



National Association
of Attorneys General

Published by the
NATIONAL ASSOCIATION
OF ATTORNEYS GENERAL
with the cooperation
and support of the
OFFICE OF ENFORCEMENT AND
COMPLIANCE ASSURANCE of the
U.S. ENVIRONMENTAL PROTECTION AGENCY

NATIONAL ENVIRONMENTAL ENFORCEMENT JOURNAL

Vol. 19 No. 11

DECEMBER 2004/JANUARY 2005

Inside . . .

FEATURE ARTICLE

- 3 Proposed Amendments to the Federal Rules of Civil Procedure:
Electronic Discovery in Litigation
By Scott Stuart and Meredith Aldridge

DECISIONS

Air

- 8 Plaintiffs Required to Give Sixty-Day Notice in Post Judgment
Action: *Richard Ellis v. Gallatin Steel Company and Harsco
Corporation*
- 9 Court Affirms Agency's Assessment of Fee for Discharging
Pollutants: *Free-Flow Packaging International, Inc. v.
Secretary of the Department of Natural Resources and
Environmental Control of the State of Delaware*

CERCLA

- 10 No Right to Contribution Under Section 113 Without Prior
Civil Action or Settlement: *Cooper Industries, Inc. v. Aviall
Services, Inc.*
- 12 Organization Has Associational Standing Based on
Informational Injury: *American Canoe Association, Inc.,
and Sierra Club v. City of Louisa Water & Sewer Commission*
- 13 Case Remanded for Decision on Continuing Clean-up Costs:
GenCorp, Inc. v. Olin Corporation
- 15 Court Adopts Pro Tanto Approach: *Hidden Lakes
Development, LP v. Allina Health System*

Copyright 2005

CERCLA (con.)	16	CERCLA Allows Recovery of Some Non-Litigation Connected Attorneys' Fees: <i>Village of Milford v. K-H Holding Corporation & TRW, Inc.</i>
	18	CERCLA Applies to Canadian Company Doing Business in Canada: <i>Joseph A. Pakootas v. Teck Cominco Metals, L</i>
CIVIL PROCEEDINGS	21	
CRIMINAL PROSECUTIONS	24	

The **NATIONAL ENVIRONMENTAL ENFORCEMENT JOURNAL** is published eleven times per year by the National Association of Attorneys General, with the support of the Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, reporting recent developments in environmental enforcement. The **Journal** is funded by the Environmental Protection Agency under grant number 83138301, administered by the Office of Enforcement and Compliance Assurance. The contents of this document do not necessarily reflect the views and policies of the Environmental Protection Agency nor of the National Association of Attorneys General nor does mention of trade names or commercial products constitute endorsement or recommendation for use. Unsolicited articles, inquiries on editorial content, and subscription requests should be addressed to:

Judith E. McKee
Editor, National Environmental Enforcement Journal
National Association of Attorneys General
750 First Street, N.E., Suite 1100, Washington, DC 20002
Phone: (202) 326-6044 Fax: (202) 408-6982

The annual subscription rate is \$195; government/nonprofit organization/academic library rate, \$95. For information on obtaining copies of other materials reported in the **Journal**, contact Dominique Alexander at (202) 326-6045. Articles appearing in this journal are indexed in *Environmental Periodicals Bibliography*.

William H. Sorrell
Attorney General of Vermont
President, National Association of Attorneys General

Roy Cooper
Attorney General of North Carolina
Chair, Environment Committee

Lynne M. Ross
Executive Director

Paula Cotter
Chief Counsel for Environment

Dominique Alexander
Environment Project Assistant

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE:
ELECTRONIC DISCOVERY
IN LITIGATION**

By

Scott Stuart and Meredith Aldridge*

Introduction

At first glance, the proposed amendments to the Federal Rules of Civil Procedure (F.R.C.P.)¹ relating to the discovery of electronically stored information appear to be a simple recognition of emerging trends in technology and information storage mediums. In actuality, the proposed amendments have the potential to reshape the field of discovery in civil litigation as well as change long-held thoughts about the retention of electronic information in daily business activities. The proposed changes would govern the discovery of e-mail communications, instant messages, and, perhaps, even recorded telephone messages — communication and storage mediums employed by virtually all business, governments, and other entities.

*Scott Stuart is a Special Assistant Attorney General with the Office of the Mississippi Attorney General. He has been in the Criminal Division since 1993 and the Environmental Division since 1998. He graduated from Grinnell College and Jackson School of Law at Mississippi College. Meredith M. Aldridge is a Special Assistant Attorney General in the Civil Litigation Division of the Office of the Mississippi Attorney General. She graduated from Mississippi State University and the Cumberland School of Law at Samford University. Ms. Aldridge, former law clerk to the Honorable Karen O. Bowdre, U.S. District Judge for the Northern District of Alabama, was a civil litigator with the Birmingham, Alabama, law firm of Johnston, Barton, Proctor & Powell LLP before joining the Mississippi Attorney General's Office in 2004.

The opinions expressed in this article are those of the authors only and not necessarily those of the Office of the Mississippi Attorney General. Nothing in this article should be construed as legal advice or counsel of any kind. Any questions or issues relating to electronic discovery or the Federal Rules of Civil Procedure should be presented to a licensed attorney.

Although these changes are necessary to reflect the rapidly emerging technology that has replaced traditional information mediums, potential pitfalls abound. The following article provides a basic overview of the proposed amendments relating to electronic discovery and attempts to identify issues for business, government, and other entities to consider if the proposed amendments are adopted.

Overview of the Proposed Amendments

The proposed amendments relating to the discovery of electronically stored information alter Rules 16, 26, 33, 34, 37, and 45 of the F.R.C.P. As the summary prepared by the Administrative Office of the U.S. Courts and Committee Report and Notes explain, the proposed amendments address several areas related to electronic discovery, including, but not limited to, the production and preservation of electronically stored information; the application of the doctrine of privilege to electronically stored information both before and after production; the discovery of electronically stored information that is not “reasonably accessible”; and the application of discovery sanctions for loss of electronically stored information. The proposed amendments also make changes to F.R.C.P. 45 (relating to subpoenas) and Form 35 (relating to the Report of Parties’ Planning Meeting) to correspond with the changes made to the other discovery rules. Below is a brief summary of the changes.

1. F.R.C.P. 16 (Pretrial Conferences; Scheduling; Management), Form 35, and F.R.C.P. 26 (General Provisions Governing Discovery; Duty of Disclosure)

The proposed amendments to Rules 16 and 26 relating to the parties’ meeting and the court’s entry of a scheduling order require the parties and the court to address the issue of electronic discovery in the early stages of litigation. Under the proposed amendments to Rule 26(f), as a part of the required planning meeting, the parties must discuss the disclosure, discovery, and preservation of electronically stored information, as well as the possibility of an agreement for the production of such information that protects privilege.

The amended Form 35 corresponds with the amended Rule 26(f). Under the amended Rule 16, the court may include provisions related to the disclosure and discovery of electronically stored information as well as the parties' agreements regarding privilege.

In addition, the proposed amendment to Rule 26(b)(2)(C) would relieve the parties from producing electronically stored information in discovery if the information is not "reasonably accessible." The proposed amendments also provide a mechanism for the party requesting the production of electronically stored information that has been deemed not "reasonably accessible" to petition the court for relief upon a showing of "good cause."

Finally, the proposed amendment to Rule 26(b)(5)(B) provides a mechanism for a producing party to assert the privileged nature of produced information if it notifies the receiving party of its claim of privilege "within a reasonable time" after its production. The proposed amendment details the treatment of the information by both the producing and receiving parties pending the court's review of the privilege.

2. F.R.C.P. (Interrogatories to Parties)

The proposed amendment to Rule 33 extends the applicability of interrogatories to electronically stored information. As amended, Rule 33(d) allows the responding party to allow access to electronically stored information in lieu of production *if* the "burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served." The text of the amended rule would require the responding party to make a specification that allows the party serving the interrogatory to "locate and identify, as readily as can the party served, the records from which the answer may be ascertained."

3. F.R.C.P. 35 (Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes)

Similarly, the amendments to Rule 34 make requests for production subject to the inclusion of electronically stored information. As the Committee Report and Notes make clear, the amended rule distinguishes between "electronically stored information" and "documents," defining each to include items "in any medium" in order to encompass future technologies. The amended rule would allow the requesting party to specify the form of production for electronically stored information (subject to an objection by the producing party). If no such specification is made, production must be made "in a form in which it is ordinarily maintained, or in an electronically searchable form."

4. F.R.C.P. 37 (Failure to Make Disclosure or Cooperate in Discovery; Sanctions)

The proposed amendment to Rule 37 adds subsection (f), which protects a party from sanctions when electronically stored information is destroyed or lost in the "routine operation of the party's electronic information system," provided the party did not violate an order regarding preservation and the party took "reasonable steps to preserve the information after it knew or should have known the information was discoverable." The Committee Report and Notes to the proposed amendments indicate that the Committee is "continuing to examine the degree of culpability that will preclude eligibility for a safe harbor from sanctions." The Committee Report and Notes also point out that Rule 37(f) applies even in the absence of a discovery request.

