2023). In NL Industries, the district court found after trial that NL had failed to provide a reasonable basis for apportionment of responsibility for commingled substances in a groundwater plume.

Union Oil also falls into the line of opinions applying the contribution provision (Section 113(f)) and the cost recovery provision (Section 107(a)) on an action-by-action basis. Contribution is a claim to recover from another responsible party the amount incurred by the contribution plaintiff beyond the contribution plaintiff's fair share. Everyone pays 100% of the dollars that it pays, and unless it has a fair share of 100%, on an action-by-action basis everyone incurs more than its fair share of the costs of every action it undertakes. But if one party does one part of the total work, it should only have a right to contribution if that part exceeds that party's fair share of the total. Analyzing the applicability of contribution on an action-by-action basis ignores that.

Government Discretion

Agency discretion and deference to agency decisions has come under attack recently. While the sorts of discretion exercised in the Superfund program are not really the statutory interpretation issues at the core of the debate over *Chevron* deference or application of the "Major Questions Doctrine," they sort of "rhyme" with those exercises of discretion and so the debate may bleed from one area to another.

Settlement

Courts have historically afforded the governmentwide discretion in decisions to settle with a responsible party, resolving its liability and protecting it from contribution claims for "matters addressed" in the settlement. But in two major contaminated river sites, responsible parties disappointed by the EPA's potential settlements with others have mounted attacks on the EPA's discretion to consider ADR-like

"allocation" processes in setting settlement amounts, the EPA's discretion to settle with some but not all parties, and the validity of contribution protection at all. See *United States v. Alden Leeds*, No. 2:22-cv-07326 (D.N.J. consent decree lodged Dec. 16, 2022)(Lower Passaic River in Newark); *Port of Seattle v. The Boeing*, No. cv-22-0993 (W.D. Wash. Nov. 23, 2022)(Lower Duwamish River in Seattle).

Remedy Selection

Because Section 113(h) of CERCLA, 42 U.S.C. Section 9613(h), bars review of remedy selections until an enforcement action or completion of the work, courts rarely consider the reasonableness of remedies. However, in *Housatonic River Initiative v. Environmental Protection Agency*, 75 F.4th 248 (1st Cir. 2023), a settlement under the Resource Conservation and Recovery Act called for selection of a corrective action (that is, a RCRA cleanup) as if it were a CERCLA remedy. RCRA allows for pre-implementation judicial review, and so an environmental group challenged, among other things, the EPA's use of mediation to select a remedy, and the remedy's reliance in part on monitored natural attenuation. The district court and the court of appeals both deferred heavily to agency discretion.

Environmental Justice

Even though this administration emphasizes environmental justice frequently, it has not offered any guidance or regulation concerning whether the presence of a Superfund site in an "overburdened community" has any substantive bearing on the remedy selection or anything else. "Community acceptance" is one of the CERCLA remedy selection criteria. The EPA has encouraged special efforts to identify and to hear from representatives of overburdened communities. But it is not clear that that is more than procedural.

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