

Liabile Party Must Share Response Costs

The U.S. Court of Appeals for the Ninth Circuit has held that, under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), when a party is found liable for environmental response costs, it must pay a fair share of the cost regardless of whether it is the sole cause of the contamination.

Boeing Company (Boeing), an airplane manufacturer, owns approximately 150 acres near Portland, Oregon. Cascade Corporation (Cascade), a lift truck manufacturer, owns 6 acres about 200 feet southeast of Boeing's property. Because the land underneath both properties slopes down to the north, groundwater flows from Cascade's property toward Boeing's. Both of the companies and their predecessors used chlorine-based solvents in their manufacturing processes, and, over the last 25 years, some of the solvents spilled or were dumped and contaminated the soil and groundwater at both sites. The main contaminants in the soil and groundwater are volatile organic compounds, specifically trichloroethene, 1,2-dichloroethene, and perchloroethene or tetrachloroethene. These compounds share such common properties as high toxicity, low solubility, and high mobility in the environment.

In 1985, Boeing drilled monitoring wells on its property for an unrelated project and discovered a contaminated aquifer, which is a relatively porous soil layer that holds water, somewhat like a sponge. Boeing signed a consent order in 1986 with the U.S. Environmental Protection Agency (EPA) requiring Boeing to investigate the extent of the contamination on its property and to identify its potential sources. Boeing installed monitoring wells, sampled groundwater and soil gases, and conducted pump and tracer tests to determine the sources and extent of the contamination. Groundwater samples taken from sixteen of the monitoring wells in the southeast corner of Boeing's property suggested that contaminated groundwater was flowing from Cascade's property onto Boeing's.

Cascade discovered contamination in its industrial supply well in 1986. For the next two years, Cascade tested the well and sent the results to the Oregon State Department of Environmental Quality (ODEQ). In 1987, Cascade tested the waste in the underground tanks it used to store waste oil and coolants, and discovered chlorine-based chemicals in the waste. Cascade then removed the contaminated soil from the site, and proceeded to enter into a consent order with the ODEQ to evaluate the extent and sources of the contamination at its site. Both Boeing and Cascade made diligent efforts to remedy contamination on their properties.

In 1989, Boeing and Cascade began working together on investigation and cleanup under the supervision of the ODEQ. In 1993, Boeing and Cascade entered into a joint consent order that directed them to control the contaminant plume and to learn more about the area of contamination in order to protect Portland's water supply.

There is an upper gravel aquifer and a lower sandstone aquifer running underneath both properties. Both aquifers are contaminated. Boeing and Cascade are separately cleaning up the gravel aquifers on their respective properties, and those costs were not at issue. However, contamination had seeped from the upper gravel aquifer into the lower sandstone aquifer, and the resulting contamination plume extended beyond both Boeing's and Cascade's properties, and

flow could eventually reach the City of Portland wells. This sandstone aquifer contamination was the subject of dispute in this case.

The contamination plume is generally north of the Cascade property, and extends both northeast and northwest of Cascade. The northwest portion of the plume extends under a section of Boeing's property. The eastern portion of the plume contains groundwater that flowed north from Cascade's property, and is solely attributable to Cascade. The western portion of the plume is solely attributable to Boeing and its predecessors. A portion of the plume in between contains contaminated groundwater from both Boeing and Cascade.

Boeing brought a contribution action in district court against Cascade, seeking to recover 80% of the costs Boeing had incurred to date in remediating the sandstone aquifer, and seeking an order that Cascade would have to pay 80% of future expenses. Following a trial without a jury, the district court found generally for Boeing, ordering that Cascade would have to pay 70% of both past and future costs of remediating the sandstone aquifer. Both parties appealed.

On appeal, Cascade argued that it should not have been held liable for a share of Boeing's costs because Boeing would have incurred the costs even if Cascade had not contaminated Boeing's soil. Because the EPA had ordered Boeing to investigate its own contamination, Cascade argued that Boeing would have incurred its own investigation costs even if Cascade had not released any contamination into the groundwater, and that Cascade did not, therefore, cause Boeing to incur any response costs. CERCLA provides that a party who releases a hazardous substance is liable for another's response costs, but only if its release caused the other party to incur those response costs:

[A]n owner and operator of . . . a facility . . . from which there is a release, or a threatened release which *causes* the incurrence of response costs, of a hazardous substance, shall be liable for –

* * *

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;...

(Emphasis added.) Therefore, Cascade argued, it cannot be said that Boeing's costs would not have been incurred "but for" Cascade's release of contaminants. For that reason, Cascade denied liability, believing that its release did not cause Boeing to incur response costs.

The appeals court, relying on its own interpretation of CERCLA's causation requirement as well as decisions by other circuits, held that where either polluter's conduct would have caused the same response cost to be incurred in the same amount, and the conduct of each party was equally blameworthy, then both polluters should be treated as having caused the response costs, and each should pay a fair share of the total costs.

Cascade next argued that the district court did not properly allocate the response costs, because Boeing did not separate its expenses for remediating the gravel aquifer from those for

the sandstone aquifer. Since Boeing's claim related only to the sandstone layer, Cascade believed that the district court mistakenly burdened it with 70% of approximately \$2 million incorrectly attributed to the sandstone aquifer. Because Boeing did not know that Cascade was involved when Boeing discovered the contamination, Boeing had no reason to separate its costs by aquifer. Therefore, Boeing did not keep separate accounts for the gravel and sandstone aquifers when it spent the money. Instead, Boeing's expert accounting witnesses allocated remediation costs after the fact, relying on all available evidence, including Cascade's expert's information.

To recover damages, CERCLA requires a plaintiff to prove that costs are "necessary response costs consistent with the national contingency plan." The national contingency plan calls for "accurate accounting of . . . private party costs incurred for response actions." However, the district court held that "accurate accounting" did not necessarily mean contemporaneous separation of expenses. The appeals court reviewed the district court's holding that the remediation of the sandstone aquifer cost Boeing \$7.2 million of the \$18.4 million it spent for clear error, and found none.

Cascade further objected to the district court's division of the remediation costs by aggregating the costs and dividing the total. Cascade argued that the district court should have left each party responsible for the expenses it had incurred for the work on its own land, and not have redistributed the costs according to the volume of each party's contaminants. CERCLA provides that "the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." This language gives district courts discretion to decide what factors ought to be considered, as well as the duty to allocate costs according to these factors. Therefore, the appeals court found that the district court did not abuse its discretion in selecting the factors to allocate the response costs and in relying primarily on the estimated volumes of solvents which each of the parties had disposed of.

Cascade's final argument was that the district court lacked authority to issue a declaratory judgment allocating expenses not yet incurred. Cascade believed that even if the district court did have authority, the amounts were too speculative to support a judgment allocating 70% of future costs to Cascade. In response to this, the appeals court found, after reviewing and interpreting CERCLA, that declaratory relief allocating future costs was consistent with the broader purposes of CERCLA.

Therefore, the court of appeals affirmed the district court's judgment in response to Cascade's appeal. Boeing's appeal was remanded so that the amount of its judgment could be increased to account more correctly for money which Boeing had recovered from a third party in a settlement.

***Boeing Company v. Cascade Corporation*, 2000 WL 300820; ___ F.3d ___, March 2, 2000**

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

