

## Detoxifying

### Environmental Law: New Cases Control Recovery of Costs for Cleanup

By John R. Jacus

Although the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Sections 9601-75 (1994), became law almost 20 years ago, parties still are litigating at considerable cost to clarify the meaning of its provisions. This judicial process increases in complexity as a result of the frequent pronouncement of administrative reforms by the U.S. Environmental Protection Agency, the continuing debate over CERCLA's draconian liability scheme and high costs, and the inability of Congress to re-authorize and amend the statute in the middle of such controversy.

Nonetheless, recent case law seems largely to have settled two important issues: the scope of CERCLA liability among potentially responsible parties and the standard to which private parties must perform in order to comply with the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Pt. 300 (1999), so as to recover their costs under CERCLA.

#### Important Distinction

One of the more significant interpretation issues under CERCLA is whether a PRP may bring a claim under Section 107(a) against other PRPs for all of its response costs or whether such a party may bring only a claim in contribution under Section 113(f) for the PRP's "fair share" of those costs. The distinction is a significant one, as it affects the scope of defendants' liability (joint and several or several only), the burden of proof among the parties, and the applicable statutes of limitation. These private-cost-recovery plaintiffs often are seeking to recover costs which they incurred in response to government orders or enforcement threats, and so their own potential CERCLA liability is an issue.

If a CERCLA claimant is adjudicated liable or admits liability, it must confine its claims against other PRPs to Section 113(f), which requires allocation of liability among all liable parties using equitable factors. See *Akzo Coatings Inc. v. Aigner Corp.*, 30 F.3d 761 (7<sup>th</sup> Cir. 1994); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9<sup>th</sup> Cir. 1997), cert. denied, 118 S.Ct. 2340 (1998); *United States v. Colorado & E.R.R. Co.*, 50 F.3d 1530 (10<sup>th</sup> Cir. 1995); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489 (11<sup>th</sup> Cir. 1996).

The rationale for this result essentially is the same in all cases. For example, in *Pinal Creek Group*, the 9<sup>th</sup> Circuit U.S. Court of Appeals reasoned that sections 107 and 113 "work together — the first section creating the claim for contribution between PRPs and the second qualifying the nature of that claim." 118 F.3d at 1302. Contribution under CERCLA, the court observed, is no different than traditional contribution actions between tortfeasors, which create several-only liability among tortfeasors. For this reason, the private-cost-recovery plaintiff in *Pinal Creek Group* could not impose joint-and-several

liability on any defendant, even with respect to any amount exceeding its own equitable share of cleanup costs.

This result potentially modifies future cases because of a recent decision of the 7<sup>th</sup> Circuit, however. In *BFI of Illinois v. Ter Maat*, 1999 U.S. App. Lexis 28141 (7<sup>th</sup> Cir. Nov. 1, 1999), the 7<sup>th</sup> Circuit held that even contribution liability under Section 113 may be joint and several where the case facts support the joint liability of contribution co-defendants, in that case an owner/operator individual and two of his affiliated companies.

Some federal appellate courts have even held that PRPs need not be adjudicated liable in order to be confined to a Section-113 contribution claim. For example, in *Centerior Service Company v. Acme Scrap Iron & Metal Corporation*, 153 F.3d 344 (6<sup>th</sup> Cir. 1998), the 6<sup>th</sup> Circuit rejected the plaintiffs' argument that their claim was not in the nature of a contribution action because no one had forced the EPA to sue them. The plaintiffs did not expressly admit liability, but neither did they assert they were "innocent" parties not responsible for the site's contamination. Moreover, the court held that under common-law principles a party need not be adjudged liable before seeking contribution; the obligation need be incurred only under legal compulsion. The court found that a CERCLA Section-106 order fulfilled this requirement. 153 F.3d at 351-352.

