

Court Holds Defendant That Probably Released PCBs Liable

An association of paper companies, the Kalamazoo River Study Group (KRS), that released polychlorinated biphenyls (PCBs) into the Kalamazoo River brought a contribution action under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), against Eaton Corporation (Eaton) alleging that Eaton was liable for PCB contamination allegedly released into the Kalamazoo River from three Eaton automotive parts manufacturing plants. The United States District Court for the Western District of Michigan held that Eaton was liable for PCB contamination that more likely than not was released from two of the plants, but not the third.

The Court had previously held that there was insufficient evidence to show that Eaton had released *significant* quantities of PCBs from any of the three plants and that Eaton was, therefore, not liable to the KRS. The United States Court of Appeals for the Sixth Circuit subsequently held that the “threshold of significance” standard applied by the District Court in the first case was an incorrect liability standard in a CERCLA contribution action.

Remanding the case back to the District Court, the Sixth Circuit instructed the Court that a person bringing a CERCLA contribution action is not required to show any direct causal link between the waste another person sent to a site and the environmental harm caused. The Sixth Circuit stated that consideration of equitable factors such as causation was proper only in allocating response costs, not in initially determining whether a person is liable under CERCLA. Thus, on remand, the District Court’s inquiry was to determine whether Eaton discharged *any* PCBs to the Kalamazoo River site, regardless of the quantity of that discharge. The Sixth Circuit had stated “[O]ne discharge of [PCBs] is sufficient to support liability; there is no requirement that the generator typically discharge waste to the site.”

On remand, the District Court examined and discussed at length the extensive evidence provided by KRS and Eaton, finding that Eaton was liable for PCB discharges from its Battle Creek and Kalamazoo plants, but not its Marshall plant.

Battle Creek Plant

Eaton’s Battle Creek plant was located approximately one-half mile from the Kalamazoo River and had been in operation from the early 1940s until 1983. Manufacturing processes at the plant included

heat treating, forging, welding, and machining – processes which involved the use of quench oils, cutting or grinding oils, and hydraulic oils. Testimony described the use of the oils, how normally closed circuit hydraulic systems would leak from time to time, and how oils were routinely spilled and cleaned up, such that the plant purchased 2,000 to 4,000 pounds per month of dry absorbent to clean up spills and leaks. Testimony also described how, prior to the mid-1960s, the plant's storm and sanitary sewers discharged to a ditch that drained into the Kalamazoo River, with no wastewater treatment other than a settling weir to settle out grinding mud from water soluble oils. Scrap metal was stored in open bins outside the plant and resulted in some oil run-off that could have entered the storm drains.

In 1967, the Michigan Water Resources Commission (MWRC) determined that the plant was discharging 2220 pounds of oil a day to the Kalamazoo River. Although the oils discharged were mostly water-soluble, and thus unlikely to contain PCBs, some "straight" oils were also contained in the discharge. The Court observed that, based upon the evidence, there was no question that Eaton discharged significant quantities of oil to the Kalamazoo River; however, that did not answer the question of whether PCBs were contained in the oil.

Eaton's employees recalled purchases of oil from Shell, Arco, Texaco, Mobil, Amoco, and Standard; but there was no evidence that any of those oils contained PCBs. Documentary evidence obtained from Monsanto, however, showed that in 1970 and 1971 Eaton purchased from Monsanto the equivalent of approximately 5 drums of hydraulic oil that was 100 percent PCB. In 1972, samples collected by the MWRC from the joint outfall of Eaton's plant and another company's plant showed the presence of PCB at 1.4 parts per billion (ppb). Other samples collected from the storm sewer as it left Eaton's property contained .24 ppb and .12 ppb PCB. The Michigan Department of Natural Resources (MDNR) thus concluded that the presence of PCBs in the wastewater showed that Eaton's process wastes were entering the storm drain. The Court noted, however, that because the sewer lines also served areas outside of Eaton's plant, the 1972 PCB detections could not be definitively attributed to Eaton. There was also some question as to the reliability of the test results because they were at the limits of detection for the analytical method used at the time the analyses were performed. The Court observed that, notwithstanding these shortcomings, the evidence taken as a whole suggested that if PCBs were in the effluent, Eaton was

the most likely source. When Eaton's wastewater discharge was monitored by MDNR in 1980 for a 24-hour period, no traces of PCBs were detected.

