

NYSBA Environmental & Energy Law Section 2019 Fall Meeting

Regulatory Initiatives & Enforcement

EPA REGION 2 UPDATE

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I. EPA Strategic Plan

EPA's Strategic Plan¹ for the period from Fiscal Years 2018-2022 identifies three major Goals for EPA, titled (1) Core Mission, (2) Collaborative Federalism, and (3) Rule of Law & Process. The document also identifies six overarching priorities: attainment of national ambient air quality standards; modernize aging drinking water and wastewater infrastructure; accelerate the pace of site cleanups and promote site reuse; comply with the statutory requirements and mandatory deadlines of the recently amended TSCA statute for ensuring the safety of chemicals; increase environmental law compliance rates; and accelerate permit-related decision-making.

Within Goal 1 there are four major "Objectives" focusing on air, water, land and chemicals; and within these there are a total of 13 specific Strategic Measures. For example, under the air quality objective, the Strategic Measure is to reduce the number of NAAQS non-attainment areas nationwide to 101 by the end of federal Fiscal Year 2022. Under the clean and safe water objective there are three Strategic Measures, including reduction of the number of non-compliant community water systems to 2,700 by the end of FY-2022. Under the Land Revitalization Objective, one of the four Strategic Measures is to make 255 additional Superfund sites ready for anticipated use site-wide. And under the Chemical Safety Objective several of the five Strategic Measures set out the commitment to achieve various TSCA-related actions by the statutory deadlines.

Goal 2 includes a focus on enhanced Compliance Assurance, among other issues.

Goal 3 provides additional focus on compliance and enforcement, and includes several Strategic Measures including reduction of the average time from violation identification to correction; and increasing the environmental law compliance rate.

¹ <<https://www.epa.gov/planandbudget/fy-2018-2022-epa-strategic-plan>>

II. EPA Policy on Federal/State Enforcement Partnerships

On July 11, 2019 EPA issued its policy on *Enhancing Effective Partnerships Between EPA and the States in Civil Enforcement and Compliance Assurance Work*.² This supersedes the January 2018 Interim Guidance on the same topic, and provides a roadmap for engaging states in discussions about the environmental enforcement and compliance assurance work that we collectively address. The policy has three major components. The first calls for periodic joint work planning between states and EPA. The purpose is to collaboratively engage in strategic planning to identify and prioritize compliance issues and appropriate areas of focus; to plan inspections so as to share the workload while avoiding unnecessary duplication, and schedule joint inspections where appropriate; and plan the enforcement response to non-compliance, including discussion of which agency will handle a given matter and what kind of response is contemplated.

The second major component of the policy addresses the roles of EPA and the states, considering specialized capabilities and expertise; resource demands and availability; and whether a particular matter advances a national compliance initiative (e.g., focusing on a particular pollutant or industry) or involves facilities in multiple states or a federal facility.

The third component establishes a process for rapid elevation of issues that arise between EPA and a state, moving up to senior career officials and finally to senior political appointees in both agencies.

III. Emerging Contaminants

In recent years, a number of un-regulated chemicals have generated considerable concern with respect to drinking water contamination and other possible exposure pathways. One such chemical is 1,4-dioxane, a semi-volatile organic compound that is both ubiquitous and difficult to manage. Also of growing concern is a group of compounds known as per- and polyfluoroalkyl substances (PFAS); perhaps most common among these is perfluorooctanoic acid (PFOA), which was used to make non-stick materials like Teflon, and was also used widely in fire-fighting foam.

These chemicals are not currently regulated under federal environmental laws³; in particular, there are no Maximum Contaminant Levels (MCLs) that have been established under the Safe Drinking Water Act, nor are they “hazardous wastes” under RCRA or “hazardous substances” under CERCLA. If disposed of they are “solid wastes” under RCRA; and, if released into the environment, they are “pollutants or contaminants” under CERCLA. However, though some action can be taken under each statute, these contaminants do not trigger corrective

² < <https://www.epa.gov/newsreleases/epa-announces-policy-enhance-enforcement-and-compliance-assurance-partnerships-states>>

³ In December 2017 EPA announced a cross-agency effort to address PFAS. *See*: <<https://www.epa.gov/pfas>>

action obligations under RCRA, and the government’s enforcement authorities under CERCLA are significantly circumscribed.

PFOA and other PFAS are being found in groundwater across the U.S.⁴ These compounds have adverse health effects at very low concentrations. On May 25, 2016 EPA published a health advisory setting out the Agency’s determination that 70 parts per trillion is the concentration in drinking water of PFOA and a related compound, PFOS, at or below which adverse health effects are not anticipated to occur over a lifetime of exposure.⁵ As discussed below, in the absence of federal regulatory action some states have moved ahead with regulatory standards of their own.

Fortunately, PFOA and some other PFAS can be removed from water relatively easily, with common treatment technologies such as air stripping or activated carbon. Unfortunately, some PFAS (including compounds intended as a replacement for PFOA and given the trade name “GenX” by manufacturer DuPont,) are somewhat less easily removed from water.⁶

DuPont, the maker of Teflon, faced some 3,500 toxic tort suits in Ohio, alleging injuries from PFOA-contaminated drinking water. In December 2016 a jury in the first of these to go to trial awarded \$2 million to the plaintiff in compensatory damages, and in January 2017 it awarded a further \$10.5 million in punitive damages.⁷ A few weeks later, in February 2017, DuPont and Chemours (its former subsidiary, which it spun off in 2015) settled these cases for a cash payment of \$671 million.⁸

On August 3, 2017 EPA added to the Superfund National Priorities List (NPL) the St. Gobain Performance Plastics McCaffrey St. facility in the Village of Hoosick Falls, NY because of PFOA discharges that contaminated the municipality’s public drinking water supplies.⁹ This is only the second time EPA has proposed to add a site to the NPL based on discharges of a “pollutant or contaminant” (rather than a “hazardous substance”), and the first time involving PFOA or any PFAS.

4 PFAS were recently found in bottled water from Massachusetts. <<https://thehill.com/policy/energy-environment/455175-senator-pushes-fda-action-as-forever-chemicals-spread-to-bottled>>

5 <<https://www.epa.gov/ground-water-and-drinking-water/drinking-water-health-advisories-pfoa-and-pfos>>

6 Information about GenX can be found in Wikipedia at: <<https://en.wikipedia.org/wiki/GenX>>. During 2017 the discovery of GenX in the Cape Fear River and associated drinking water supplies in North Carolina brought ... well, considerable fear to local communities. *See, e.g.*: <<http://www.capefearriverwatch.org/advocacy/genx-what-happened>>. The state established a “health goal” of 140 ppt for drinking water; *see*: <https://files.nc.gov/ncdeq/GenX/FAQ_updated_100417-5.pdf>. EPA has not established any advisory or regulatory limits.