Finally, as indicated in the Committee Report and Notes, Rule 37 applies only to the loss of information after a lawsuit has been filed; it does not address such loss prior to litigation or the more general duty of a

party to preserve information prior to litigation. Moreover, the amended rule does not address the interplay of the safe harbor provision with the “reasonable accessible” standard and appears to leave open the possibility that parties may be under a duty to preserve even information that will not later be considered “reasonably accessible.”

5. F.R.C.P. 45

The proposed amendments to Rule 45 merely reflect the changes made to other discovery rules concerning electronically stored information.

Potential Issues to Consider Relating to Electronic Discovery²

The potential implications of the proposed amendments cannot be overstated. Although several likely problems and issues left unsettled by the proposed amendments are evident, the emphasis is clear: electronically stored information, a form of recordkeeping used by virtually all businesses, governments, and other entities, will be subject to the traditional discovery provisions of the F.R.C.P. The amendments seek to balance the need for electronically stored information with the necessary burdens of preservation and cost on the parties. The F.R.C.P. will join the rules of the few district courts and states that have already enacted rules of civil procedure governing electronic discovery.³ As in these states, the application of the amended F.R.C.P. will raise several concerns, some of which are briefly discussed below.

1. Overall Concerns

As an initial matter, the idea of retrieving and producing all “electronically stored information” relevant to discovery requests will seem overwhelming to almost all (if not all) businesses, government offices, and other entities. The potential for dealing with voluminous records by both sides of a dispute will be daunting to even the most experienced litigator. The burden of

identifying, retrieving, and producing relevant (and non-privileged) electronically stored information could be particularly difficult and costly for governmental bodies with traditionally limited budgets and manpower.

In addition to the potential difficulties in retrieval and production, businesses, governments, and other entities face concerns over the preservation of electronically stored information. Just as with retrieval and production, the cost and burden of preservation could be staggering. This burden could be exacerbated by uncertainties in the requirements for preservation of certain information for litigation purposes, particularly when such preservation alters, interrupts, or halts established information retention and expulsion procedures such as backup tapes, disaster recovery systems, and similar mechanisms.

The challenge of including electronic discovery in the traditional framework of discovery will be compounded by the fact that, at least in the past, case law concerning discovery varies by jurisdiction and is not often discussed by appellate courts.

2. Parameters for Preservation of Electronically Stored Information

The proposed amendments require the issue of electronic discovery to be discussed early and often. As the Committee Report and Notes indicate, the proposed amendments would require parties to discuss potential discovery issues. Just as the forms of electronically stored information vary, so too will the ways litigants agree to preserve and produce such information. Because electronic data often change form — for example, the common practice of overwriting old information with new — the challenge of preservation is great, particularly if the preservation interferes with or greatly increases the expense of maintaining current records during the preservation. Moreover, although the amended rules would address the sanctionable nature of conduct in relation to routine destruction of information, it is not clear how this standard will be applied.

3. Definition of “Reasonably Accessible”

Under the proposed amendment to Rule 26(b)(2), only electronically stored information that is “reasonably accessible” must be produced in response to a discovery request. No definition of “reasonably accessible” is provided in the proposed amendments regarding this almost certain area of dispute among parties in discovery. The Committee Report and Notes to Rule 26 provide some guidance, describing “reasonably accessible” information as that which the producing party “routinely accesses or uses” or that is easily located or retrieved. These guidelines, however, raise additional issues of what is easily located or retrieved. For example, information may be “easily located” at great expense. In addition, the proposed amendments require information to be “identified” as “not reasonably accessible,” creating a potential burden on the responding party.

The rules regarding production of electronically stored information that is “reasonably accessible” do provide some safeguards for the parties. Specifically, the producing party need only produce what it identifies as “reasonably accessible.” If the requesting party challenges that characterization, the producing party will have the burden of demonstrating that the information sought is not “reasonably accessible.” The court will consider the issue and order production only on a showing of “good cause” by the requesting party, which will balance the need for the information against the burden of production. Undoubtedly, the application of this traditional discovery standard will be more challenging in the arena of electronically stored information. The Committee Notes cites a few cases that have addressed these issues.

4. Extent of Duties Under Rules 33 and 34

The proposed amendment to Rule 33 will make clear that electronically stored information is required to be considered as responsive to an interrogatory. This general change to include electronically stored information is, perhaps, less difficult to apply than the amended Rule 33(d) allowing for production to be substituted with access to electronically stored infor-

mation when the above-described requirements are met. Importantly, the ability to provide access rather than production will almost certainly raise issues regarding the requirement of providing means to access the information, technical support, particular software, and the like to the requesting party in order to allow it access and use of the information. By contrast, the means and choices for form of production under Rule 34 appear to provide less room for dispute.

5. Privilege and Waiver

The proposed amendments update the traditional rules of privilege and waiver with respect to electronically stored information. As the Committee Report and Notes point out, because of the volume and form of electronically stored information, the review of documents for privilege will likely be more time consuming and expensive. The proposed amendment to Rule 26(b)(5)(B), which is not limited by its terms to electronically stored information, attempts to curtail these difficulties by allowing production subject to a later claim of privilege under a non-waiver agreement. The language of the proposed amendment does not address whether there has been a waiver of privilege by using the method described in the amended rule, not does the proposed amendment define “within a reasonable time” as it relates to the notification of the claimed privilege. If applicable, however, the parties must discuss such an agreement as a part of the parties’ planning meeting, which the court could then include in the scheduling order. As the Committee Report and Notes indicate, the parties are not required to make such an agreement, and the court is not authorized to address the issue in absence of an agreement by the parties.

6. Safe Harbor Provisions

The proposed amendments to Rule 37 provide a limited safe harbor when a party fails to provide electronically stored information. To be eligible for the safe harbor, the party must meet certain requirements, including the requirement of taking “reasonable steps” to preserve the information when the party knew or

should have known of the discoverability of the information. By its terms, the safe harbor provision expressly applies to the destruction of electronically stored information during the “routine operation of the party’s electronic information system.” As noted above and as acknowledged by the Committee in its Report and Notes, the interruption or alteration of routine operations in a party’s electronic information system in order to comply with rules concerning electronic discovery (including Rule 37) could be costly or burdensome. Moreover, sanctionable conduct under Rule 37 could potentially raise concerns under the applicable rules of professional responsibility. Government entities would be wise to begin reviewing their electronic data processes and storage procedures to prepare for potential changes to the F.R.C.P., particularly with respect to the maintenance and elimination of files

Conclusion

Public comments to the proposed amendments have been numerous and varied. Some say that the inclusion of electronic discovery rules is an absolute necessity; others, that the proposed amendments will be too burdensome. Whether or not the proposed amendments pass in their current form, some modified form, or not at all, there is sure to be an ongoing dialogue regarding electronic discovery.

ENDNOTES

1. The proposed amendments were prepared by the Judicial Conference’s Advisory Committee on Civil Rules. The proposed amendments are open for public comment through February 15, 2005. Comments may be submitted electronically to www.uscourts.gov/rules. In addition to written comments, public hearings have been and will be held. The last one is scheduled for Washington, D.C. on February 11, 2005. Transcripts of the hearings are available on the above website. If the proposed amendments pass, they will become effective on December 1, 2006.

2. Valuable consideration is given to these and related issues in *MANUAL FOR COMPLEX LITIGATION* (4th ed.), available at www.fjc.gov. The Manual was often cited in the Committee Notes.

3. For example, the Mississippi Rules of Civil Procedure were amended in 2003 to add the following subsection to Rule 26(b):

(5) *Electronic Data*. To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot — through reasonable efforts — retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court may also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

This provision, like its proposed federal counterpart, uses a vague term — “reasonably available” — to govern production of electronic data. The Mississippi rule, however, expressly provides a provision that allows the court to order the requesting party to pay the reasonable expenses for any “extraordinary steps” needed to obtain the electronic data.