When the Battle Creek plant was demolished in 1983 – 1984, Eaton tested select areas of the wood block floor that covered the plant for PCB. PCBs were detected in all 55 samples, ranging from 3.1 parts per million (ppm) to 155 ppm. Eaton had selectively sampled in areas near electrical equipment that contained PCBs, in heat treating areas where quench oils were used, and areas to serve as “background” samples. An Eaton environmental scientist testified that he was unable to find any pattern to the locations of the PCB-contaminated floor blocks. He concluded that in all probability the PCBs must have come from hydraulic fluids used during the war years.

The Court also reviewed the results of sediment samples from the drainage ditch and the Kalamazoo River that were collected and analyzed for PCBs by multiple parties. Although PCBs were detected in the ditch, the closest sample to the river was 1,500 to 1,600 feet from the river and KRSG's expert was unable to find where the ditch emptied into the river. Also, although PCBs were detected in samples of Kalamazoo River sediments, those samples were miles downstream of Eaton's Battle Creek plant. The Court observed that the information gathered from the river sediments and water was of primary relevance to the issue of allocation and was of less importance to the issue the Court was considering – whether any PCBs were released from Eaton's plant to the Kalamazoo River.

The Court reviewed KRSG's arguments regarding the various types of PCBs, known as “Aroclors,” that were detected at Eaton's plant and in environmental samples. The Court held that, based upon that data, the evidence, including new evidence produced during the rehearing, did not support a finding that the PCBs detected at the Battle Creek plant were related to the cutting and quench oils used at the facility. KRSG had not shown that Eaton purchased such oils containing PCBs, that PCBs were necessary for Eaton's processes using those oils, or that PCB Aroclors were present in the river to indicate the use of PCBs in open systems. Because KRSG had the burden of proof and the presence of PCBs at Eaton's Battle Creek plant could all be explained by leaks from normally closed system hydraulic and electrical equipment, the Court found that the PCBs at the plant were not attributable to use in the quench and cutting oils, but due to leaking electrical transformers and capacitors and leaking hydraulic systems.

The Court further stated that because the electrical and hydraulic systems are closed or nominally closed systems, the quantity of PCBs released in the waste oils was probably minimal. The Court held that, nevertheless, it was “fair to conclude that it is more likely than not that some very small quantity of PCBs probably found their way to the Kalamazoo River.” The Court further ruled:

[KRSG] has established by a preponderance of the evidence that some small quantity of PCBs probably went to the River. Based upon Eaton’s purchase of PCB-containing hydraulic oil, the presence of PCBs in Eaton’s effluent, and the detection of PCBs in the Eaton ditch, it appears to this Court that it is more likely than not that some of the PCBs from the Eaton plant found their way into the sewer system and into the ditch. . . .

While the new evidence does not change this Court’s previous conclusion that there is insufficient evidence of a detectable or measurable discharge of PCBs from Eaton’s Battle Creek plant into the Kalamazoo River, under the liability standard articulated by the Sixth Circuit, this Court is constrained to find that Eaton is liable for some PCB releases from its Battle Creek facility to the Kalamazoo River.

Kalamazoo Plant

Eaton manufactured truck transmissions at the Kalamazoo plant from the mid-1950s until it closed the plant in 1984. The plant, which was served by city sewer and water, was located approximately one-half mile from the Kalamazoo River. The plant used water soluble cutting oils, synthetic cutting compounds, and quench oils in its operations. The plant discharged both to the municipal wastewater treatment plant and to the Zantman drain via storm sewers and floor drains. A catch basin was designed to remove some oils before discharge to the drain, but there was no other treatment before the discharge and it did not prevent all oil from entering the drain.

In 1965 the MWRC tested the water in the Zantman drain and found oil at concentrations of 41 ppm and 51.2 ppm. The MWRC told Eaton that it was responsible for excessive oil in the drain and oil that was pooling in a swampy area. Eaton was also told that “[t]he amount of oil being lost to the drain would undoubtedly create oil pollution problems in the Kalamazoo River were this drain to be cleaned out to the river.” In a 1967 survey, the MWRC estimated that Eaton was releasing 1332 pounds of oil per day to the Zantman drain. The MWRC stated that the major source of the oil was parts washers in the heat treating department and was concerned about oil pooled around a scrap metal pile that could be washed overland into the drain during heavy precipitation. Eaton responded by making changes to its waste disposal system

in the early and mid 1970s. The Kalamazoo County Drain Commissioner informed Eaton in 1973 that oil was discharging from the Zantman Drain to the Kalamazoo River.

