

## ***Court Assesses Only Ten Percent Share Of Partial Investigation Costs In Kalamazoo River PCB Case***

The Kalamazoo River Study Group (KRSNG), an association of four paper companies, brought a contribution action under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) against Eaton Corporation (Eaton) in the United States District Court for the Western District of Michigan for polychlorinated biphenyl (PCB) contamination released into the Kalamazoo River. As reported in the November 2001 edition of the Michigan Environmental Compliance Update (MECU), in a May 9, 2001 decision, the court found Eaton liable for PCB contamination released from two of its three automotive parts manufacturing plants located along the Kalamazoo River because the evidence established that Eaton had more likely than not released PCB contamination from its plants located in Battle Creek and Kalamazoo into the River. The 2001 case, however, considered only Eaton's liability under the CERCLA contribution claim.

The "allocation" phase of KRSNG's contribution action was held in a February 2002 trial in which the court determined the extent of Eaton's liability for the PCB contamination in the Kalamazoo River. KRSNG sought a ruling that Eaton was liable for 40% of the \$29,226,865.09 in past investigation costs, as well as 40% of all future investigation and cleanup costs. The court held that it was equitable to allocate to Eaton only 10% of the costs of investigating a portion of the River upstream of Morrow Lake and in the vicinity of Eaton's Battle Creek plant – which amounted to only \$62,261.58.

### **Geography**

The Kalamazoo River Superfund site consists of a 35-mile stretch of the River listed on the National Priorities List (NPL). The upstream end of the NPL site begins at the confluence of the Kalamazoo River and Portage Creek downstream to the Allegan City Dam, plus three miles

of Portage Creek. Eaton's Kalamazoo plant was located three miles downstream from the upstream end of the NPL site and was downstream of three of the four KRSG members. Under a 1990 administrative consent order with the Michigan Department of Natural Resources, KRSG agreed to fund and conduct a remedial investigation and feasibility study of a 95-mile stretch of the River, which also included the NPL-listed portion of the River. Thus, included within the study area was Morrow Lake, created by damming the Kalamazoo River approximately five miles upstream of the NPL site. Eaton's Battle Creek plant, which was demolished in 1984, was located approximately 15 miles further upstream of the Morrow Lake Dam and, therefore, was located upstream of all four members of the KRSG.

## **Background**

The court explained that it was established in the previous cases that the PCBs found at the NPL site consist primarily of Aroclors 1242, 1248, 1254, and 1260. KRSG acknowledged that its members were primarily responsible for the majority of Aroclor 1242 present at the NPL site, while Aroclors 1254 and 1260 account for only 2 to 3 % of the PCBs in the KRSG members' landfills. In the Morrow Lake sediments, however, approximately 90 % of the PCBs are Aroclors 1254 and 1260, and those Aroclors account for approximately 25 % of the PCBs in the sediments of the Kalamazoo River between Morrow Lake and the Allegan Dam. KRSG, therefore, argued that because of the difference between the proportion of Aroclors 1254 and 1260 in the River and the landfills, the KRSG members could not be responsible for the majority of those Aroclors at the NPL site. KRSG argued that the evidence showed that the PCBs more likely than not came from Eaton, while Eaton argued that the quantity of any PCBs it contributed to the River was so small as to be negligible.

The court acknowledged that, due to the fact that none of the parties were aware of their disposal of PCB, the court must rely upon circumstantial evidence in order to arrive at an allocation.

### **Battle Creek Plant**

In its 2001 decision finding liability, the court determined with respect to Eaton's Battle Creek Plant that: (i) the primary PCBs present were Aroclors 1248 and 1254; (ii) the PCBs were not used in process oils, but came from leaking electrical equipment and hydraulic systems, which were normally closed systems; and (iii) even if the PCBs from the leaks were absorbed by the floors or swept up and discarded, some were probably contained in the facility's effluent and made it from the ditch into which the plant discharged its wastewater and into the Kalamazoo River. The court, however, noted that its determination of liability regarding the Battle Creek plant was based upon what was now known to be erroneous testimony that the Clark Equipment Company (Clark) did not discharge process wastewater to the same ditch that Eaton also discharged.

After the liability stage of the trial, it was learned that Clark discharged process wastewater to the ditch up until 1978. Clark manufactured industrial trucks, tractors, trailers, stackers, and forklifts – operations that involved forging, machining, and hard chrome plating. KRSG's expert conceded that, based upon this new evidence, that the PCBs present in the ditch could have come from Clark if its effluent contained PCBs. Although there was no direct evidence that Clark discharged PCBs, similar to Eaton, Clark's plant had PCB-containing electrical equipment. Clark also had approximately 30 hydraulic systems that could have contained PCBs and the forklifts it manufactured could have used PCB-containing hydraulic fluids.

