

## ***Court Declines to Resolve PRP Committee Meltdown***

In an interesting twist of Potentially Responsible Party (PRP) Group dynamics, the United States District Court for the Western District of Michigan found itself in the middle of a dispute that surfaced during PRP negotiations with the United States Environmental Protection Agency (U.S. EPA) at a Superfund site in central Michigan. The site involved alleged groundwater contamination in the Saginaw Aquifer in Lansing, Michigan at the former Motor Wheel Disposal Site (MWDS). Three parties, W.R. Grace, Goodyear and Textron, had entered into a PRP Participation Agreement that set forth the cooperative obligations and financial liability of its members. Participation Agreements of this nature typically include voting rights and usually operate by consensus first and voting shares second.

### Facts and Background

The site involved the potential impact of ammonia on the Saginaw Aquifer. Ammonia allegedly can adversely affect the disinfection process of water treatment facilities. The Lansing Board of Water and Light's (LBW&L) municipal supply wells draw from the Saginaw Aquifer and from that source supply water to the residents of the City of Lansing.

This case actually was the second time the parties sought court intervention during the life of the MWDS project. In the first case, W.R. Grace commenced an action against Goodyear seeking to allocate the costs of complying with the cleanup order issued under the Safe Drinking Water Act (SDWA) based on the real estate sales agreement by which Goodyear purchased the property from W.R. Grace. Alternatively, W.R. Grace claimed that the PRP Agreement also supported its claim for reimbursement from Goodyear. Because the real estate sales agreement required Goodyear to pay 80% of the environmental expenses relating to the cleanup, Goodyear preferred to rely on the applicability of that agreement. In November, 1999, the Court had granted W.R. Grace's Summary Judgment Motion with respect to the real estate sales agreement, holding Goodyear and Textron responsible for approximately 80% of the cleanup costs associated with complying the SDWA Order. A later motion for reconsideration was denied. That decision was appealed.

During the pendency of the appeal, Goodyear commenced the current action against W.R. Grace alleging a breach of the PRP Agreement. In an unusual public display of the internal workings of a PRP Group, Goodyear alleged that W.R. Grace breached the PRP Agreement by repudiating and undermining the PRP Group's agreed-upon position regarding the proposed ammonia cleanup level. Following an internal preparation meeting during which the proposed 34 ppm ammonia cleanup standard was discussed and debated, the Executive Committee of the PRP Group voted in favor of advocating this standard. W.R. Grace had seriously questioned the appropriateness of using the proposed 34 ppm standard, apparently out of concerns over future potential toxic tort litigation. W.R. Grace, having the benefit of a determination that it would receive 80% reimbursement from the other parties, pushed hard for a more stringent cleanup standard.

At a meeting with U.S. EPA the next day, W.R. Grace apparently advocated that the Human Health Risk Assessment should consider the amount of risk to the LBW&L water treatment plant posed by the ammonia in the Saginaw Aquifer. This would have forced a more stringent cleanup standard to be used for ammonia under the Comprehensive Environmental Response, Compliance and Liability Act (CERCLA). W.R. Grace again advocated a more stringent standard, contrary to the position of the Group, in a meeting with U.S. EPA one month later. A month following that, W.R. Grace allegedly advocated this more stringent standard once again in a letter to U.S. EPA. W.R. Grace also advocated that U.S. EPA should proceed under CERCLA rather than the SDWA, contrary to the position taken by the Executive Committee of the PRP Group.

The PRP Agreement included duties to participate in common negotiations and to develop a common response under the Agreement. The Agreement granted the Executive Committee the authority to undertake all activities deemed necessary and proper to carry out the purposes of the Agreement, including the power to negotiate with government agencies and third parties with respect to the site.

In the present action, Goodyear and Textron sought a declaration from the Court that W.R. Grace had breached the PRP Agreement.

W.R. Grace moved to dismiss on the grounds that the present action was an attempt to nullify the Court's prior ruling which determined that Goodyear was responsible for 80% of the cleanup costs. W.R. Grace raised the question on whether a "case or controversy" existed. Goodyear, on the other hand, argued

that there was a “case or controversy” because the prior summary judgment decision was not final until an appellate decision was rendered. Goodyear conceded that if the summary judgment in the prior action was affirmed upon appeal, no cause of action would be available in the then current action.

#### Court Ruling

The Court ruled that the prior summary judgment constituted “law of the case” and formed the basis of all legal rights between the parties in any proceedings before the Court. The Court declined to consider causes of action that were based upon a reconsideration of its earlier judgment or speculation that the earlier judgment might be reversed in the Appellate Court. The Court also indicated that if ever the PRP Agreement governed the allocation of costs to implement the SDWA Order, there would be a further bar to Goodyear's and Textron's claims because the case would not be “ripe” so as to present a justifiable case or controversy. The Court noted that the claim was not “ripe” because the PRP Agreement related only to CERCLA Liability and U.S. EPA had not yet asserted a claim under CERCLA with respect to the Saginaw Aquifer.

The Court concluded by admonishing the parties and urging them to work together to negotiate and resolve their differences, instead of focusing their energies on continuing litigation. The opinion was authored by U.S. District Judge Robert Holmes Bell.

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