7 *See*: <http://www.law360.com/articles/875696/dupont-owes-2m-in-teflon-testicular-cancer-trial-jury-says?article_related_content=1> *and* <http://www.law360.com/environmental/articles/877780/breaking-dupont-hit-with-10-5m-punitive-verdict-in-cancer-trial?nl_pk=39e483ab-a175-4cb9-9e56-1b4eb4bff18d&utm_source=newsletter&utm_medium=email&utm_campaign=environmental>

8 *See*: <<https://www.reuters.com/article/us-du-pont-lawsuit-west-virginia/dupont-settles-lawsuits-over-leak-of-chemical-used-to-make-teflon-idUSKBN15S18U>>

9 *See*: <<https://www.gpo.gov/fdsys/pkg/FR-2017-08-03/pdf/2017-16172.pdf>>

1,4-dioxane is also common; it was used as a stabilizer for other solvents, and was also used in many consumer products including paint strippers, dyes, greases, varnishes, waxes and even baby shampoo. It is classified by EPA as a likely human carcinogen.¹⁰ Unlike PFAS, it is comparatively difficult to extract from water. Its discovery at some Superfund sites has generated considerable public concern.¹¹ Reference doses have been established for several exposure pathways, but the chemical is not currently regulated under federal environmental laws.¹²

In May 2018 EPA held a “PFAS Summit” with representatives of nearly all the states, and other stakeholders, in attendance.¹³ The purpose of the meeting was to share information on ongoing efforts to characterize risks from PFAS and develop monitoring and treatment/cleanup techniques; to identify specific near-term actions, beyond those already underway, that are needed to address challenges currently facing states and local communities; and to develop risk communication strategies that will help communities to address public concerns with PFAS. After the meeting EPA announced these follow-up actions:

- EPA will initiate steps to evaluate the need for an MCL for PFOA and PFOS. EPA will convene its federal partners and examine everything the agencies know about PFOA and PFOS in drinking water.
- EPA is beginning the necessary steps to propose designating PFOA and PFOS as “hazardous substances” through one of the available statutory mechanisms, including potentially CERCLA Section 102.
- EPA is developing groundwater cleanup recommendations for PFOA and PFOS at contaminated sites.
- EPA is developing toxicity values for GenX and PFBS.

10 <https://www.epa.gov/sites/production/files/2014-03/documents/ffro_factsheet_contaminant_14-dioxane_january2014_final.pdf>

11 A number of such sites are within the author’s area of responsibility, including the Dewey Loeffel site in NY and the Ringwood Mines site in NJ. At the former site, the PRP carrying out the groundwater pump-and-treat remedy (selected based on the presence of other chemicals that are “hazardous substances”) agreed to install additions to the treatment train designed to remove 1,4-dioxane.

12 See EPA’s fact sheet at: <https://www.epa.gov/sites/production/files/2014-03/documents/ffro_factsheet_contaminant_14-dioxane_january2014_final.pdf> which includes the following: “EPA risk assessments indicate that the drinking water concentration representing a 1×10^{-6} cancer risk level for 1,4-dioxane is 0.35 µg/L [ppb].”

13 For information about the PFAS Summit see <<https://www.epa.gov/pfas/pfas-national-leadership-summit-and-engagement>>

A number of bills have been introduced in Congress that would require EPA to establish enforceable standards for some of these pollutants, and/or set those standards directly through legislation.¹⁴ To date, none of these have successfully made it to the point of enactment.

Meanwhile, several states have established their own standards or guidelines for these emerging contaminants, which are often more stringent than the federal health advisory. In March 2017 New York State became the first in the nation to designate PFOA and PFOS as “hazardous substances” under the state’s Superfund-analog statute.¹⁵ And in July, 2019 New York Governor Cuomo directed the NYS Department of Health to establish MCLs for PFOA, PFOS and 1,4 dioxane.¹⁶ The Governor’s press release on this directive noted that the State Health Commissioner had already accepted the recommendations made in December 2018 by the NYS Drinking Water Quality Council. The Council recommended that the MCLs for PFOA and PFOS should be set at 10 parts per trillion (ppt), and that the MCL for 1,4-dioxane (which would be the nation’s first such MCL) should be set at 1 part per billion (ppb).¹⁷

New Jersey has added PFNA to its List of Hazardous Substances under the New Jersey Spill Act (the NJ analog to CERCLA); proposed an MCL for drinking water of 14 ppt for PFOA; and adopted an MCL of 13 ppt for PFNA.¹⁸ Vermont has established an MCL of 20 ppt for PFOA¹⁹; North Carolina set a “health goal” of 140 ppt for GenX,²⁰ Dupont’s Teflon replacement compound (actually, a group of compounds); and Colorado set 0.35 ppb as the maximum level for 1,4-dioxane in drinking water supplies.²¹

At least one local government has also legislated in this arena. In December 2017, Rensselaer County, NY passed a law setting a limit on discharges of 1,4-dioxane from any Superfund site that operates a groundwater treatment plant located on County-owned land.²² There is only one such site -- the Dewey Loeffel Superfund site, at which a pump-and-treat remedial response action is ongoing. In 2014, at EPA’s request, the groundwater treatment plant at the site was

14 See, for example, <<https://www.congress.gov/bill/116th-congress/house-bill/535/all-info>> and <<https://www.congress.gov/bill/116th-congress/house-bill/2377>>

15 See <<https://www.dec.ny.gov/chemical/108831.html>>

16 <<https://www.governor.ny.gov/news/governor-cuomo-announces-availability-350-million-water-system-upgrades-statewide-and-directs>>. New York State has a number of locations where elevated levels of PFAS have been found in drinking water, including Hoosick Falls and Newburgh. In July 2019, NY was named as one of six recipients of federal funding from the Centers for Disease Control and Prevention to expand biomonitoring programs to better assess the extent of PFAS accumulation in people. NY is expected to receive about \$5 million in federal funding for the study over a five year period. <<https://midhudsonnews.com/2019/07/27/congress-approves-federal-funding-for-cdc-study-of-pfa-chemicals-in-new-york/>>

17 See: <https://www.health.ny.gov/press/releases/2018/2018-12-18_drinking_water_quality_council_recommendations.htm>

18 See: <<https://www.nj.gov/dep/srp/emerging-contaminants/>>

19 See: <<http://www.wateronline.com/doc/vermont-sets-new-drinking-water-standard-for-pfoa-0001>>

20 NC established a “health goal” of 140 ppt for drinking water; see:

<https://files.nc.gov/ncdeq/GenX/FAQ_updated_100417-5.pdf>.