Since the 2001 liability trial, KRSG's expert also collected a number of new sediment samples from the ditch and the Kalamazoo River, the results of which were extensively discussed by the court. Based upon a comparison of the PCB data relating to the ditch and PCB data from the Kalamazoo River at and downstream of Eaton's discharge, KRSG's expert opined that the Battle Creek plant was among the most contaminated throughout the Kalamazoo River system and caused significant PCB contamination of the River, including Morrow Lake and downstream through the NPL site. KRSG argued that the court should revise its earlier findings and conclude that Eaton used large quantities of PCB-containing process oils. KRSG further argued that given the significant PCB contamination found in the ditch and the adjacent River, it was reasonable to conclude that Eaton caused PCB contamination of a magnitude similar to that caused by KRSG's members, which reached more than 50 miles downstream of the member's facilities.

The court disagreed with KRSG's expert's conclusions on five bases. First, the court noted that it was impossible to know if the PCBs in the ditch came from Eaton or Clark. Second, the PCBs in the ditch did not match the PCBs found at Eaton's Battle Creek plant. As discussed above, the court previously found that primarily Aroclor 1248, with significant amounts of Aroclor 1254, were used at the plant. Aroclor 1248 was not detected at all in the ditch or river samples and the Aroclors present in the sediments did not match the Aroclors found in the Battle Creek plant's floor.

Third, the court pointed out that neither of the Aroclors found in the PCB-containing hydraulic oil known to have been purchased by the plant were found in the ditch. Fourth, the court stated that KRSG's arguments ignored the other potential sources of PCBs located upstream of Eaton's Battle Creek plant, with 25% of the Kalamazoo River watershed being

located upstream of the plant. The court observed that the Aroclors identified by KRSG in the vicinity of the Battle Creek plant were consistent with the types found in electrical equipment such as transformers and capacitors, which were commonly used in a variety of industries. The court also pointed to data from 1972 showing the presence of Aroclor 1254 in the effluent of two other companies located in Battle Creek. Another study in 1971 found that the most significant source of PCBs to the Kalamazoo River upstream of Battle Creek was from the Battle Creek River, which flows into the Kalamazoo River upstream of Eaton's plant. The court noted that, despite this evidence, KRSG's expert did not perform any testing upstream of Eaton's plant.

Finally, the court stated that it ascribed little significance to KRSG's expert's comparison of the ditch sediment samples to those taken from the Kalamazoo River, observing that the ditch samples would naturally be more concentrated because they had not been subject to the dilution effects seen in the River due to greater flows and the addition of clean sediment.

The court next summarized the testimony of Eaton's expert, which the court found to be more persuasive than the testimony of KRSG's expert, noting that Eaton's expert had more expertise in the areas of hydrogeology and PCB transport in rivers and had recently testified before a Congressional subcommittee on contaminated sediment issues. Eaton's expert testified that river sediment will normally show a gradient in PCB concentration, with the highest concentrations near the source and declining concentrations proceeding downstream from the source.

Eaton's expert testified that if the Eaton Battle Creek plant was a source of PCBs to the River, he would expect to see detectable concentrations of PCBs in the 13-mile stretch of the River from the plant to Morrow Lake, with a gradient of the highest concentrations near Eaton's plant and declining concentrations proceeding downstream. Such was not the case, however. A

1976 study found no Aroclor 1254 in the sediments between Eaton's plant and Morrow Lake. Other data collected between 1993 and 2000 from Battle Creek through the NPL site to Lake Allegan also showed no declining gradient of PCB concentrations starting at Eaton's Battle Creek plant. Eaton's expert testified that the data appeared to indicate multiple sources of Aroclor 1254 to the River and was not consistent with a single or primary source of PCBs originating from Eaton's plant. Eaton's expert testified that the evidence strongly supported the PCBs found in Morrow Lake originated from a source close to the Lake, not 15 miles upstream. Further, two other industrial facilities that discharged to Morrow Lake were identified as possible sources of PCBs to the Lake. In addition, the Michigan Department of Environmental Quality (MDEQ) project manager identified KRSG's members' landfills as potential sources of windborne PCBs to Morrow Lake.