A similar result resulted in *Great Lakes Container Corp. v. Columbia Steel Drum Co.*, 54 F.Supp.2d 706 (E.D. Mich. 1999). There, the court concluded that the former site operator was limited to Section-113 contribution claims because it had not conducted a voluntary cleanup and was unlikely to meet the "truly innocent" test established in other circuits. But see *Ninth Ave. Remedial Group v. Allis Chalmers Corp.*, 974 F.Supp. 684, 691 (N.D. Ind. 1997), citing *U.S. v. SCA Services*, 865 F.Supp. 533, 543 (N.D. Ind. 1994) (party not admitting liability or adjudicated liable may maintain Section-107 cost-recovery claim).

Although the question of whether a PRP may bring a joint-and-several cost-recovery action or is limited to an action for contribution is essentially settled, the issue still arises in cases where the private CERCLA plaintiff asserts innocence regarding the contamination at issue. This creates some potentially troublesome case-management issues for plaintiffs and defendants in such actions, such as whether liability should be adjudicated separately or simultaneously or whether a liability phase should precede a damages and allocation phase.

## **Compliance with NCP**

Another significant, frequently litigated issue is whether a private party that has incurred cleanup costs may bring a contribution action against other PRPs because of its failure to comply with the requirements of the National Contingency Plan. In addition to other items, the NCP requires a party to do the following:

- Conduct and document site investigations.
- Make a meaningful evaluation of remedial alternatives.
- Establish a process through which the public can have meaningful input on the final-remedy selection.

Although only "substantial compliance" with the NCP is required, 40 C.F.R. Section 300.700(c)(3)(i), many private parties have been unable to maintain a prima facie case against other responsible parties for their shares of cleanup costs because of failure to comply with the NCP.

For example, in *Public Service Company of Colorado v. Gates Rubber Company*, 175 F.3d 1177 (10<sup>th</sup> Cir. 1999), the plaintiff brought a contribution action against two other parties after cleaning up the site. The district court granted summary judgment for the defendants, and the 10<sup>th</sup> Circuit affirmed. The plaintiff spent \$9 million on the cleanup that required at least four years to complete and would effect a permanent remedy. These facts meant the plaintiff had completed a "remedial" action, rather than a "removal" action, and the more stringent NCP requirements for "remedial" actions applied. 175 F.3d at 1184.

The 10<sup>th</sup> Circuit rejected the plaintiff's argument that oversight by the Colorado Department of Public Health and Environment was an adequate substitute for NCP compliance. CDPHE's involvement was limited, and it focused on compliance with state-law requirements which did not "fully mirror those of the NCP." *Id.* CDPHE "was never involved in assessing the Site, proposing alternative remedies, overseeing the remedy or informing the surrounding community." *Id.* Therefore, CDPHE involvement was not an adequate substitute for the NCP procedures, particularly those requiring public involvement.

In contrast, the court in *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998), found state involvement in the cleanup process an adequate substitute for public involvement in the remedy selection. In that case, state officials periodically were present throughout the investigation and implementation of the response action. The court found that this "comprehensive input" by the state fulfilled the public participation requirement of the NCP.

*Sills* appears to represent a departure from the majority view that seeking public involvement in the cleanup process is essential to establishing NCP compliance. See, e.g., *County Line Investment Co. v. Tinney*, 933 F.2d 1508 (10<sup>th</sup> Cir. 1991); *PMC Inc. v. Sherwin-Williams Co.*, No. 93 C 1379, 1997 WL 223060 at \*8 (N.D. Ill. 1997), *aff'd in part, vacated in part*, 151 F.3d 610 (7<sup>th</sup> Cir. 1998), cert. denied, 119 S.Ct. 871 (1999). Accord *VME Americas Inc. v. Hein-Warner Corp.*, 946 F.Supp. 683, 690-93 (E. D. Wis. 1996); *Alcan-Toyo Am. Inc. v. Northern Ill. Gas Co.*, 904 F.Supp. 833, 836 (N.D. Ill. 1995).

These recent developments concerning the scope of private-party liability under CERCLA and the extent of the NCP's requirements for costs to be recoverable under CERCLA lend greater certainty to CERCLA parties and claimants considering contribution or cost-recovery claims.