21 <https://www.colorado.gov/pacific/sites/default/files/41_2016%2812%29.pdf>

22 See: <<http://www.ny1noticias.com/nyc/noticias/news/2017/12/13/rensselaer-county-passes-law-to-protect-clean-water>>

modified by the PRP, General Electric, to treat 1,4-dioxane. The treated effluent discharges to a surface stream that is not used for drinking water. However, the County legislation sets a stringent discharge limit of 0.35 ppb, a level apparently based on the above-mentioned Colorado limit applicable to drinking water supplies.²³ Although the treatment system has been optimized and is functioning well, it probably cannot meet the 0.35 ppb limit on a steady basis. EPA expressed concerns to the County legislature about the proposed law before it was passed, advising, *inter alia*: “[W]e believe a federal judge would find that the County law is preempted by CERCLA under the Supremacy Clause of the U.S. Constitution [and a]n attempt by the County to enforce its standard might also be considered a premature challenge to a [Superfund] response action, under Section 113(h) of CERCLA.”²⁴

IV. Notable Region 2 Enforcement Developments

A. Methyl Bromide Misuse Cases: In May 2015 a family of four vacationing in a luxury condo on St. John in the U.S. Virgin Islands was tragically poisoned by an illegal application of methyl bromide in the unit below where they were staying. The chemical is a pesticide, regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Methyl bromide is a gas used as a fumigant; permissible uses are strictly limited, and it is not permitted to be used in residential settings. The applicator was a Terminix franchisee. The unit where the pesticide was illegally applied had not been properly sealed. The gas leaked out and reached the unit above, where the members of the Esmond family were exposed. All four became gravely ill, and suffered varying degrees of permanent neurological damage; the two teenage sons were the most seriously affected with paralysis and other effects, and the father remains in a wheelchair, unable to walk.²⁵

Criminal enforcement actions against, among others, Terminix and Jose Rivera, the local applicator, were concluded with guilty pleas. Civil investigations revealed additional instances of methyl bromide having been applied in residential settings in Puerto Rico and the USVI, and resulted in administrative enforcement actions being taken against twelve applicators and two distributors. The actions cited numerous violations of FIFRA, and also a number of reporting and record-keeping violations of the Clean Air Act. The enforcement actions sought both penalties and injunctive relief. Many of them have since been settled. Several respondents did not timely respond, and EPA has filed motions for default judgments in those cases.

²³ See: <https://www.colorado.gov/pacific/sites/default/files/31_2018%2801%29.pdf> at page 41; the Colorado limit is presumably based on the EPA risk assessment cited in Note 66, above.

²⁴ Letter dated Nov. 13, 2017 from Sharon Kivowitz, Assistant Regional Counsel, EPA Region 2, to Stephen Pechenik, Rensselaer County Attorney.

²⁵ The story was widely reported, but there has been little publicly reported information about the current conditions of the various family members. One story that provided some information can be found at: <<https://www.delawareonline.com/story/news/crime/2018/04/13/man-indicted-using-pesticide-poisoned-delaware-family-vacation-st-john/514704002/>>

B. Total Petroleum Emergency CAA Order: On May 20, 2019 EPA issued an emergency order to Total Petroleum Puerto Rico Corp. under Section 303 of the Clean Air Act. The order addresses elevated lower explosive limit ("LEL") measurements at four gasoline storage tanks at the Total facility in Guaynabo, which indicate a dangerous fire hazard. EPA became aware of the elevated LEL measurements for five tanks when, on the evening of May 8, 2019, Total submitted its response to a CAA §114 information request for LEL testing. Total's measurements showed that all five tanks were over 25% LEL concentration. The National Fire Protection Association, which sets fire safety standards, has a standard for tanks such as these (internal floating roof tanks) to not exceed a 25% LEL in the headspace. Two of the five tanks initially tested as high as 100% LEL; two between 50 and 75%; and another at 39%. On May 9 EPA communicated with Total about the results, and remained in regular and frequent communication with the company in the days thereafter. Ten days later, Total had only emptied one tank; the remaining four tanks remained at elevated LEL levels. EPA therefore issued the emergency order, which required that Total take the following actions:

- Immediately stop adding gasoline to the tanks;
- within 3 days of the order, provide a timeline to empty, de-gas, and clean the four tanks as soon as possible, and to inspect and identify the cause of the elevated LEL levels in each tank;
- identify and complete any necessary repairs to the tanks while they are out of service, and notify EPA of the repairs; and
- take daily measurements of the LEL in the headspace of each tank and provide that information to EPA.

Once Total believes that operating a given tank would not cause imminent and substantial endangerment to public health or welfare or the environment, Total may ask EPA for permission to restart use of that tank. Total may not resume use of a tank without EPA approval.

C. Hillview Reservoir Cover: On March 18, 2019 a complaint and consent decree were concurrently filed in the Eastern District of New York initiating and simultaneously proposing resolution of an enforcement action brought by EPA against the City of New York under the Safe Drinking Water Act. The suit cited the City for failure to cover the Hillview Reservoir, located in Yonkers, in violation of federal regulatory requirements, and federal and state administrative orders. The consent decree requires the City to cover the reservoir and pay a civil penalty.²⁶

The reservoir is part of the City's public water system. It is an open storage facility and is the last stop for finished drinking water before it enters the City's water tunnels for distribution to residents. The 90-acre reservoir receives nearly a billion gallons of water each day through the

²⁶ Much of the information in the text above is contained in the press release issued by the U.S. Department of Justice on the occasion of the lodging of the proposed consent decree: < <https://www.justice.gov/usao-edny/pr/city-new-york-agrees-settle-federal-complaint-covering-hillview-reservoir-prevent>>

Catskill and Delaware Aqueducts, and serves as a holding tank that allows the City to meet daily peak water demand. It is divided into two segments, the East and West Basins. Prior to the water entering the reservoir, it receives a first treatment of chlorine and ultraviolet treatment. Since the reservoir is downstream of these treatments and is an open storage facility, the finished water in the reservoir is subject to recontamination with microbial pathogens, such as viruses, *Giardia* and *Cryptosporidium*, from birds, animals and other sources. Sufficient microbial treatment is not available downstream of the reservoir, so a cover is necessary to prevent recontamination by such pathogens. Until the cover is in operation, the City is required to take active measures to control wildlife in and around the reservoir and monitor to ensure that the water is safe for drinking.