DECISIONS

Air

Plaintiffs Required to Give Sixty-Day Notice in Post Judgment Action: *Richard Ellis et al. v. Gallatin Steel Company and Harsco Corporation*, Nos. 02-6421 et al. (6th Cir. Oct. 26, 2004)

Background

Two companies, Gallatin Steel Company and Harsco Corporation, operate a steel manufacturing company and a slag processing company, respectively, on rural property in Gallatin County, Kentucky. Their operations are a quarter mile west of two rural residences. The dust particles from the manufacturing operations have migrated to these two residences and severely affected the people living there. The two residents so affected, the Ellis family and Laverne Brashear, sued the two companies, alleging, *inter alia*, that the companies violated the Clean Air Act (CAA) by violating Kentucky's fugitive dust emissions rule and by failing to obtain a state prevention of significant deterioration (PSD) permit. The lawsuits also claimed a violation of the Kentucky nuisance law and alleged that the companies were liable to the plaintiffs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

U.S. EPA also brought suit against the companies under the CAA. The district court granted the private citizens' motion to intervene in the federal lawsuit and, in July 2002, granted the United States' motion to enter consent decrees. The court then dismissed the private plaintiffs' fugitive dust and PSD claims, finding that the consent decrees and a state administrative proceeding had barred or precluded the claims. It also concluded that the CERCLA claim was meritless. Three months later, the court held a bench trial concerning the state law claims. The Ellis plaintiffs showed that fugitive dust had crossed their property lines after the entry of the consent decree. The court awarded injunctive relief, based on the CAA and the state nuisance claim, and compensatory and punitive damages for the nuisance claim.

Among the issues on appeal was whether a sixty-day notice was necessary prior to granting the plaintiffs' injunctive relief under the CAA.

Holding

Harsco and Gallatin challenged the court's decision to grant injunctive relief. They argued, among other things, that the post-consent decree violations constituted new claims that required compliance with the notice provisions of the CAA. The court awarded injunctive relief under the CAA because it determined that Harsco and Gallatin had violated the statute by failing to take adequate dust-abatement measures. In granting injunctive relief, the court went beyond the consent decree by appointing a special master to monitor the fugitive dust situation at Harsco and Gallatin. In contrast, the consent decree only required Harsco to allow EPA access to its facilities to ensure the company's compliance with the consent decree.

The plaintiffs did not explain why the CAA would not require them to give the required sixty-day notice prior to filing a claim for the post-consent decree violations of the act when their original CAA claims had been dismissed by the trial court. There does not seem to be any difference from a policy standpoint between a requirement to notify in the first instance and a requirement to notify the EPA on a claim that relies on the inadequacy of a consent decree negotiated by the agency.

In granting the injunctive relief, the court expressed the concern that the Ellises could not directly enforce the consent decree and had no apparent remedy for continued fugitive dust problems because, under the decree, EPA will not monitor the situation on a regular basis. However, it is unclear why this concern was not met by the court's granting the Ellises injunctive and monetary relief under the Kentucky nuisance law. The appellate court also remarked that it should be remembered that the CAA primarily serves public, not private, interests. The purpose behind the citizen suit provision is to benefit not private interests, but society as a whole. "Personalized" remedies are not a first priority of the statute.

Furthermore, the Ellises did have three avenues of federal relief available to them. They could have petitioned EPA to enforce the consent decrees; they could have petitioned EPA or the court to obtain a modification of the consent decree; and they could have filed a new lawsuit after supplying the requisite notice to EPA, Kentucky, and Harsco and Gallatin.

Therefore, the court reversed the portion of the case that granted injunctive relief under the CAA.

Court Affirms Agency's Assessment of Fee for Discharging Pollutants: *Free-Flow Packaging International, Inc. v. Secretary of the Department of Natural Resources and Environmental Control of the State of Delaware, No. 1, 2004* (Del. Nov. 12, 2004)

Background

In the 1990 amendments to the federal Clean Air Act (CAA), Congress required that certain sources of air pollutants obtain a Title V operating permit. Before 1999, in Delaware, the permit fees were based on the source's level of emissions as recorded in a 1990 inventory. Free Flow Packaging was classified as a "small source" and paid a \$7,000 per year permit fee. In 1999, the state legislature changed the fee structure to impose a "user fee" and a "base fee." The user fee is based, as was the original fee, on the source business's level of emissions. The base fee relates to the range of services that the Department of Natural Resources and Environmental Control (DNREC) must provide for all sources of pollution. In December 1999, Free-Flow received a bill for \$20,000, which included an \$18,000 base fee. This fee was assessed because DNREC determined that Free-Flow is a "complex" source requiring up to 625 hours of services.

Free-Flow objected to the fee and withheld a portion of it. After the DNREC issued a Notice of Violation, Free-Flow appealed to the Environmental Appeals Board, which upheld DNREC's finding. The Superior Court affirmed and Free-Flow appealed. It argued that the DNREC could not lawfully determine each source's base fee without adopting a regulation

or other written guideline that specifies the methodology by which the base fee will be assessed.

Holding

The statute governing for the base fee provides, in relevant part:

(d) The base fee relates to services that are common to all sources subject to the Program. These services include activities such as permit issuance and renewals; stationary source regulation development; ambient monitoring; emission inventory; control strategy development; and development, administration and implementation of 2 additional programs: the SBTCP and a portion of the accidental release prevention program. The Department will place each subject source into 1 of the following 4 categories, either as a voluntarily requested synthetic minor or as determined from estimated hours spent performing services:

- (1) Synthetic minor: \$3,000;
- (2) Routine, up to 400 hours spent: \$7,400;
- (3) Complex, from 401 to 625 hours spent: \$18,000; and
- (4) Very complex, over 625 hours spent: \$39,500.

DEL. CODE ANN. tit. 7, § 6097(d).

Free-Flow contended that DNREC had to issue a regulation or have a written guideline before determining each source's base fee, arguing that state caselaw dictates that written standards be adopted to ensure against capricious or whimsical policy making, citing *Butler v. Insurance Commissioner*, 686 A.2d 1017 (Del. 1997).

This court, however, and the trial court concluded that *Butler* is not applicable. In that case, the insurance

commissioner required a suspended insurance agent to complete three ethics courses prior to reinstatement. The policy to require the courses was not written although it had been imposed for several years. The court concluded that unless there was a written regulation applicable throughout the department, the policy could not be enforced, especially when non-compliance yielded such a severe penalty, license revocation.

This is not the same case. The DNREC did not adopt any unwritten policy. The statute itself required the agency to place each source into one of two categories. The DNREC must make the estimation of the number of hours spent performing services and publish the results in the Delaware Register of Regulations. There is no concern here, as in *Butler*, about “whimsical policymaking.” There was clear legislative directive.

Alternatively, Free-Flow contended that the process by which the DNREC assigned sources to one of the categories was a regulation because it was a statement of procedure to be used as a standard and that, under Delaware’s Administrative Procedure Act, an agency action must be either a regulation or a case decision and it does not fit the definition of a case decision. The court disagreed with the premise that everything an agency does must be either a regulation or a court decision. The APA standardizes the methods that state agencies must use to exercise their statutory powers but not everything an agency does is subject to the APA. In this case, the court was satisfied that the DNREC was authorized to implement the base fee categorization without a regulation.

The court reviewed the legislative history and noted that the categorization process used in the legislation was adopted on the recommendation of the Title V Operating Permit Program Advisory Committee. The statute must be renewed every three years and the Advisory Committee must submit a new report each time. Thus, the permit fees are closely monitored and subject to triennial modification.

Finally, Free-Flow argued that the DNREC’s assignment of categories was arbitrary and capricious because the agency did not estimate the number of hours that would be spent on activities relating to Free-Flow and did not repeat its categorization process after the statute was amended. As to the first allegation, the court held that the record supports the conclusion that the DNREC did estimate the amount of time it would spend on Free-Flow. Free-Flow is correct that there was no re-categorization after the amendment. However, the DNREC already had performed the categorization as part of the Advisory Committee’s report prior to the legislation being adopted. Free-Flow could not show any reason why the agency would be required to undergo the procedure again after the legislature had essentially ratified the categorizations by passing legislation based on them.

Thus, the court affirmed the decision of Delaware’s Environmental Appeals Board.

CERCLA

No Right to Contribution Under Section 113 Without Prior Civil Action or Settlement: *Cooper Industries, Inc. v. Aviall Services, Inc.*, No. 02-1192 (U.S. Dec. 13, 2004)

Background

Cooper Industries, Inc., owned and operated four aircraft engine maintenance sites in Texas that it sold to Aviall Services, Inc., in 1981. Ultimately, Aviall discovered that both it and Cooper had contaminated the facilities with petroleum and other hazardous substances. Cooper notified the Texas Natural Resource Conservation Commission, which directed Aviall to clean up the site, threatening to pursue an enforcement action if Aviall failed to undertake remediation. Aviall began the cleanup under the state’s supervision in 1984.

Aviall sold the properties in 1995 and 1996, but it remains contractually responsible for the cleanup. It has expended about \$5 million so far. In 1997, it filed the present action against Cooper, seeking to recover

the clean-up costs. The original lawsuit asserted a claim for cost recovery under section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), a separate claim for contribution under section 113(f)(1), and state law claims. Later, Aviall amended the complaint, combining its two CERCLA claims into a claim under section 113(f)(1).