Eaton's expert admitted that some amount of PCBs from Eaton's plant may have entered the ditch, traveled to Morrow Lake, and also traveled over the Morrow Lake Dam and into the NPL site; however, he opined that Eaton's plant did not release any measurable quantities of PCBs to the Lake or the NPL site.

The court concluded that KRSG had "provided no persuasive, credible, or reliable new evidence which would undermine [the court's] previous determination that any releases from Eaton's Battle Creek facility were minimal . . . ." In fact, the new evidence that Clark discharged to the ditch prior to 1978 further decreased the likelihood that the PCBs in the ditch were attributable to Eaton. The court found that the evidence supported the conclusion that Eaton's Battle Creek plant was not a significant source of PCBs to the NPL site – that the PCBs contributed by the plant would not be measurable above background levels.

### **Kalamazoo Plant**

In explaining its 2001 finding that Eaton was liable for the release of PCBs from its Kalamazoo plant to the Kalamazoo River, the court noted that it also found at that time it was unlikely that any PCBs were used at the plant in an open process. During the 2002 allocation trial, KRSG presented new evidence of testing performed by MDEQ in 2001 which detected PCB Aroclors 1248 and 1260 at 3.2 and 2.1 parts per billion (ppb), respectively, in a sample from a “product dispenser.” KRSG also presented evidence that sampling in 1983 showed that four of five press pits at the plant had total PCB levels of 12,000 ppb, 57,000 ppb, 94,000 ppb, and 880,000 ppb.

KRSG argued that MDEQ’s detection of PCBs in a process oil 30 years after PCBs were banned from such uses was significant, while Eaton’s expert argued that the single detection was so low as to not indicate residual contamination and supported the conclusion that it was related to isolated incidental contamination. KRSG argued that the presence of PCBs in the press pits confirmed Eaton’s use of PCB-containing process oils.

The court rejected KRSG’s arguments that this new evidence required the court to conclude that Eaton widely used PCB-containing process oils at its Kalamazoo plant. The new evidence did not address the court’s findings in the 2001 trial that the plant had no reasons to use PCBs in its processes and that PCBs were not present in the area where metal chips were stored and process oils drained off them and into the soils below. The court further stated that evidence of PCB use in the plant was not significant if the PCBs did not reach the Kalamazoo River. Accordingly, the court turned its attention to the data from the Zantman Drain and the River.

KRSG again presented evidence based on the additional testing it performed in the Zantman Drain and the River after the 2001 liability trial. The court stated that the Drain was “a stagnant, slow moving, organically rich ditch” that “would have been an excellent environment

for capturing PCBs that came down the Drain.” However, only Aroclor 1260 was detected in the Drain. The court reasoned that if an assortment of Aroclors were released into the Drain, they should have been present in the Drain’s sediments. There was no evidence that the Zantman Drain was a significant source of the other Aroclors present in the River. Therefore, the court concluded that Eaton’s Kalamazoo facility was not a significant source of PCBs to the River.

### **Allocation Of Response Costs**

Section 113(f) of CERCLA, governing the allocation of response costs under a contribution action, provides: “[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate . . . .” The court recited the following nonexhaustive list of factors, known as the “Gore factors,” that courts have applied under Section 113(f):

- (1) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished;
- (2) the amount of the hazardous waste involved;
- (3) the degree of toxicity of the hazardous waste involved;
- (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
- (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
- (6) the degree of cooperation by the parties with the Federal, State or local officials to prevent any harm to the public health or environment.

KRSG argued “that based on the three Gore Factors of volume of discharge, toxicity, and cooperation with governmental authorities, Eaton should be allocated 40% of the River investigation and remediation costs [KRSG] has incurred and will incur in the future at the Site.” The court found, however, that the equities with regard to cooperation with governmental agencies worked in the favor of neither KRSG nor Eaton. Further, neither KRSG nor Eaton was

careful regarding the release of wastes into the River. Therefore, the court stated it would give no weight to the cooperation Gore factor.

Regarding the toxicity factor, KRSG argued that PCBs present in fish was driving the sediment cleanup and that Aroclor 1254 accumulated in fish four times more than the Aroclor 1242 released by KRSG's members. KRSG argued that, therefore, Aroclor 1254 is more toxic than Aroclor 1242 and its discharge should be weighted more heavily. The court noted that it had rejected this same argument in the 2000 case KRSG brought against Rockwell International (see January 2001 MECU) and the Sixth Circuit Court of Appeals found no error in the court's approach of treating all PCBs on an equal toxicity basis. Therefore, the court held that because cooperation and toxicity were not relevant to the allocation in the case at hand, the most relevant Gore factor was the volume of PCBs released to the site by each party.