The City has been required to cover the reservoir since it first executed an Administrative Order with the State of New York in January 1999. In March 2006 the City also became obligated to cover the reservoir under federal regulation pursuant to the Safe Drinking Water Act; the regulation required uncovered finished water storage facilities to be covered by April 1, 2009 (or for there to be further downstream treatment). In May 2010, EPA entered into an Administrative Order requiring the City to meet a series of milestones leading to the completion of a cover for the reservoir. The first milestone date was January 31, 2017; the City failed to meet that date, and this judicial enforcement action followed.

The schedule in the decree is an extended one. The East Basin cover is to be constructed and operational by 2042, and the West Basin cover by 2049. The City's estimate in 2009 for the cost of its then-planned concrete cover for the 90-acre reservoir was \$1.6 billion. (The actual cost of the cover may be lower, should the City choose a different type of cover.) The schedule is so extended because two other related, major projects need to be completed before the Hillview cover work is started. These are the Kensico Eastview Connection and the Hillview Reservoir Improvements. The completion of the former is expected to take until 2035, with an estimated cost of about \$1 billion; the latter project will be conducted concurrently and is anticipated to be completed by 2033 at a cost of about \$375 million. (The decree provides for potential schedule acceleration, which could be possible under certain circumstances.)

The decree also requires various interim measures to protect the water until the reservoir cover is in full operation, including: (1) enhanced wildlife management at the reservoir; (2) weekly sampling of source water for *Cryptosporidium* and *Giardia* at the Kensico and Hillview Reservoir effluents; (3) quality control sampling of the Hillview effluent; and (4) implementation of a *Cryptosporidium* and *Giardia* Action Plan for response procedures for elevated *Cryptosporidium* and *Giardia* at Hillview.

In addition, the decree requires that the City pay a civil penalty of \$1 million for its past violations of federal requirements. The City will also pay New York State \$50,000, and implement a state Water Quality Benefit Project in the amount of \$200,000, to settle the State's claim for penalties for violations of the State administrative order.

D. New York City Housing Authority: On January 31, 2019, the U.S. Department of Housing and Urban Development and the New York City Housing Authority signed an administrative agreement requiring NYCHA, under the supervision of a federal monitor, to fundamentally reform its operations and remedy living conditions for its residents, including lead paint hazards, mold growth, pest infestations, lack of heat, and inadequate elevator service.²⁷ The agreement, which went into effect immediately and does not require court approval, resolves the United States' claims against NYCHA detailed in a judicial complaint filed on behalf of HUD and EPA in federal district court on June 11, 2018.²⁸ At that time, the parties had also submitted to the court a proposed consent decree that would resolve the cited violations. The court subsequently rejected the proposed decree; the parties thereafter negotiated the administrative agreement. (The judicial complaint was dismissed without prejudice after the monitor was appointed in February 2019.)

EPA's claim in the judicial complaint concerned NYCHA's long-term and ongoing violations of regulations concerning lead-based paint hazards, specifically the Renovation, Repair, and Painting Rule (RRP) Rule promulgated under TSCA and set out at 40 C.F.R. Part 745 subpart E. In addition to requiring NYCHA to comply with the RRP Rule, the remedial relief mandated by the administrative agreement sets out compliance actions under the RRP Abatement (subpart L) and Disclosure Rules (subpart F) as well. Specifically, the administrative agreement requires NYCHA to remediate living conditions at NYCHA properties by specific deadlines and meet strict, objective compliance standards regarding lead paint hazards. For example, NYCHA is required to take action within 30 days to visually inspect all non-exempt units built before 1978 where NYCHA believes a child under 6 resides or routinely visits, and remediate any deteriorated lead-based paint in the apartment; and, over time, to abate all lead paint in all NYCHA developments in accordance with the applicable work-practice standards.

The administrative agreement obligates NYCHA to establish three new critical functions: a Compliance Department, an Environmental Health and Safety Department, and a Quality Assurance Unit. In addition, the agreement requires the City to select a new chief executive officer for NYCHA from a list of qualified professionals jointly compiled by HUD, the U.S. Attorney's Office, and the City. The agreement also renews the City's commitment, reflected in the June 2018 proposed Consent Decree, to provide an additional \$1 billion in capital funds to NYCHA over the next four years and an additional \$200 million in capital funds each subsequent year for the duration of the Agreement. Also, the agreement locks in an additional \$4 billion in City funds budgeted through 2027.

27 <<https://www.hud.gov/sites/dfiles/PA/documents/HUD-NYCHA-Agreement013119.pdf>>

28 That judicial complaint was accompanied by a proposed Consent Decree that had been negotiated in advance by the parties. *See*: <<https://www.epa.gov/newsreleases/manhattan-us-attorney-announces-settlement-nycha-and-nyc-fundamentally-reform-nycha-0>>. However, the district court ultimately rejected the proposed Consent Decree, which led the parties to instead negotiate the administrative agreement.

Pursuant to the agreement, a federal monitor, selected by HUD and the U.S. Attorney's Office in consultation with NYCHA and the City and paid for by the City, will oversee NYCHA's reform efforts.²⁹ Beyond the specifically enumerated remedial actions required under the Agreement, NYCHA will develop action plans, subject to the monitor's approval, to remediate living conditions at NYCHA and meet the compliance standards set forth in the Agreement. The monitor and NYCHA also will collaboratively develop a plan to overhaul NYCHA's organizational, management, and workforce structure, informed by a new comprehensive study from an independent third-party consultant. Throughout the term of the Agreement, the monitor is required to engage with the community, including NYCHA residents, resident groups, and stakeholders, regarding matters covered by the Agreement, and provide public reports detailing NYCHA's progress. The monitor has wide-ranging powers to ensure that the action plans are implemented, and compliance achieved.

V. Interim and Early Remedies at Region 2 Superfund Sediment Sites

EPA Region 2 has recently announced its intention to proceed with "interim remedies" at two major Superfund sediment sites; and to proceed with an early action at a third. The first of these to be announced was an interim remedy at the Berry's Creek site in New Jersey. Three federal Superfund sites are situated on the banks of the creek, which is a tributary of the Hackensack River. In September 2018 EPA selected a \$332 million dredge-and-cap remedy for the upper portion of the creek, which is heavily contaminated with mercury and other hazardous substances.³⁰ The interim approach explicitly recognizes that more work in the lower portion of the creek, and in the surrounding marshes, and even in the upper portion of the creek itself, might be required in the future; and, in any event, a future Record of Decision (ROD) will be necessary to select a final remedy. Nevertheless, the extensive interim remedy – which was proposed by the PRPs themselves – is expected to dramatically reduce contaminant loadings to the rest of the creek and the Hackensack River, and it can be carried out quite a bit earlier than if a final remedial selection were awaited.