Both parties moved for summary judgment. The court held that relief under section 113(f)(1) was unavailable to Aviall because it had not been sued under section 106 or 107 of CERCLA. Since it dismissed Aviall's federal claims, the court declined to exercise jurisdiction over the state-law claims. After a divided panel of the Fifth Circuit affirmed, the court reheard the case en banc. It reversed, holding that section 113(f)(1) allows a PRP to obtain contribution from other PRPs regardless of whether it had been sued under section 106 or 107. Three members of the en banc court dissented. The Supreme Court granted certiorari.

Holding

The first section of section 113(f)(1) provides that "[a]ny person may seek contribution . . . during or following any civil action under section 9606 of this title or under section 9607(a) of this title." 42 U.S.C. § 9613(f)(1). Aviall argued that the "may" should be read permissively so that the initiation of a civil action is only one, but not the exclusive, occasion whereby contribution might be sought under section 113(f)(1). The Court disagreed. It held that the natural meaning of "may" in the context of an enabling clause is that the specified condition must be met in order for a contribution suit to be brought.

The Court also noted that, if section 113(f)(1) authorizes contribution actions at any time, the words "during or following" would be rendered superfluous. Section 113(f)(3)(B), which authorizes contribution actions after settlements, would also be superfluous.

The savings clause in section 113(f)(1) did not change the Court's conclusion. That sentence states: "Nothing

in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title." 42 U.S.C. § 9613(f)(1). The sole function of that section, according to the Court, is to clarify that other causes of contribution may exist independently of section 113(f)(1). It does not itself create a cause of action.

The statute of limitations provision in section 113 provides two corresponding three-year limitations periods for contribution actions, one beginning at the date of judgment (section 113(g)(3)(A)) and one beginning at the date of settlement (section 113(g)(3)(B)). There is no statute of limitations if a judgment or settlement never occurs. The lack of such a provision bolstered the Court's conclusion that such a contribution claim is not cognizable under CERCLA's section 113.

Aviall and an amicus argued that, in the alternative, recovery is available under 107(a)(4)(B) even though it is a potentially responsible party (PRP). The dissent would also so hold. However, the majority declined to address that issue since the Fifth Circuit sitting en banc did not consider Aviall's section 107 claim. The court noted the importance of the section 107 issue. Since there was no decision in the court below on that issue and, thus, no briefing on it and in light of the plethora of decisions from other circuit courts holding that a PRP may not pursue a section 107(a) lawsuit, the Court decided to withhold judgment.

The Court also declined to decide whether Aviall has an implied right to contribution under section 107. The Court did note earlier decisions where it had refused to recognize implied or common-law right to contribution in other statutes and also commented that, in enacting section 113(f)(1), Congress explicitly recognized a particular set of contribution rights that the courts had recognized, prior to the Superfund Amendments and Reauthorization Act. Nonetheless, its sole holding in this case was that section 113(f)(1) does not support Aviall's suit.

Organization Has Associational Standing Based on Informational Injury: *American Canoe Association, Inc., and Sierra Club v. City of Louisa Water & Sewer Commission et al.*, No. 02-6018 (6th Cir. Nov. 1, 2004)

Background

The American Canoe Association and the Sierra Club filed a complaint on both their own behalf and on their members' behalf alleging that the defendants had violated the terms of their National Pollutant Discharge Elimination System (NPDES) permit, thereby violating the Clean Water Act (CWA). The district court determined that the plaintiffs lacked standing because none of its members had standing to sue in his or her own right. The court then denied a motion for reconsideration and the plaintiffs appealed. Among the issues on appeal was whether a group has associational standing because of informational injury due to the defendants' failure to accurately and adequately monitor and report the pollution they discharge.

Holding

The court noted that there is no question that an association may have standing to assert an injury whether or not its individual members have standing. See *Warth v. Seldin*, 422 U.S. 490, 511 (1975). In this matter, the plaintiffs alleged that the monitoring and reporting violations negatively affected its efforts to "research the compliance status of Kentucky dischargers . . . and to report the results of that research to [its] members, to propose legislation . . . ; and to bring litigation to prevent violation of the discharge limitations in the permit and thereby protect the waters affected by the facility's discharge." The plaintiffs relied on the decision in *FEC v. Akins*, 524 U.S. 11 (1998), where the Court found a cognizable informational injury under the Federal Election Campaign Act. They also cited *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440 (1989), where, again, the Court found a cognizable informational injury under the Federal Advisory Committee Act.

The court went on to discuss the decision in *Akins* in depth. Standing requires a showing of both injury in fact, fairly traceable to the conduct of the defendants and redressible by a favorable decision, and satisfaction of prudential standing, among which had normally been a requirement that the complaint be more than a "generalized grievance." In *Akins*, the Court determined that the prudential standing requirement had been met because Congress had granted standing to all citizens who could demonstrate Article III, injury-in-fact standing. Nonetheless, the Court addressed the Federal Election Commission's argument that the *Akins* lawsuit involved only a generalized grievance, that the commission had failed to classify a particular group as a political committee, thereby triggering some disclosure requirements. The Court determined that the grievance was "concrete" enough to establish standing, contrasting the allegation of withholding information relating to voting to an "abstract and indefinite" harm to the "common concern of obedience to the law." *Id.* at 23. Thus, the Court held that Congress can create standing where an *actual* injury befalls every member of the community.

The Court's decision in *Akins* could be read to add an additional requirement to its earlier holding in *Public Citizen* in order that informational injury be cognizable in the federal courts. In *Public Citizen*, the Court held that "those requesting information under [the Freedom of Information Act] need '[not] show more than that they sought and were denied specific agency records'" in order to demonstrate standing. 491 U.S. at 449. In comparison, in *Akins*, the Court held: "We conclude that . . . the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts." 524 U.S. at 24-25.

The court found it difficult to distinguish the facts in those two cases so declined to read into *Akins* a firm requirement that a plaintiff must allege more than the withholding of required information from the citizenry in order to establish standing. Nor could the court distinguish the case before it from the Supreme Court

cases. Here, American Canoe and the Sierra Club wish to have information that the defendants are legally obliged to provide. The injury alleged is not that the defendants are failing to obey the law; the injury is that the defendants are disobeying the law by not providing information that the plaintiffs desire and allegedly need. If, in fact, *Akins* does require more — some reason the plaintiffs need the information — that requirement is liberally construed and has been met in this case. The court could find no difference between the organizations' interest in "proposing legislation" than the desire to "participate in the judicial nomination process," the interest involved in *Public Citizen*.

Thus, the court concluded that associational standing had been met.

[Editor's note: J. Kennedy wrote a dissent in which he notes that the majority failed to address an issue raised in *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972), and by the D.C. Circuit in *Foundation on Economic Trends v. Lyng*, 943 F.2d 79, 84–85 (D.C. Cir. 1991). That concern is how a court, which grants standing to an association based on an allegation of informational injury, could avoid eliminating Article III standing requirements entirely for other organizations and citizens. He noted that, although, under the CAA, a permittee must file compliance information with the state and that those filings are public information, nowhere in the statute does it grant a specific right to the information, unlike the Federal Elections Campaign Act in *Akins* and the Federal Advisory Committee Act in *Public Citizen*.]

Case Remanded for Decision on Continuing Clean-up Costs: *GenCorp, Inc. v. Olin Corporation*, Nos. 03-3019/3211 (6th Cir. Nov. 22, 2004)

Background

In the 1960s, GenCorp, Inc., and Olin Corporation entered into a complicated business arrangement, which, as the court noted, defies easy categorization. Olin built a manufacturing plant on land owned by GenCorp, adjacent to a GenCorp plant, where Olin was to manufacture toluene di-isocyanate (TDI). GenCorp promised to purchase fifty percent of the TDI for use in manufacturing urethane foam. GenCorp also agreed to purchase hydrochloric acid, a byproduct of the TDI manufacturing process, from

Olin and to supply steam for Olin's new plant.

The agreement did not speak to the issue of hazardous waste disposal. The agreement further did not mention the furnishing of employees; however, GenCorp supplied all of Olin's hourly workers, keeping them on its own payroll and negotiating a collective bargaining agreement for them. Olin supplied many of the supervisory employees; GenCorp did supply some of them. A four-member committee (two from Olin and two from GenCorp) oversaw the construction, operation, and management of the plant.

The committee addressed the issue of waste disposal in various ways. The hauling costs for residue disposal appeared as a line item on Olin's budget; GenCorp paid this as part of the variable costs by incorporating it into the price paid for TDI.

Although the 1962 agreement contemplated that GenCorp would eventually purchase the plant from Olin, in a new agreement in 1971, GenCorp relinquishing that right in exchange for a \$1.65 million payment from Olin. In that agreement, GenCorp also promised to purchase not less than eighty percent of its yearly TDI requirements from Olin. At that time, GenCorp employees were placed on Olin's payroll and the committee for overseeing the TDI plant was dissolved.