KRSG argued that Eaton should be liable for most of the PCB contamination downstream of Eaton's Battle Creek plant to the Morrow Lake Dam and should be liable for a significant portion of the Aroclor 1254 and 1260 contamination downstream of the Dam. In addressing KRSG's arguments, the court extensively analyzed the evidence presented by KRSG's and Eaton's experts. Regarding KRSG's contribution of Aroclors 1254 and 1260 to the River, the court found:

The Court concludes that it is more likely than not that 2 to 5% is representative of the KRSG's discharges of Aroclors 1254 and 1260 to the River. Thus, most of the Aroclors 1254 and 1260 in the Kalamazoo River . . . between Morrow Lake and Lake Allegan had to have come from sources other than [KRSG]. The Court agrees with [KRSG] that because Aroclors 1254 and 1260 are not associated with paper wastes and because they are not found in the [landfills] in any significant ratio, much of the PCB Aroclors 1254 and 1260 now present in sediments between Morrow Lake Dam and Lake Allegan Dam is attributable to sources other than [KRSG's] members' papermaking operations.

The court again noted that the failure of KRSG to do any testing upstream of the Eaton Battle Creek plant prevented it from showing by a preponderance of the evidence that Eaton was the source of the PCBs in Morrow Lake, as opposed to sources further upstream. Further, there was no gradient of PCBs going downstream from the Battle Creek plant. The court also concluded that Morrow Lake was not a significant source of PCBs to the NPL site. If it had been, the court stated that one would expect to find a gradient of Aroclor 1254 declining downstream of the Morrow Lake Dam. Instead, the evidence showed a multiple source pattern for Aroclor 1254 within the NPL site. The court further noted that MDEQ had not expressed an interest in remediating Morrow Lake and the River upstream. The court held as follows:

Because this Court finds that Eaton's Battle Creek facility was not a significant source of PCBs to Morrow Lake, and because this Court now concludes that Morrow Lake was not a significant source of PCBs to the NPL Site, Eaton Battle Creek's facility [sic], which is upstream of Morrow Lake, is an even less significant contributor of PCBs to the NPL Site.

Based upon the finding contained in this opinion and all of the previous opinions in this case, this Court concludes that the [Aroclor] 1254 in the NPL Site came from multiple sources. Eaton was one of those many sources. So were [KRSG's] members.

The court stated that it assumed that every industry along the Kalamazoo River was a possible source of a small amount of Aroclor 1254 to the NPL site. The court found insufficient evidence, however, for singling out Eaton as a significant source of Aroclor 1254 to the NPL site. The court, therefore, found Eaton's contribution of PCBs to the NPL site to be "very minimal."

The court held that it would not be equitable to require Eaton to participate in the high cost of remediating the NPL site because:

- Eaton was not a significant source of Aroclor 1254 to the NPL site;

- Small quantities of Aroclor 1254 were contributed by a large number of industries; and
- The total amount of Aroclor 1254 would not have required remediation but for the large amount of Aroclor 1242 discharged by KRSG's members – that is, the PCBs contributed by Eaton did not affect the scope of or need for a cleanup.

Notwithstanding this holding, however, the court held that Eaton should be required to pay some portion of the cost of the investigation performed upstream of Morrow Lake. Based on the discovery of PCBs at Eaton's Battle Creek plant and in Morrow Lake, Eaton's lack of any historical records, and the presence of Aroclor 1254 beyond that which could be attributed to KRSG's members, both KRSG and Eaton had an interest in determining the amount of PCBs Eaton contributed to the Kalamazoo River. The court thus concluded that Eaton had reaped the benefits of the investigation conducted by KRSG and held that it would be equitable to require Eaton to bear 10% of the costs of investigating the River upstream of Morrow Lake and in the vicinity of Eaton's Battle Creek plant. With respect to the costs of KRSG's investigation of the Kalamazoo River downstream of Morrow Lake, however, the court concluded that KRSG would have incurred those costs regardless of Eaton's involvement as a potential source. Therefore, the court held that Eaton should bear none of the investigation costs incurred within the NPL site. Consequently, the court held that Eaton must pay KRSG \$62,261.58, plus prejudgment interest as provided under CERCLA §107(a), for its share of the investigation costs.

*Kalamazoo River Study Group v. Eaton Corporation*, No. 1:95-CV-838 (W.D. Mich. August 29, 2002).

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