The PRPs for the nearby Passaic River made a similar proposal for the upper nine miles of the Lower Passaic River, and EPA has preliminarily endorsed that approach and proceeded with a focused feasibility study, recently completed.³¹ The PRP's proposal contemplates an interim

²⁹ The monitor's first report was issued in July 2019, in which he expressed concerns about the pace of actions to assess and address lead paint problems. The report notes that as of 5/31/19 NYCHA was awaiting lab results for nearly 1000 units, and had yet to inspect over 600 units. 18 cases of children with elevated blood lead levels had been reported since January, and 10 of those between April and June. See <<http://www.nydailynews.com/new-york/ny-federal-monitor-report-nycha-20190722-xz6gguijabenlfjr65irogvxua-story.html>>

³⁰ See: <<https://www.epa.gov/newsreleases/epa-moves-forward-332-million-cleanup-berrys-creek-bergen-county-nj>>

³¹ See <<https://semsub.epa.gov/work/02/534002.pdf>>

dredge-and-cap remedy, with the understanding that a later, final remedy selection might require additional work.

And at the Newtown Creek site in New York, EPA in December 2018 executed an administrative consent order with the City of New York for performing a focused feasibility study (FFS) to evaluate a possible early remedy for control of combined sewer overflows (CSO) into the creek.³² Here, too, the selection of such a CSO remedy would precede a final site-wide remedy selection. A full remedial investigation and feasibility study (RI/FS) for the site is being conducted by six parties – the five members of the “Newtown Creek Group” (NCG) plus New York City -- under a separate administrative settlement agreement issued in 2011 to address site conditions throughout the five-mile long creek. However, the selection of a final, site-wide remedy based on that RI/FS is still a number of years off. In the meantime, the FFS being conducted by the City will evaluate the sufficiency for CERCLA purposes of the CSO controls proposed by the City in the Long Term Control Plan for Newtown Creek issued in 2017 pursuant to the Clean Water Act.³³ If the FFS demonstrates that those CSO controls are sufficient for CERCLA purposes and would be consistent with any eventual site-wide remedy for the Creek, then EPA expects to proceed with that early remedy selection. The City’s interest in this process is to secure confirmation that the very extensive and expensive CSO control work proposed in the LTCP is indeed consistent with what would be required under CERCLA, so that it can proceed with development of those projects with confidence that more or different work would not later be required under a final site-wide CERCLA remedy.

And on July 25, 2019 EPA issued an Administrative Order on Consent to the five members of the NCG³⁴ requiring them to undertake a separate FFS to investigate hazardous substances in the lower two miles of Newtown Creek. Following completion of that FFS, EPA Region 2 anticipates that, if appropriate, it will select a remedy for an interim early action to be carried out in the lower two miles of the site. It is anticipated that the final remedy decision for those lower two miles will be memorialized as part of the future site-wide remedy to be selected once the RI/FS is completed.

VI. Burlington Northern CERCLA Decision Progeny

On May 4, 2009 the Supreme Court handed down its decision in *Burlington Northern & Santa Fe Railway Co., et al v. United States, et al.*³⁵ The decision is of major significance with respect to two areas of Superfund jurisprudence: “arranger” liability, and divisibility or apportionment of harm.

32 < <https://semspub.epa.gov/src/document/02/528368>>

33 < http://www.nyc.gov/html/dep/pdf/cso_long_term_control_plan/ltcp-newtown-creek-cso.pdf>

34 Phelps Dodge Refining Corporation, Texaco, Inc., BP Products North America Inc., Brooklyn Union Gas Company d/b/a National Grid NY, and ExxonMobil Oil Corporation

35 129 S. Ct. 1870.

The Court held that defendant Shell was not liable as an “arranger,” observing that the term is not defined in CERCLA, so it should have its ordinary meaning. The Court held that the word “arrange” implies “action directed to a specific purpose” and therefore liability as an arranger would attach only if one takes “intentional steps to dispose of hazardous substances.” Acknowledging that Shell knew of spillage at the Brown & Bryant facility -- which became the Superfund site in question -- the Court held that “knowledge alone is insufficient to prove that an entity ‘planned for’ disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product.” The Court noted that Shell took a number of steps to encourage B&B to reduce the likelihood of spills. The court did observe that circumstantial evidence can be sufficient to prove intent: “In some instances, an entity’s knowledge that its products will be leaked, spilled dumped or otherwise discarded may provide evidence of the entity’s intent to dispose of its hazardous wastes.”³⁶

The Court also held that the district court had a reasonable basis for apportioning liability. The Court noted with apparent approval the long line of cases holding that the standard of liability under CERCLA is joint and several, unless the harm at the site is divisible and can reasonably be apportioned, and that the burden is with the defendants to prove that “a reasonable basis for apportionment exists.” The Court quoted with approval the Restatement of Torts, holding that when “two or more causes produce a single, indivisible harm, ‘courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm’.” The Court nevertheless concluded that in this instance the District Court had a reasonable basis for apportioning the defendant railroads’ liability at 9%.³⁷ The Court further confirmed that equitable considerations play no role in divisibility analysis, which is a purely legal issue. (Equitable considerations may be employed to *allocate* costs in contribution actions among joint and severally liable parties, but not to *apportion* legal liability.³⁸)

Is joint and several liability still the default standard? The Supreme Court indicated it was so. At the time, some commentators expected that the high court’s approval of the apportionment carried out by the district court (based on a very simplistic and arguably nonsensical methodology³⁹) would open the door for apportionment in many more cases; but that has not happened.

36 This acknowledgement by the Supreme Court is relevant when considering whether the *Aceto* decision, discussed further in the text below, is still good law.

37 This author contends that the district court’s basis for assigning the two defendant railroads a 9% apportioned share was fundamentally flawed. See: Walter Mugdan, *The Burlington Court’s Flawed Arithmetic*, 40 *Env’tl. L. Rep. News & Analysis* 10637 (2010). Similar criticisms are made by William C. Tucker in: *All is Number: Mathematics, Divisibility, and Apportionment under Burlington Northern*, *Fordham Env. L. R.*, Fall 2010. Note that while the Supreme Court in *Burlington* accepted the district court’s apportionment calculation, it did not mandate the sort of arithmetic used by the district court.

38 A number of courts have confused apportionment with allocation, and have purported to apportion when in fact they were carrying out an equitable allocation. See, e.g., *The City of Gary v. Paul Shafer d/b/a Paul’s Auto Yard and Paul’s Auto Yard, Inc.*, 2011 WL 3439239 (N.D. Ind. August 5, 2011), in which the two terms are used interchangeably, suggesting the court did not understand the difference. And in *Reichhold v. United States Metals Refining Co.*, 2009 WL 1806668 (D.N.J. June 22, 2009), the court purported to carry out an apportionment but relied explicitly on equitable considerations.