In the late 1970s, Olin began investigating toxic contamination at the site. In consultation with state environmental officials, in early 1980, Olin performed an erosion control project at the site. In September 1983, the area was placed on U.S. EPA's National Priority List under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In 1985, EPA notified Olin that it was a potentially responsible party for the site and requested that it conduct a remedial investigation and feasibility study. EPA issued a unilateral administrative order in March 1990 against Olin to implement the remedial action plan for the site. Olin began implementing the plan in late 1992.

GenCorp filed a declaratory judgment against Olin in October 1993, anticipating that Olin would seek contribution for the remediation costs. Olin counterclaimed, seeking a court declaration that GenCorp was jointly and severally liable with Olin for the response costs or owed Olin contribution for at least one half of its costs. GenCorps' claim was voluntarily dismissed. GenCorps then counterclaimed, alleging, among other things, that Olin had breached its contract obligation to insure the TDI plant.

At trial, the court dismissed Olin's claim under section 107 of CERCLA. The court determined that GenCorp was liable as an "arranger" and as an owner and operator, responsible for thirty percent of the costs at one site and forty percent of the costs at another. It entered judgment against GenCorp of approximately \$19 million plus more than \$9 million in prejudgment interest. It tabled the breach-of-contract claim pending the outcome of a lawsuit in New York between Olin and its insurers.

Among the issues on appeal was whether the statute of limitations bars Olin's claims and whether the district court should have granted Olin's request for declaratory relief regarding future clean-up costs.

Holding

In regard to the statute of limitations issue, the parties agreed that section 113(g)(2) of CERCLA governed the case. That section contains two different time limitations, one for a removal action (three years after completion) and one for a remedial action (six years after initiation). GenCorp argued that the actions taken by Olin in the early 1980s triggered the statute for a remedial action. Olin argued, however, that the limitations period did not begin running until the work ordered by the EPA was begun. The district court concluded that the relatively low cost and the short duration of the earlier project made it more in the nature of removal, not remediation. The circuit court agreed, noting that CERCLA defines remedial action as encompassing only "those actions consistent with [the] permanent remedy taken . . . to prevent or minimize the release of hazardous substances." 42 U.S.C. §

9601(24). Olin's earlier actions were not consistent with EPA's permanent remedy for the site and, in fact, were inconsistent with it. The final plan called for Olin to dismantle its previous work at the site.

The Ninth Circuit has held that the initiation of construction of the remedial action can occur only *after* the remedial action is adopted. Therefore, any activity conducted prior to the adoption of the remedial plan cannot be considered a remedial action. *California ex rel. California Department of Toxic Substances Control v. Neville Chemical Company*, 358 F.3d 661, 667 (9th Cir. 2004). Although other circuits have rejected this bright-line rule, they have adopted the principle that work must be consistent with a permanent remedy in order for a remedial action to begin. The court determined that it was not necessary to determine whether to adopt the Ninth Circuit's rule because, in this case, Olin's initial work in the 1980s was not consistent with the EPA-ordered final remedial plan. Thus, it concluded that its 1980s activities did not trigger the statute of limitations for recovery of costs related to its remedial actions later.

Olin argued that the district court should have entered a declaratory judgment against GenCorps for Olin's future costs. Section 113(g)(2) provides that, in a contribution action, "the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent . . . actions to recover further response costs or damages." 42 U.S.C. § 9613(g)(2). GenCorp argued that it is up to the discretion of the court as to whether declaratory relief should be ordered. The court agreed with Olin that requests for declaratory judgments concerning future response costs under section 107 and 113(f) must be treated alike. However, entry of a declaratory judgment can never be fully mandatory. Under Article III, there must be a "case or controversy" for a court to ask. The court found that the record was insufficient to determine whether the evidence of future response costs satisfied the "case or controversy" requirement. Therefore, the court remanded this issue to the district court for determination whether the "case or controversy" requirement has been met.

Court Adopts Pro Tanto Approach: *Hidden Lakes Development, LP v. Allina Health System et al.*, No. Civ. No. 02-406 (JNE/JGL) (D. Minn. Sept. 27, 2004)

Background

This lawsuit, filed under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), was brought by the purchaser of a sixty-eight acre property in Golden Valley, Minnesota. Hidden Lakes Development (HLD) alleged that the defendants had violated CERCLA and its state counterpart and also alleged certain state common law claims. The contamination on the property was caused when a large ravine was filled with construction debris, some of which contained asbestos-contaminated materials.

A third-party defendant, Transitional Hospitals Corporation (THC), signed a settlement agreement whereby THC paid over \$2 million to HLD and HLD agreed to indemnify and defend THC against future actions relating to claims under CERCLA and the Minnesota Environmental Response and Liability Act (MERLA). The court, thus, barred the defendants' cross-claims for contribution from THC. However, a question remained as to how to apply the proceeds of THC's settlement to any damages HLD may recover.

Holding

The defendants argued that the court must apply THC's settlement pro tanto, instead of applying it proportionately. The court noted that the issue as to the credit rule to apply in CERCLA cases brought by private parties is not well settled.

The proportionate approach, coming from the Uniform Comparative Fault Act, would result in a reduction of the plaintiff's claim by the percentage of the settlor's fault. Using that approach, the court would determine all parties' percentage of fault and the amount of total damages. The settlement amount would then be credited as having paid the settlor's determined percentage of fault, regardless of whether

the settlement amount actually equals that percentage.

The pro tanto approach, on the other hand, found in the Uniform Contribution Among Tortfeasors Act, applies a credit of the settlement towards the plaintiff's ultimate recovery. Thus, non-settlers would be liable for the remainder of the damages amount. If the court uses this measure, it must evaluate the settlement agreement for good faith and fairness to ensure no collusion occurred.

In section 113 of CERCLA, when there is a settlement with the United States or a state, Congress mandated that the pro tanto approach must be used. However, the statute is silent as to whether this approach must be used for private party settlements. Some courts have interpreted this silence as permission for a court to use its discretion. *Atlantic Richfield Company v. American Airlines, Inc.*, 836 F. Supp. 763, 775 (N.D. Okla. 1993). Others have interpreted the silence to mean the proportionate share rule should be applied. *See New York v. Solvent Chemical Company*, 984 F. Supp. 160, 168 (W.D.N.Y. 1997). Still other courts have applied the proportionate credit rule to create a uniform approach. *See, e.g., Lyncott Corporation v. Chemical Waste Management*, 790 F. Supp. 1409, 1417 (E.D. Pa. 1988).

The court concluded that it should choose the credit rule that, based on the facts of this case alone, would best promote the interests of CERCLA and the governmental interests.

Looking at the settlement release itself, the court noted that, by its terms, it was to be construed as a *Pierringer* release, one in which a plaintiff may settle his claims against some tortfeasors while reserving the remainder of his cause of action against non-settlers.

According to the court, this statement of intent would normally mean that the court should apply the proportionate rule, but the court determined that, in this case, application of that rule would be a complete windfall for HLD since HLD's own expert assigned no per-

centage of liability to THC. That windfall would pay almost 80% of HLD's enumerated costs. Under the pro tanto approach, on the other hand, THC's payment would be credited to HLD's claimed costs and the remainder (approximately \$500,000) would be allocated amongst the remaining tortfeasors.

Therefore, applying the proportionate rule, the defendants' incentive would be to intensely litigate the liability attributable to THC whereas HLD would be encouraged to play down THC's liability. Since application of the proportionate rule would operate to increase, rather than minimize, litigation, the court applied THC's settlement pro tanto to any recovery awarded HLD.

CERCLA Allows Recovery of Some Non-Litigation Connected Attorneys' Fees: *Village of Milford v. K-H Holding Corporation & TRW, Inc.*, No. 03-1597 (6th Cir. Nov. 23, 2004)

Background

In 1989, the Village of Milford, Michigan, discovered that its municipal water supply wells were contaminated with trichloroethene (TCE) and dichloroethene (DCE). Milford later discovered three other hazardous chlorinated compounds—dichloroethane (DCA), trichloroethane (TCA), and tetrachloroethane (PCE)—in its groundwater. In 1994, the village retained an environmental attorney and consultants to determine the source of contamination. It also asked the Michigan Department of Natural Resources (MDNR) to determine that K-H, a company which operated a facility uphill of Milford's wells, was a potentially responsible party (PRP). The MDNR declined, advising Milford to conduct additional studies. In 1996, the Michigan Department of Environmental Quality (MDEQ) did identify K-H as a PRP, based on the additional studies. At all times, Milford's water has met federal safe drinking water standards.

K-H discovered that TCE, DCE, DCA, TCA, and PCE were in the groundwater on its property and were

migrating toward Milford's wells. K-H provided Milford with a report but denied responsibility for contamination of its wells. In 1994, K-H began remedial measures, installing a soil vapor extraction system which removed contaminants from the soil at the facility. It also installed an interdiction system to stop contaminant-laden groundwater from flowing towards Milford's wells in 1999.

