

## ***Court Allows Superfund Defendant to Renegotiate Allocated Share to Account for Change in Cleanup Plan***

Groups of potentially responsible parties (PRPs) responding to a government demand to clean up a Superfund site find endless issues about which to argue, particularly concerning how they should allocate among themselves the costs of remediation. PRP groups sometimes allocate costs based on a simple *per capita basis*, or on relative volumes of waste that each PRP sent to the site. Sometimes they allocate costs based on the different kinds of wastes that each party sent, and the estimated cost of cleaning up each particular kind of waste. Such cost-driven allocations often make sense, but what happens to such an allocation if EPA fundamentally changes the cleanup plan upon which the allocation was based? May one of the PRPs demand a new allocation, or is “a deal a deal”?

This is the issue that the United States Court of Appeals for the Fifth Circuit recently addressed in *United States v. Amoco Chemical Co.*, No. 99-20586 (May 15, 2000). In 1991, BFI Waste Systems of North America (BFI) and a number of other PRPs entered into a consent decree with the United States Environmental Protection Agency (EPA) requiring the PRPs to remediate the Brio Superfund Site near Houston, Texas. The 1991 consent decree was based on a remedy that EPA had selected calling for the site to be remediated using either biological treatment or incineration. BFI and the other PRPs negotiated an allocation of costs based in part on the assumption that incineration would be the remedy. The allocation was expressed in a document known as the “Brio Site Trust Agreement.” According to BFI, it agreed to pay a higher percentage of costs than it normally would have because the tar that it sent to the site contained a contaminant that makes incineration more costly than normal.

After the 1991 consent decree was approved by the district court, the local community voiced opposition to the plan to incinerate wastes on site. The PRPs asked EPA to modify the remedy to delete the incineration requirement. In 1997, EPA agreed to modify the remedy to require that wastes be contained on site rather than incinerated. EPA and the PRPs then drafted an Amended Consent Decree, and the PRPs drafted an Amended Trust Agreement.

In March 1998, BFI informed the other PRPs that it was not willing to accept responsibility for the same share of costs which it had accepted in the original Brio Site Trust Agreement, because the only reason it had agreed to pay a higher percentage of costs was that its tar would have made the incineration remedy more costly, a factor that would not apply to the new containment remedy. BFI signed the Amended Consent Decree, but did not sign the Amended Trust Agreement. BFI advised the other PRPs, before any of them had signed the Amended Consent Decree, that it would not agree to pay the same share of costs as before. Under pressure from the government, the other parties signed the amended consent decree and the Amended Trust Agreement. The court then entered the Amended Consent Decree.

In February 1999, the other PRPs filed a motion with the district court asking it to require BFI to sign the Amended Trust Agreement, and thereby accept responsibility for the same share of costs that it had accepted under the original Brio Site Trust Agreement. The district court granted the motion, and ordered BFI to sign the Amended Trust Agreement. BFI appealed to the Fifth Circuit.

The other PRPs argued that BFI agreed to accept the same allocated share when it signed the Amended Consent Decree, because the Amended Consent Decree contained statement that required each settling defendant to “present to EPA for approval concurrent with this Amended Decree a signed amended Brio Site Trust . . .” However, the court held that this part of the Amended Consent Decree did nothing more than obligate BFI to sign *some* trust agreement, but not necessarily that included the same allocation as in the original Trust Agreement. The other PRPs also argued that the original Trust Agreement formed a part of the Amended Consent Decree, because the Amended Consent Decree defined “Settlers” as “those persons who are signatories to this Amended Decree . . . including the Brio Site Trust formed pursuant to . . . the original consent decree and continued under this Amended Decree.” However, the court held that this language simply provided that the members of the original Trust Agreement are included among the settling parties, and does not specify that the allocation agreement between the PRPs will necessarily remain unchanged.

The court placed great significance on the fact that BFI had informed the other PRPs, before any of them signed the Amended Consent Decree, that BFI would insist on reallocating its share. BFI did not raise the issue when the PRPs were negotiating the Amended Consent Decree with EPA and circulating a proposed Amended Trust Agreement. The court held that BFI’s silence during the early stages did not bind it to accept the Amended Trust Agreement later. S

The court briefly discussed and distinguished *United States v. Lightman*, a case in which the court allowed a PRP group to enforce a written agreement-in-principle on allocation against a member of the PRP group, even though the draft formal agreement (which was never executed) contained a provision stating that it would not be enforceable until it was signed by all PRPs, which never happened. In the *Lightman* case, the court held that the written agreement-in-principle was enforceable, partly because the conduct of the holdout PRP after entering into the agreement-in-principle led the other PRPs to believe that it had agreed to accept its allocated share.

The Fifth Circuit concluded that BFI was obligated to negotiate with the other PRPs “and agree to some system of allocation.” The court also held that if BFI and the other PRPs could not agree to a new allocation, then the district court was authorized to resolve the allocation dispute by the dispute resolution clause of the Amended Consent Decree.

It is fairly common these days for EPA to amend a Superfund remedy. It is even more common that cost estimates prove to be inaccurate. For example, initial estimates of volumes of soil to be remediated often prove to be too low. Whenever a PRP cost allocation depends in part on the remedy selected, and the remedy is modified, one or more PRPs may believe that costs should be reallocated. The lesson of this case is that PRPs should keep a good record of the basis used to allocate costs, and make sure that their allocation agreements clearly express what circumstances, if any, may justify later readjustment to the allocation.

***United States v. Amoco Chemical Co.*, No. 99-20586 (May 15, 2000)**

This article was prepared by Christopher J. Dunsky, a partner in our Environmental Department, and previously appeared in the August, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.