39 See note 37, above.

Is the *Aceto* line of cases still good law with respect to “arranger” liability? In *U.S. v. Aceto*,⁴⁰ manufacturers were held liable for spills on the property of a repackager. There are important distinctions from *Burlington*, however, suggesting that *Aceto* is still good law. In *Aceto*, the manufacturers retained ownership of the chemicals throughout the repackaging and subsequent reshipment processes. By contrast, Shell simply sold a useful product to B&B, a type of transaction that has long been held to *not* give rise to “arranger” liability. As noted above, in *Burlington* the Supreme Court wrote: “In some instances, an entity’s knowledge that its products will be leaked, spilled dumped or otherwise discarded may provide evidence of the entity’s intent to dispose of its hazardous wastes.” The *Aceto* manufacturers did not take any precautions against spillage and had knowledge of the likelihood of spillage; indeed, they had “tolling agreements” with the repackager which recognized that a certain amount of spillage (and thus product loss) would occur. The Restatement of Torts, cited with approval by the Supreme Court in *Burlington*, was also cited by the *Aceto* court for its proposition that those who employ independent contractors to perform abnormally dangerous activities will be subject to strict liability for the harms therefrom. In other words, an entity cannot escape liability by contracting out dangerous parts of a process.

Several lower courts have indicated that *Aceto* is still good law. In *American International Specialty Lines Insurance Co. v. U.S.*, 2010 WL 2635768 (C.D. Cal. Jun 30, 2010) the district court cited *Aceto* and distinguished *Burlington* in its decision holding the U.S. government liable as an arranger. In *Duke Energy Progress, Inc. v. Alcan Aluminum Corp.*, 2013 U.S. Dist. LEXIS 65165 (E.D.N.C. May 6, 2013) the court also cited *Aceto*. Both decisions are summarized below.

Recent Lower Court Decisions: There have been dozens of district court opinions, and a growing number of Circuit Court opinions, that have interpreted or applied *Burlington*.⁴¹

Arranger Liability Decisions:

Defendants have had some success escaping “arranger” liability. The courts have agreed that these cases are fact-driven; most have focused on trying to ascertain the intent or purpose of the alleged “arranger,” but the analyses have led to sometimes inconsistent outcomes. Following are a few recent examples of how courts have ruled.

- *U.S. v. Dico*, 8th Circuit, Jan. 15, 2019, Case No. 17-3462. The case involves Dico’s sale of a contaminated building to a purchaser who dismantled it for saleable steel scrap. In 2015 the Circuit reversed and remanded for trial the district court’s summary judgment finding that Dico was liable as an arranger. To determine Dico’s intent it instructed the lower court to consider the sale price of the materials in comparison with the cleanup cost liability avoided by the sale; and the usefulness of the materials sold in general, without reference to how the

⁴⁰ 872 F.2d 1373 (8th Cir. 1989).

⁴¹ The author is deeply indebted to his colleagues in EPA’s Office of Site Remediation Enforcement for compiling the information on which these very brief summaries are based. Any errors that may be contained in these summaries are, however, solely the authors’ responsibility.

buyer actually used the materials. The district court conducted a bench trial in 2017, and found that Dico and its co-defendant Titan arranged to dispose of a hazardous substance, and held them jointly and severally liable for EPA's response costs. It further held Dico liable for the same amount in punitive damages, and found Dico and Titan jointly and severally liable for all costs not yet reported, all future costs, all enforcement costs, and attorney's fees. Dico and Titan appealed. In this 2019 decision the Circuit affirmed the district court's judgment.

- ***New Mexico v. EPA et al., 2018 U.S. Dist. LEXIS 22548 (D.N.M. Feb. 12, 2018).*** Plaintiffs sued EPA and its contractor, Environmental Restoration (ER), for releasing acid mine drainage and heavy metals from the Gold King Mine in Colorado, into the Animas River watershed. Plaintiffs asserted that Defendants were liable as operators, arrangers, and transporters of hazardous substances. ER contended it was not liable as an arranger because the discharge of acid mine drainage was accidental. The district court rejected ER's argument, concluding that ER's sole purpose was the disposal of hazardous substances that were no longer useful. The court found that the "intent to dispose" analysis set forth in *Burlington* is not applicable to "plain" arranger liability, which the court described as a transaction with the sole purpose of discarding substances that are used and no longer useful (*i.e.*, wastes). Because the acid mine drainage was used and no longer useful, the court denied ER's motion to dismiss the arranger claim.
- ***Pakootas v. Teck Cominco Metals, Ltd., No. 15-35228 (9th Cir. July 27, 2016).*** The 9th Circuit Court of Appeals reversed the trial court decision from the Eastern District of Washington denying Teck's motion to dismiss certain CERCLA claims against it. The appellate court held that the term "disposal," as defined in RCRA and cross-referenced in CERCLA (and as used in the arranger liability provision of Section 107 of that law, *i.e.*, "arranged for disposal..."), does not include aerial emissions of hazardous substances that were carried by the wind from Teck's smelter smokestacks in Canada to the Upper Columbia River (UCR) Superfund site in the U.S. The 9th Circuit had previously held that Teck, a Canadian corporation, could be held liable for releases of hazardous substances into the UCR site. The case had been remanded to the district court for a determination on Teck's CERCLA liability. Plaintiffs then filed an amended complaint to add the CERCLA claim based on air emissions from the stacks, and Teck moved to strike that claim. The trial court denied Teck's motion, but certified the case to the 9th Circuit after that court's 2014 decision on a similar question in a RCRA case, *Ctr. for Cmty. Action & Env'tl. Justice (CCA EJ) v. BNSF Ry. Co.*, 764 F.3d 1019 (9th Cir. 2014).

This 9th Circuit's decision is directly contrary to an earlier decision out of the Southern District of Ohio, ***The Little Hocking Water Association, Inc., v. E.I. du Pont de Nemours & Co.***, Case No. 2:09-CV-1081, March 10, 2015,⁴² holding that air emissions that are deposited

42 <https://insideepa.com/sites/insideepa.com/files/documents/mar2015/epa2015_0626.pdf>

onto the ground *do* constitute “disposal” under RCRA. The Ohio court expressly declined to follow the 9th Circuit’s 2014 *CCA EJ* decision.