Milford filed suit in March 1999, seeking damages for trespass under Michigan law and recovery of its costs under the Comprehensive Environmental Response, Compensation, and Liability Act and Michigan's Natural Resources and Environmental Protection Act (NREPA). A jury found K-H liable for trespass, but the court granted judgment notwithstanding the verdict, determining that the three-year statute of limitations barred the claim. The court found that the only attorney's fees that Milford could recover under CERCLA, if recoverable at all, were those related to determining that K-H was a PRP. It also concluded that the CERCLA claim failed because Milford's response costs were not "necessary." The NREPA claim failed because Milford did not show that K-H caused the release of contaminants and, again, because Milford's actions were not a *required* response to the contamination.

Holding

The court first addressed the statute of limitations issue. In Michigan, the statute of limitations for trespass is three years. The court concluded that CERCLA and Michigan law provide the same commencement date and that the date was more than three years before Milford filed the lawsuit. CERCLA provides that the federally required commencement date should be used if the state commencement date is earlier. CERCLA's commencement date is the date on which "the plaintiff knew (or reasonably should have known) that the . . . property damages . . . were caused by or contributed to by the hazardous substance or pollutant or contaminant concerned." 42 U.S.C. § 9658(b)(4)(A). Under Michigan's discovery rule, a plaintiff's claim accrues when, with rea-

sonable diligence, the plaintiff should have discovered the injury and the causal connection between the injury and the defendant's breach. Michigan courts have not considered whether the discovery rule applies to groundwater contamination cases.

The federal court assumed that the Michigan Supreme Court would apply the discovery rule in this case. The commencement date established by the discovery rule is functionally identical to the federal commencement date under CERCLA. The question asked by both rules is when the plaintiff knew or should have known of the potential action against the defendant. In this case, the record is clear that K-H told Milford in 1993 or 1994 that it had discovered a release of hazardous substances and that Milford asked the MDNR to identify K-H as a PRP in 1994. Under the discovery rule, it is not required that there be certainty as to the identity of the tortfeasor. According to the court, "[t]o toll the limitations period because a prospective defendant denies its liability, or because the plaintiff lacks absolute certainty as to the tortfeasor's identity, would circumvent the purpose of the statute of limitations." Slip op. at 4. The court, thus, concluded that the limitations period for a trespass action had expired prior to Milford's bringing the lawsuit.

Milford argued, however, that there was a continuing trespass because there was a continuing migration of the contaminants. However, Milford did not present evidence at trial to suggest that K-H continued to release substances after March 1, 1966. Further migration of contaminants is not a new act of trespass. There must be further acts of the defendant in order for a continuing trespass to be successfully alleged. In *Hovarth v. Delida*, 540 N.W.2d 760 (Mich. Ct. App. 1995), the court held that, where water seepage causes property damage, the cause of action accrues when the land is visibly damaged. Therefore, the seepage of more water (or, in this case, more contaminants) would not constitute an additional tort.

The district court concluded that Milford's response activities "were not cost effective and environmentally sound, and did not contribute in any significant manner to directly addressing the release of contami-

nants from the facility." The appellate court held that the district court's finding of fact conflicted with this conclusion. The appellate court noted that Milford hired consultants, met with the MDNR, undertook more studies, and worked closely with the MDEQ. These activities indicate that at least some of the activity would be considered recoverable monitoring and evaluation costs.

The district court also denied recovery because it found that Milford's costs were not recoverable as "removal" costs. The court disagreed. Milford's costs fall squarely into the definition of removal. Even the district court concluded that "this suit is a cost recovery action for 'removal' costs, which may include preliminary investigative and evaluative costs." Nonetheless, because the trial court found that Milford had failed to present evidence of an *immediate* threat, it denied Milford recovery. Although much of the caselaw has indicated that removal actions are frequently short-term actions in response to an emergency, the court has never held that these characteristics are required for finding that costs of an action recoverable as removal costs.

The district court also denied recovery because Milford did not comply with the National Contingency Plan in conducting its response actions. However, jurisprudence in the Sixth Circuit is that consistency with the NCP is not required for recovery of monitoring and investigation costs. *Donahey v. Bogle*, 987 F.2d 1250, 1255 (6th Cir. 1993), *vacated on other grounds*, 512 U.S. 1201 (1994). The court therefore concluded that the trial court erred in denying recovery on the basis that the costs are not removal costs and that Milford failed to comply with the NCP.

The court also determined that the response costs were not "necessary," partially because Milford's water has always met federal safe drinking water standards. The safety of a water supply is certainly a factor in considering "necessity." However, when a release has occurred and there is a potential for future contamination, some response costs will certainly be reasonable, if only to ensure the continual safety of the water.

The court also held that the awarding of attorneys' fees only to the extent of determining that K-H was a PRP was too restrictive. The court acknowledged that its earlier rulings interpreting the Supreme Court's holding in *Key Tronic Corporation v. United States*, 511 U.S. 809, 819 (1994), are ambiguous. In that case, the Court held that attorneys' fees for litigation-related activities are not recoverable under CERCLA. Clarifying its earlier rulings, the court held that a CERCLA plaintiff may recover attorneys' fees "if the activities for which the fees are incurred could have been performed by a non-attorney, are closely tied to an actual cleanup, are not related to the litigation, and are otherwise necessary." Slip op. at 7. Identification of PRPs is only one such activity.

The court vacated the district court's judgment in favor of the defendant on the CERCLA and NREPA claims and remanded for further proceedings.

CERCLA Applies to Canadian Company Doing Business in Canada: *Joseph A. Pakootas et al. v. Teck Cominco Metals, LTD.*, No. CV-04-256-AAM (E.D. Wash. Nov. 8, 2004)

Background

Two members of the Confederated Tribes of the Colville Reservation brought a citizen suit under the Comprehensive Environmental Response, Compensation, and Liability Act to enforce the U.S. EPA-issued Unilateral Administrative Order for Remedial Investigation/Feasibility Study (UAO) issued to Teck Cominco Metals (TCM), Ltd. TCM, a Canadian corporation, owns and operates a smelter in British Columbia, approximately ten miles up the Columbia River from the U.S.—Canada border. The UAO ordered TCM to investigate and determine the full nature of the contamination at the "Upper Columbia River Site" includes "all areas within the United States where hazardous substances from [TCM's] operations have migrated or materials containing hazardous substances have come to be placed." The State of Washington intervened on the side of the plaintiff.

TCM contended that the court has neither subject matter nor personal jurisdiction and that CERCLA cannot be applied to a foreign corporation for actions occurring within Canada.

Holding

Since the lawsuit arises under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), there is federal question jurisdiction. If the argument is that the federal law does not provide a remedy, the dismissal should be granted on the merits, not for want of jurisdiction. The question of personal jurisdiction requires an inquiry whether a defendant has minimum contact with the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Company v. Washington*, 326 U.S. 310, 316 (1945). A federal court can, if permitted by the state's long-arm statute, exercise personal jurisdiction if the defendant's activities are "substantial, continuous and systematic." Even if the defendant's activities in the forum state are limited, personal jurisdiction may attach if there is a showing that the "defendant purposefully directed activities towards residents of the forum state, the plaintiff's cause of action arises out of the defendant's contacts with the forum state, and the exercise of personal jurisdiction is reasonable and comports with "fair play and substantial justice." *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 473–76 (1985).

In this case, the Washington long-arm statute provides that "[a]ny person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person . . . to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any said acts." Wash. Rev. Code § 4.28.185. One of those enumerated acts is the "commission of a tortious act within this state." The statute goes on to state that, when jurisdiction is based on the statute, only causes of action arising out of an enumerated act may be asserted. Under Washington caselaw, personal jurisdiction can be established based on intentional actions, expressly aimed at the forum state,

causing harm which the defendant knew would likely be suffered in the forum state. The facts in the plaintiff's and the state's complaints satisfy this test. Therefore, the court has personal jurisdiction.

The defendant argued that the UAO cannot be enforced against a foreign corporation based on conduct which occurred outside the United States. Although the Upper Columbia River Site is entirely within the United States, TCM contended that what the plaintiffs are seeking to do is regulate the discharge of hazardous substances from the smelter which is located in Canada. The court noted that an argument could be made that this case is actually *not* about the extraterritorial application of CERCLA but is, instead, about cleaning up hazardous substances within the United States. To make such an argument, however, would require reliance on a legal fiction that would separate the releases into the Upper Columbia River Site from the discharge of those substances in Canada. The court was hesitant to do so, but also noted that the lawsuit does not attempt to regulate the discharges in Canada but to deal with their effects in the United States.