The Court pointed out, however, that the issue was whether PCBs were in the oils being discharged. The Court stated that there was no evidence of any testing or testimony that would indicate that the process oils discharged contained PCBs. In 1973 and 1976 industrial wastewater survey by the MWRC, no PCBs were detected in Eaton's discharge.

When Eaton sold the plant in 1984, PCBs were found in the wood block flooring in levels ranging from non-detect to 743 ppm. Sixty-nine samples were collected, twenty-eight of which were non-detect, and four of which contained PCBs in excess of 20 ppm, all of which were located near transformers and capacitors.

The Court found that it was unlikely that Eaton used PCBs in its open processes at the Kalamazoo facility, but that it was more likely than not that PCBs were present in the electrical equipment and in some hydraulic fluid. The Court next had to determine whether the preponderance of the evidence showed that any of those PCBs reached the Kalamazoo River.

Reviewing the evidence, the Court noted that PCBs were found on the floors of the plant and that an Aroclor characteristic of PCB-containing hydraulic fluid was detected in one sample, which the Court stated made it more likely than not that Eaton used PCB-containing hydraulic oil at some point. The Court also stated that it was more likely than not that Eaton's transformers and capacitors leaked PCB-containing oil at some time. Oil discharges from Eaton were reported numerous times throughout the length of the Zantman Drain. Therefore, the Court held:

Based upon all the evidence and the Sixth Circuit's direction that any release of PCBs is sufficient for a finding of liability, the Court finds it more probable than not that some of the PCBs from the floor of the Kalamazoo facility were washed down the drain and into the Kalamazoo River along with the other oily wastes from the facility. The Court accordingly concludes that Eaton's Kalamazoo facility is liable for the release of some PCBs to the Kalamazoo River.

Marshall Plant

Eaton's Marshall plant was located the farthest upstream of the three facilities and approximately one-quarter mile from the Kalamazoo River. Operation of the plant began in 1941 and it remains in operation. No evidence was presented of any use of PCB-containing process oils at the Marshall plant. No

testing of the process oils had been performed showing the presence of PCBs in the oils and no Eaton employees testified that PCB-containing process oils had been used at the plant. Although some of the electrical equipment at the plant contained PCBs, KRSG did not present any evidence of leaks from the equipment. An Eaton employee who was an electrician and maintenance supervisor at the plant testified that there were trays under the electrical equipment to catch any leaks, but that he was unaware of any leaks ever occurring.

No PCBs were detected in the Marshall plant's wastewater in tests performed by MDNR in 1973. MDNR performed more tests in 1980, at which time PCBs were detected in one sample at 0.82 ppb. MDNR suggested that the PCBs were associated with the process oils used by Eaton, but Eaton's review of all incoming products was unable to identify any containing PCBs. The 1980 PCB detection had never been repeated in subsequent sampling.

In 1993, Eaton retained an environmental consultant to conduct sediment sampling for PCBs in the Kalamazoo River immediately downstream of the Marshall plant. PCBs were not detected in those samples.

The Court stated that KRSG's entire case against the Marshall plant rested on the single detection of PCBs in the 1980 wastewater sampling; and explained that "[a]lthough one discharge may be sufficient to support a finding of liability, this Court looks for some corroborating evidence to insure that the one detection is liable." The Court held:

Based upon all the evidence presented, the Court finds that the single admittedly low level detection of PCBs at the Marshall facility in 1980 is not reliable. There being no other evidence of PCBs discharged by the Marshall facility, the Court concludes that [KRSG] has not met its burden of demonstrating by a preponderance of the evidence that Eaton released PCBs from its Marshall facility to the Kalamazoo River. Accordingly, the Court finds that Eaton is not liable for the release of any PCBs from its Marshall facility.

Kalamazoo River Study Group v. Eaton Corporation, 142 F. Supp.2d 831 (W.D. Mich. 2001).

Brian J. Negele