Divisibility or Apportionment Decisions:

Defendants have generally been less successful overcoming traditional joint and several liability, though there are some notable exceptions. In some cases, it appears the courts have confused legal “apportionment” and equitable “allocation.” Examples include:

- ***Pakootas v. Teck Cominco Metals, Ltd*, 2018 U.S. App. LEXIS 26098 (9th Cir. Sept. 14, 2018).** The circuit court affirmed the district court’s ruling on summary judgment rejecting Teck’s divisibility defense. Plaintiffs alleged that Teck discharged hazardous substances from its smelter, which is located 10 miles north of the US/Canadian border, into the Upper Columbia River (UCR). These discharges flowed downstream into the United States. The 9th Circuit began its analysis by classifying divisibility as the “rare” exception to CERCLA joint and several liability. The Court rejected Teck’s divisibility defense under both prongs of the two-part divisibility analysis – finding that Teck failed to show the harm is theoretically capable of apportionment and that Teck failed to establish a reasonable factual basis to apportion the harm. None of the apportionment methods posed by Teck's expert considered threatened releases of hazardous substances, the mixture and synergistic effects of contaminants, or the full range and extent of contaminants. Thus, Teck failed to meet its burden of showing that the entire harm caused by Teck’s wastes combined with all other pollution in the UCR was theoretically capable of apportionment. Teck erred in considering "the effects of its waste in isolation from the other contaminants at the site." Further, all three of the apportionment methods offered by Teck's expert were some variation of a volumetric approach, but Teck failed to take into consideration other critical factors, such as the geography of the site (*e.g.*, how far the slag travels down the River, variations in conditions in the river), the time when the wastes entered the river, and the relative toxicity and migratory potential of the hazardous substances. Without evidence of how these factors affected the contamination at the Site, an apportionment would be arbitrary. The court noted that Teck could bring a contribution action against other sources to mitigate any inequity as a result of the unavailability of apportionment.
- ***United States v. NCR Corp. (“Fox River”)*, 688 F.3d 833 (7th Cir. August 3, 2012).** The Fox River site has proved to be one of the most fertile for post-*Burlington* judicial decisions, though the jurisprudence has not necessarily been the clearest or most consistent. The river was contaminated with PCBs from multiple sources, mostly involving (directly or indirectly) the manufacture or recycling of PCB-impregnated “carbonless carbon paper.” In this 2012 decision the 7th Circuit held that NCR failed to prove the harm was capable of apportionment because PCB levels contributed by NCR caused sufficient contamination to warrant the clean-up of river sediments. The court described this case as an example of “multiple sufficient causes” of environmental harm. NCR’s expert asserted NCR had only contributed about 6% to 9% of the PCBs in the river. The court held, however, it did not follow that NCR was only responsible for 6% - 9% of the clean-up costs. Had NCR been the only party to dump PCBs into the river, the

river would still have to be dredged and capped, because PCB levels contributed by NCR exceeded EPA's threshold. There was no linear correlation between the cost of cleanup and the level of PCBs in the river. Once the PCBs reached a threshold level, cleanup became necessary. The court concluded that in this case, "contamination traceable to each defendant" is the proper measure of harm, though other measures of harm may be appropriate in different circumstances. This legal conclusion was confirmed after an 11-day bench trial (2013 U.S. Dist. LEXIS 62265 (E.D. Wis. May 1, 2013)).

However, in *United States v. P.H. Glatfelter Co.*, 2014 U.S. App. LEXIS 18436 (7th Cir. Sept. 25, 2014), the Seventh Circuit reversed the district court's ruling from that trial, finding that the harm by NCR is theoretically capable of apportionment and remanding for further proceedings. On May 15, 2015, the District Court in *U.S. v. NCR Corp.*, Case No 10-C-910, ruled that in view of the Circuit Court's opinion, NCR indeed established its divisibility defense. This is a case where only one contaminant – PCBs -- is present; there are records sufficient to provide reliable estimates of the amounts of PCBs discharged by the various PRPs; and those various PRPs are all viable and involved in the case. The court held that NCR showed the harm was theoretically capable of division, and that NCR was able to suggest a reasonable basis on which to apportion its share of the remediation. (The apportionment basis suggested by NCR was, essentially, the relative amounts of PCBs contributed by the PRPs.)

BUT WAIT, THERE'S MORE! In a further twist, on October 19, 2015 the District Court reversed its May 15 decision, holding instead that NCR had *not* demonstrated a reasonable basis for *not* being held jointly and severally liable. Ruling on Motions for Reconsideration, the court analyzed expert opinion testimony and ultimately concluded that "NCR has failed to meet its burden to demonstrate both that the harm is theoretically capable of divisibility and that there is a reasonable basis for apportionment." Slip Opinion at 9.

VII. Other Notable CERCLA Case Developments

A. Statute of Limitations

In August, 2017 in *Asarco LLC v. Atlantic Richfield Co.*,⁴³ the 9th Circuit overturned a decision by the District Court for Montana⁴⁴ which had held that the three-year statute of limitations in CERCLA applied to Asarco's contribution claim against Atlantic Richfield, and ran from the date Asarco entered into a judicially approved settlement of its liability for environmental cleanup of an old lead smelter site, even though the settlement was under the RCRA and Clean Water Act statutes and *not* under CERCLA. Asarco had

43 No. 14-365723 (9th Cir., August 10, 2017) <<https://law.justia.com/cases/federal/appellate-courts/ca9/14-35723/14-35723-2017-08-10.html>>

44 Civil Action No. 12-53-H-DLC (District of Montana, Helena Division, August 26, 2014)

entered into a later judicial settlement that purported to be under CERCLA, but which imposed no different requirements than did the earlier non-CERCLA settlement. On appeal, the Circuit agreed that a non-CERCLA settlement can be the basis for a CERCLA contribution action because a “corrective measure” under a different law can qualify as a CERCLA “response” action. But the court disagreed that the 1998 RCRA decree in this case resolved ASARCO’s liability, and so the SOL did not begin to run at that time.

In *Hobart Corp. v. Waste Management*⁴⁵ the Supreme Court declined to hear an appeal from the Sixth Circuit’s opinion ruling that CERCLA §113 contribution claims are subject to a three year statute of limitations, and that the “most logical” triggering event in this case was the effective date of an administrative order that the plaintiff entered into with EPA to conduct a remedial investigation and feasibility study (RI/FS). This is potentially troubling, because a cooperative PRP may enter into an agreement to perform an RI/FS early in the process, before much is known about the likely cost of cleanup. In the absence of that information, settlement among PRPs is likely to be more difficult.

In *New York v. Next Millennium Realty, LLC*,⁴⁶ the Second Circuit addressed the distinction between Superfund “remedial” and “removal” actions. CERCLA establishes different statutes of limitation for the two types of response action. The Circuit Court overturned a district court decision dismissing plaintiff’s cost recovery claim as time-barred because the money was spent on remedial response work; the appellate court held that the work was removal response, which has a more lenient statute of limitations.