Although Congress has the authority to enforce laws outside the territorial boundaries of the United States, courts normally interpret laws as applying only within the boundaries of the country unless a contrary congressional intent is expressed. The Supreme Court has held that the presumption against extraterritoriality is necessary to avoid the inevitable clash between foreign and domestic laws. See *Equal Employment Opportunity Commission v. Arabian American Oil Company*, 499 U.S. 244 (1991). In *Environmental Defense Fund v. Massey*, 986 F.2d 528 (D.C. Cir. 1993), the D.C. Circuit noted that the presumption against extraterritoriality is not generally applied where "the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States." *Id.* at 531. This language was cited by the Ninth Circuit in *In re Simon*, 153 F.3d 991 (9th Cir. 1998), when the court concluded that Congress intended extraterritorial application of the Bankruptcy Code. In contrast, in *Subafilms v. MGM-Pathe Communications Company*, 24 F.3d 1088 (9th

Cir. 1994), the court, in concluding that the copyright laws did not apply extraterritorially, cited an "undisputed axiom" that copyright laws had no application to extraterritorial infringement.

The question of the extraterritorial application of CERCLA is one of first impression. Thus, there is no "undisputed axiom" that CERCLA does not apply extraterritorially. It is true that CERCLA does not contain any language evidencing a congressional intent to reach beyond the country's borders. However, CERCLA does express a clear intent that domestic conditions be remedied. This clear intent, coupled with the principle that the presumption against extraterritorial application is not applied where failure to extend a law beyond the country's borders will result in adverse affects within the United States, led the court to conclude that extraterritorial application of CERCLA is appropriate in this case.

There is no language in CERCLA which would exclude a foreign corporation from the definition of "person." The UAO defines the "facility" as the Upper Columbia River Site. Since TCM is *not* the owner or operator of the facility, its liability would be premised on liability under section 107(a)(3) as an "arranger" for the disposal of hazardous substances at a facility "owned or operated by another party or entity [here the United States] and containing such hazardous substances." 42 U.S.C. § 9607(a)(3).

The defendant argued it could not be an "arranger" because the plain language of the statute would appear to require that another party be involved in the disposal of hazardous substances. However, the defendant was not able to cite a decision or any legislative history that has held the involvement of another party in the disposal is required for arranger liability. Given the totality of the circumstances, the court could not say that arranger liability could not be imposed on the defendant. However, the court noted that this issue could be litigated at a later date.

The plaintiffs contended that Congress' intent to include foreign polluters of U.S. territory within the ambit of CERCLA became clear in the Superfund Amend-

ments and Reauthorization Act of 1986 (SARA). Under CERCLA, as originally enacted, an owner and operator of a vessel were liable only if “otherwise subject to the jurisdiction of the United States.” Under SARA, however, Congress made it clear that foreign flagged vessels are subject to liability under section 107. There is no difference between the situation where a foreign vessel spills hazardous substances in international waters where U.S. waters become affected and the situation in this case where TCM’s alleged placing of hazardous substances within Canada has affected U.S. waters.

The defendants noted that applicability of CERCLA liability to it would subject it to liability beyond those of U.S. companies because it could not take advantage of the “federally permitted release” provision of CERCLA. Under 107(j), a facility that releases contaminants while it is operating in compliance with its permit under another federal statute is not liable under CERCLA 107. Instead, response costs or damages must be obtained pursuant to the permit regime. TCM’s smelter could not obtain a permit for discharges to the Columbia River; it is regulated by Canadian environmental agencies under permits issued by Canadian statutes.

The plaintiff responded that a “federally permitted release” is not a defense to a CERCLA clean-up order such as the one issued in this case. Furthermore, a U.S. facility does not get a “free pass” under the federally permitted release section of CERCLA. It will still be potentially liable under another statute. In this case, Canada’s laws can not compel TCM to clean up the contamination. Canadian permits consider only the impact on the river while it is flowing within Canadian borders, not the impact on territory located in the United States where much of the contamination has allegedly come to rest.

TCM also argued that CERCLA treats foreign claimants differently from domestic claimants in seeking reimbursement for clean-up costs and that this is indicative of congressional intent not to extend CERCLA’s reach to those outside U.S. boundaries. The court disagreed. The definition of “person” un-

der CERCLA does not distinguish between foreign claimants and domestic claimants. While it is true that section 111(1) provides a specific mechanism for foreign claimants to seek reimbursement for certain releases, this section does not cover the situation where the releases occur within the United States, the situation in this case. It is also true that CERCLA limits intervention as a matter of right in a citizen suit to the United States or a state and that there is no requirement that citizens notify a foreign government of its intent to sue. However, there is no allegation that Canada is unaware of this lawsuit and it certainly could seek permissive intervention if it so desired.

The court concluded that there is no direct evidence one way or the other on congressional intent regarding the extraterritorial application of CERCLA. It is clear, however, that Congress intended that CERCLA address hazardous sites within the United States. That clear intention, coupled with the principle that the presumption against extraterritorial application does not usually apply where adverse effects occur within the United States, led the court to conclude that extraterritorial application is not precluded in this case. The court therefore concluded it had subject matter jurisdiction under CERCLA.

The court also certified the case for an immediate appeal to the U.S. Court of Appeals for the Ninth Circuit.

CIVIL PROCEEDINGS

New Filings

Water

United States v. AgriProcessors, Inc., No. 2:04-cv-01050-LRR (N.D. Iowa Dec. 1, 2004)

The federal government has filed a lawsuit against AgriProcessors, Inc., alleging that the company has violated the Clean Water Act by failing to comply with pretreatment requirements for its wastewater. The wastewater is discharged into a lagoon treatment system owned by the City of Postville and is then discharged into the Yellow River.

AgriProcessors, Inc., is a meat packaging plant. The complaint alleges that the company has caused the city to violate the Clean Water Act by violating pollutant limitations. The city, the State of Iowa, and the federal government entered into a settlement of the city's violations last October.

The complaint also alleges a violation of the Emergency Planning and Community Right to Know Act and the Clean Air Act for failing to properly submit emergency and hazardous chemical inventory forms and develop a risk management program.

The plant in Postville is a kosher meat processing plant for beef, veal, lamb, chicken, and turkey.

[For the settlement in a connected case, see *United States v. Iowa Turkey Products, Inc., infra*. For further information, contact AUSA Robert M. Butler at (319) 363-0091.]

Settlements

CERCLA

United States and Texas v. Alcoa, Inc., No. 6:04-cv-00119 (S.D. Tex. Dec. 10, 2004)

Alcoa has entered into two settlements with the federal and state governments addressing natural resource restoration and the cleanup of mercury-contaminated sediments in Lavaca Bay, Texas, ongoing unpermitted discharges of mercury into the bay, and soil contamination at the Point Comfort/Lavaca Bay Superfund site. Under one agreement, Alcoa will undertake a variety of restoration actions to compensate for natural resource losses. Alcoa has already spent approximately \$40 million in early response actions and will spend approximately \$11.4 million to complete the remaining clean-up actions.

The sediments in the bay were contaminated with mercury from past operations at Alcoa's Point Comfort facility. Other areas were contaminated with polycyclic aromatic hydrocarbons. High mercury levels in oysters, finfish, and crabs caused the Texas Department of Health to close part of the bay to fishing. Although mercury levels have now decreased in parts of the bay, portions still remain closed.

Under the consent decree, Alcoa will dredge mercury-contaminated sediments, operate a ground water recovery system, cap portions of the plant, and monitor sediments and fish to confirm the recovery of sediment and fish tissue to acceptable levels. The companies have agreed to pay the governments' future costs as well as past costs of \$404,726 to the United States and \$100,000 to Texas.

To restore ecological losses, Alcoa will cause the transfer of 729 acres of land to be preserved by the U.S. Fish and Wildlife Service as part of the Aransas National Wildlife Refuge, create seventy acres of intertidal salt marsh, and create eleven acres of new oyster reef habitat in Lavaca Bay.

Alcoa will also construct new fishing piers and other facilities along the bay to improve access and enhance recreational fishing opportunities.

[For further information, contact Elizabeth A. Edmonds, DOJ, at (202) 514-1032.]

United States v. Atlantic Richfield Company, No. 89-39 (D. Mont. Nov. 5, 2004)

A settlement, subject to a thirty-day public comment period, has been reached over the federal government's costs in responding to the contamination at the Clark Fork River site in Montana. The cleanup addresses mine waste from historic mining, milling, and smelting processes.

Under the consent decree, the federal government will receive \$62 million to cover the government's costs from the early 1980s until July 31, 2002. As part of the agreement, Atlantic Richfield (ARCO) has agreed not to assert liability defenses against the United States for reimbursement for the costs it has incurred at the site or for the conduct of future cleanup action. The agreement also settles ARCO's counterclaims against several federal agencies.

[For further information, contact Matthew Morrison, DOJ, at (202) 514-3932.]

United States v. Atlantic Richfield Company, No. 04-CV-1028 (D. Utah Nov. 5, 2004)

The Atlantic Richfield Corporation has reached a settlement with the federal government under which it will pay an estimated \$7.4 million for its share of the cleanup of the Eureka Mills superfund site south of Salt Lake City, Utah. ARCO's mining of the area resulted in contamination from lead and arsenic. The site was listed on the National Priorities List in September 2002.

EPA performed a Superfund Removal Action at the Site from July 2001 through 2002. The removal action cleaned up seventy-one of the most contaminated residential properties at the Site. EPA is currently per-

forming remedial action at the site, which includes the capping of mine waste piles and cleaning up residential soils throughout the area.

[For further information, contact John Moscato, DOJ, at (303) 312-7346.]

Water

United States v. Esso Standard Oil Company, No. 90-11-3-1510 (D.V.I. Oct. 25, 2004)

The Esso Standard Oil Company recently agreed to pay \$3 million towards the cleanup of the Tutu Wellfield superfund site in St. Thomas, U.S. Virgin Islands. The site includes an area of contaminated groundwater covering 108 acres. It is located in a commercial and residential area on the island. Several potentially responsible parties have been identified, including the defendant, a dry cleaner, and a government maintenance center.

[For further information, contact Mark Gallagher, DOJ, at (202) 514-5405.]

United States v. Iowa Turkey Products, Inc., No. 2:04-cv-1045-LRR (N.D. Iowa Nov. 15, 2004)

An Iowa turkey processing company has agreed to pay \$100,000 to resolve claims that it had discharged wastewater into a publicly owned treatment plant in violation of its National Pollutant Discharge Elimination System permit. The complaint had alleged that the discharges caused the City of Postville to violate the effluent limits of its own permit. The complaint also alleged a violation of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) by failing to immediately notify the proper officials of the release of 7,500 pounds of anhydrous ammonia when the plant burned on December 20, 2003.

Under the consent decree, \$80,000 of the penalty will be paid to the federal government. The remaining \$20,000 will go to the Department of the Interior for development of a project to restore natural resources in the Yellow River area.

[For a connected case, see *United States v. AgriProcessors, Inc.*, *supra*. For further information contact AUSA Robert M. Butler at (319) 363-0091.]

***United States and Tennessee v. Knoxville Utilities Board*, No. 3:04-cv-00568 (E.D. Tenn. Dec. 1, 2004)**

The Knoxville Utilities Board (KUB) has settled a joint enforcement action brought by the federal government and the State of Tennessee. The agreement requires the KUB to implement management, operation, and maintenance programs to prevent overflows; ensure that the sewer system has adequate capacity before allowing new connections; respond to overflows when they occur, including cleaning up building backups; and institute a comprehensive water quality monitoring program. The work, estimated to cost about \$530 million, is expected to eliminate approximately 3.5 million gallons of sewage overflows annually.

The KUB will also pay a civil penalty of \$334,000, which will be divided evenly between the state and federal governments. The state's portion will be paid

in the form of an environmental project to provide funds for the acquisition of real property interests in the Williams Creek watershed. KUB will also perform a \$2 million Supplemental Environmental Project by providing funding to lower income owners of residential property to repair their privately owned sewer pipes that connect into KUB's sewer system.

[For further information, contact Patricia Hurst, DOJ, at (202) 307-1242.]

***United States v. Orange County Sanitation District*, No. 04-1317 (S.D. Cal. Nov. 15, 2004)**

A consent decree has been filed in this litigation that will ensure that the Orange County Sanitation District will achieve full secondary treatment by December 31, 2012. This agreement represents the first time in California that a local wastewater treatment agency has voluntarily elected to upgrade its treatment level to a higher secondary treatment level. The upgrade will result in an annual reduction in discharges of approximately 8,500 metric tons of total suspended solids and approximately 14,700 metric tons of biological oxygen demand.

The sanitation district serves approximately 2.5 million residents over 470 square miles. In a joint effort with the water district, the sanitation district will construct the country's largest water reuse facility by July 2007. Secondary effluent now being discharged to the ocean will be treated to tertiary levels for salt water intrusion barrier use. Approximately \$450 million will be spent on collection system upgrade work that will reduce potential future sewer spills.

[For further information, contact Bradley O'Brien, DOJ, at (415) 744-6491.]

CRIMINAL PROSECUTIONS

Pleas/Verdicts

Endangered Species

United States v. Optimus, Inc., dba Marky's Caviar and International Food Emporium, No. 04-20868-CR-Gold (S.D. Fla. Nov. 12, 2004)

Optimus, Inc., a gourmet food company based in Miami, Florida, has pled guilty to purchasing approximately 5.9 tons of smuggled caviar. Under the plea agreement, Optimus will pay a \$1 million criminal fine and serve five years' probation while developing a stringent wildlife compliance plan.

Under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), a valid foreign export permit for caviar must be issued by the country of origin or a valid foreign re-export certificate issued by the country of re-export must be first be obtained. CITES is enforced in the United States under the Endangered Species Act.

Optimus admitted to knowingly purchasing sturgeon caviar with false wildlife invoices, knowingly purchasing smuggled caviar, and failing to exercise due care in purchasing smuggled caviar.

[For further information, contact Richard Udell, DOJ, at (202)-305-0361.]

Water

United States v. Holland America Line, No. A98-108 (D. Alaska Dec. 13, 2004)

Holland American Line pled guilty recently to illegally discharging 20,000 gallons of untreated sewage in the harbor at Juneau, Alaska, two years ago. Under the plea agreement, the cruise line will pay a \$200,000 fine. It has also agreed to donate \$500,000 to the National Forest foundation for use in reducing sewage and other water pollution in southeast Alaska.

Finally, it will spend \$1.3 million to establish a new environmental compliance plan.

An investigation began in August 2002 when a Juneau resident reported he had seen a suspicious discharge coming from the *Rydam*, which was docked at the harbor. Officials notified ship officials of the discharge, but the cruise members failed to properly respond. The discharge was untreated sewage.

[For further information, contact Marty Wodlfle, DOJ, at (202) 353-2373.]

United States v. Rick D. Stickle, No. 04-CR-20072 (S.D. Fla. Nov. 23, 2004)

Rick D. Stickle, Chairman and CEO of Sabine Transportation, Inc., a Cedar Rapids, Iowa, company was recently convicted by a federal jury of engaging in a multi-purpose conspiracy. The conspiracy involved the illegal discharge of oil-contaminated grain in the South China Sea, obstructing a proceeding initiated by the U.S. Coast Guard by presenting false and misleading statements and records, and defrauding the United States by hampering and impeding the Coast Guard and the Department of Agriculture to enforce environmental laws and laws and regulations governing the carriage and delivery of donated agricultural commodities.

Four other senior employees of Sabine, including its president, were previously convicted for their involvement in the conspiracy.

Crew members of the ship involved, the *S.S. Juneau*, told a Coast Guard inspector when the ship arrived in Portland, Oregon, of diesel oil leaking into one of the ship's main cargo tanks that was discovered while a humanitarian shipment of grain was being off-loaded in Bangladesh in December 1998. Approximately 442 metric tons of wheat were contaminated and could not be off-loaded.

Sabine officials sought to seek authorization to discharge the residue at sea by characterizing the contaminated grain as being merely an oily waste that

could be processed through an oil pollution prevention device. Sabine officials decided to hire a team of fifteen Bulgarian nationals and a technician to board the *S.S. Juneau* in Singapore and directly discharge the contaminated wheat into the South China Sea during the return voyage to the United States.

[For further information, contact Greg Linsin, DOJ, at (202) 305-0327.]

United States v. Triple H Food Processors, Inc., No. SA-CR04-282 (C.D. Cal. Oct. 28, 2004)

Triple H Food Processors, Inc., of Riverside, California and its vice-president, Richard Joseph Harris, have pled guilty to discharging acidic wastewater into the Riverside Sewer System, in violation of its National Pollutant Discharge Elimination System permit. Triple H acknowledged it had failed to manually sample and record pH readings when its automatic meters were not operating.

If the plea agreement is approved by the court, Harris will be placed on probation for three years, including three months' home detention, and will pay a \$50,000 fine. The company will also pay \$11,480 in restitution to the City of Riverside.

[For further information, contact AUSA Richard Cutler at (714) 338-3534.]

United States v. Kamal P. Yadav and Chemco Industries, Inc., No. 4:04-CR-00618 (E.D. Mo. Oct. 29, 2004)

Chemco Industries, Inc., a chemical blending company in the St. Louis, Missouri, area, and its owner, Kamal P. Yadav, recently pled guilty to one felony count involving discharging untreated wastewater and chemicals into the city's sewage system. The company's manufacturing process uses trichlorethone, tetrachloroethene, benzene, toluene, and ethylbenzene.

The company faces a possible fine of \$500,000. Yadav faces up to three years in prison and a fine of up to \$250,000. Sentencing has been scheduled for January 18, 2005.

[For further information, contact SAUSA Ann Rauch at (913) 551-7288.]