B. Owner Liability Rulings

In July 2017 the 10th Circuit Court of Appeals ruled that the U.S. government is an “owner” and therefore potentially liable under CERCLA for cleanup costs at a former mining site located on U.S.-owned National Forest lands.⁴⁷ The court found that the U.S. clearly held title to the land in question, and was therefore an owner in the widely accepted common sense of the word, notwithstanding that it did not control or direct the mining operations that caused the contamination. (The court also found that the U.S. was not liable as an “arranger”; see the discussion, above, of arranger liability under the Supreme Court’s *Burlington Northern* decision.)

The Supreme Court has been asked to resolve a difference between the 2nd and 9th Circuits regarding the determination of when a tenant can be considered an “owner” for

⁴⁵ 758 F.3d 757 (6th Cir. 2014), *cert denied* 2015 WL 231991 (U.S. Jan. 20, 2015)

⁴⁶ No. 12-2894 (2d Cir. Oct. 15, 2013)

⁴⁷ *Chevron Mining, Inc., v. U.S.*, No. 15-2209, 10th Circuit, July 19, 2017; <<https://www.ca10.uscourts.gov/opinions/15/15-2209.pdf>>

purposes of Superfund liability.⁴⁸ The owners of a site in NY have asked the Court to reverse a 2nd Circuit decision holding a tenant is not an owner under CERCLA even if it meets the common law definition of an owner, the test adopted by the 9th Circuit. The 2nd Circuit declined to adopt the common law standard, instead following its own earlier decision that established a more complicated test to determine if a tenant/sublessor is an owner under CERCLA. The petitioners assert that the actions of the tenant "when the pollution occurred, without any involvement, consent or oversight by the [petitioners], confers owner liability under CERCLA on Tenant/Sublessor, for the contamination discharged by its Subtenant." They urge the Court to adopt the 9th Circuit's 2011 ruling in *City of Los Angeles v. San Pedro Boat Works*,⁴⁹ which expressly rejected the 2nd Circuit's standard.

C. Tort Claims Against the U.S. for Hazardous Waste Disposal Practices

In *Angela Pieper, et al., v. United States*,⁵⁰ the Court declined to review a case concerning the U.S. government's past waste disposal practices at a military installation in Frederick, MD. The Army disposed of hazardous waste there decades ago; the property has since been named a federal Superfund site. Plaintiffs alleged the waste caused health problems and sued under the Federal Tort Claims Act, which waives sovereign immunity for some but not all acts. Excluded from the waiver are actions that involve judgment and discretion on policy and similar issues. The 4th Circuit affirmed the district court's holding that the decisions of Army personnel on how and where to dispose of hazardous substances represented an exercise of such discretion, and the Supreme Court declined to hear the appeal.

D. Successful Challenge to Inclusion of a Site on the NPL

In *Genuine Parts Company v. EPA*⁵¹ the D.C. Circuit Court removed a site from the Superfund National Priorities List – a rare outcome in NPL challenges. At the West Vermont Drinking Water Contamination site in Indiana, a dry cleaner had discharged perchloroethylene into a sewer system that leaked; a separate manufacturing facility also had discharges into the system. Plaintiffs argued there was a “confining layer” that prevented contamination from reaching water supplies. The court held that EPA didn't adequately address several diagrams that “appear to contradict the agency's position” that two aquifers beneath the site are interconnected. “Because EPA ‘entirely failed to consider an important aspect of the problem’ by failing to address evidence that runs

48 *Next Millennium Realty, LLC, et al., Petitioners, v. Adchem Corp. et al., Respondents, Petition for Writ of Certiorari*, filed Sept. 25, 2017. *See*:

<https://insideepa.com/sites/insideepa.com/files/documents/oct2017/epa2017_2091.pdf>

49 <<http://cdn.ca9.uscourts.gov/datastore/opinions/2011/03/14/08-56163.pdf>>

50 No. 17-1324, Supreme Court of the United States, May 21, 2018.

51 D.C. Circuit Court, No. 16-1416, May 18, 2018.

counter to the agency's decision we must hold that the listing of the site is arbitrary and capricious.”

E. Scope of Judicial Review of EPA Remedy Selection

In *Emhart Industries v. U.S. Department of the Air Force, et al.*,⁵² plaintiff challenged EPA’s selection of the remedy for an NPL site, and asserted a “sufficient cause” defense for its non-compliance with an EPA unilateral administrative order under CERCLA §106 requiring it to carry out that remedy. In its remedy challenge, Plaintiff sought to introduce evidence, including expert testimony, that it had not presented to EPA prior to issuance of the Record of Decision, and that was therefore outside the scope of the agency’s administrative record. The District Court took note of CERCLA’s directive that review of remedy selection “shall be limited to the administrative record.”⁵³ Citing general principles of administrative law, the court identified several very narrow exceptions that would allow it to consider evidence outside that record. Among these was one on which the court relied in admitting plaintiff’s additional expert witness testimony. The court cited a First Circuit decision that allowed an exception to the “rule against supplementation [of the record]” where “additional testimony by experts” will “aid to understanding highly technical, environmental matters.”⁵⁴ The court found that the subject matter in this case was indeed “high technical” and that additional expert testimony (from both the plaintiff and the government) would aid its understanding. The court acknowledged that the additional testimony is only for the purpose of assisting it in understanding information contained in the administrative record, and that the court must still look “first and foremost” at the administrative record, “not some new record” made in the current trial.⁵⁵

The court went on to note that pursuant to CERCLA and the National Contingency Plan regulations, plaintiff should ordinarily be limited to arguments that it advanced prior to EPA’s final remedy decision, particularly during the public comment period on the proposed remedial plan, and which were therefore available to the agency for consideration at the time of the administrative decision-making process. But here, again, the court identified a narrow exception, to wit that EPA must explain any “key assumptions” that underpin its decisions, and that plaintiff’s evidence may be received on the specific question of whether EPA adequately did so in this matter.⁵⁶

52 U.S. District Court for Rhode Island, C.A. No. 06-218 S, August 17, 2017
<<http://www.lawandenvironment.com/wp-content/uploads/sites/5/2017/08/Opinion-Emhart-Indus.-v.-New-England-Container-Co..pdf>>

53 42 U.S.C. §113(j)(1), which goes on to specify that the agency’s decision must be upheld unless a challenger can demonstrate, on that record, that the decision was arbitrary and capricious.

54 *Emhart, id.* at 23.

55 *Id.* at 25.

56 *Id.* at 30.

The court in fact did find that EPA's remedy selection decision was "arbitrary, capricious or otherwise not in accordance with law" with respect to three specific EPA findings; and that therefore plaintiff had sufficient cause not to comply with EPA's unilateral administrative order.⁵⁷

⁵⁷ *Id.* at 106 *et seq.*