

## ***Court Of Appeals Affirms No Cleanup Cost Allocation To Liable Party In Kalamazoo River PCB Case***

In the ongoing saga of the Kalamazoo River polychlorinated biphenyl (PCB) cleanup case, the United States Court of Appeals for the Sixth Circuit affirmed the ruling by the United States District Court for the Western District of Michigan that, although a company was liable under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for the release of PCBs into the river, no cleanup costs should be allocated to that company because its contribution to the contamination was miniscule in comparison to that of the other liable companies. This article summarizes the Circuit Court's review of the District Court's opinion in *Kalamazoo River Study Group v. Rockwell International Corp.* that was summarized in the November 2001 edition of MECU.

### **Background**

The Michigan Department of Environmental Quality (MDEQ) completed an initial investigation in 1990 that concluded that a 35-mile stretch of the Kalamazoo River was contaminated with PCBs. Based on MDEQ's findings, the United States Environmental Protection Agency (EPA) listed this portion of the river, along with a three-mile section of Portage Creek, on the National Priorities List as a Superfund Site under CERCLA. EPA then authorized MDEQ to conduct a risk assessment of the Superfund Site, one result of which was that MDEQ identified three paper mills as being potentially responsible for the PCB contamination. The companies that owned the paper mills entered into an Administrative Order by Consent (AOC) with MDEQ that required them to conduct a remedial investigation and feasibility study (RI/FS) of the Superfund Site and the surrounding area. A fourth paper

company later agreed to share the costs of the RI/FS. The four paper companies joined together to form the Kalamazoo River Study Group (KRSKG).

Under the AOC, the RI/FS covered a 95-mile stretch of the Kalamazoo River, a portion of which is adjacent to a former automotive parts manufacturing plant of Rockwell International Corp. (Rockwell) in Allegan, Michigan. Rockwell operated the plant from approximately 1910 to 1989. In 1995, KRSKG brought a suit under CERCLA against Rockwell and several other companies seeking contribution from them for the costs of the RI/FS and for a future cleanup of the Superfund Site. The CERCLA contribution claims against the other companies were eventually settled or otherwise resolved, leaving only the claims against Rockwell to be heard by the District Court. The trial against Rockwell was split into two stages – the first limited to whether Rockwell was liable under CERCLA, and the second addressing the allocation of response costs between KRSKG and Rockwell.

The District Court initially applied a “threshold of significance” standard of liability to determining whether Rockwell was liable. Under that standard, the court considers whether a party’s release of hazardous substances was of sufficient significance to justify response costs. Applying this standard, the District Court held that both the KRSKG and Rockwell had released a sufficient amount of PCBs to be held liable under CERCLA. In another case, the Sixth Circuit later held that it was inappropriate to apply the “threshold of significance” standard to determine liability because it improperly imposed too high a standard for liability by requiring the party bringing the action to show that the other party’s release of hazardous substances caused response costs. Thus, a relaxed liability standard did not help Rockwell because the District Court had already determined that Rockwell was liable under the stricter standard for determining liability.

After the liability stage, the District Court considered the appropriate allocation of response costs between KRSB and Rockwell. The District Court identified three factors as generally relevant to the cost allocation: (i) the relative quantities of PCBs released by the parties; (ii) the relative toxicity of the PCBs released by the parties; and (iii) the cooperation of the parties with the regulatory agencies. The District Court found that the last two factors did not favor any particular allocation between KRSB and Rockwell. With respect to the relative quantities released, the District Court found that Rockwell likely released no more than 20 pounds of PCBs while, in contrast, the KRSB parties released hundreds of thousands of pounds of PCBs into the river. Based on those findings, the District Court allocated no response costs to Rockwell.

KRSB appealed to the Sixth Circuit on three bases:

- The District Court's refusal to allocate response costs to Rockwell was inconsistent with the court's holding that Rockwell was liable under CERCLA.
- The District Court erred in holding that Rockwell released an inconsequential amount of PCBs.
- The District Court erred in determining that the factors concerning the relative toxicity of the PCBs released by the parties and the cooperation of the parties with regulatory authorities did not favor any particular allocation of response costs.

### **Liable, But Zero Cost Allocation**

KRSB argued that the District Court's zero allocation of response costs to Rockwell was logically inconsistent with its holding that Rockwell was liable under CERCLA for releasing PCBs into the Kalamazoo River under the threshold of significance standard. The Sixth Circuit disagreed, explaining that in determining that Rockwell was faced with liability under CERCLA, the District Court did not make specific findings as to the quantity of PCBs released by Rockwell to the river. The District Court instead focused on whether Rockwell's discharges were "more

than incidental or sporadic.” The Sixth Circuit stated that the District Court’s finding that Rockwell released PCBs in “measurable or detectable quantities” did not obligate it to allocate response costs to Rockwell irrespective of the court’s later analysis of the relative amounts of PCBs released by the parties.

The Sixth Circuit explained that where other responsible parties release vast quantities of a hazardous substance, another party’s release which may be significant when considered in the abstract, may nevertheless have no impact on the total cost of cleaning up a site that has been contaminated by much larger releases. The Sixth Circuit cautioned, however, that a party cannot always avoid being allocated response costs by showing that its release does not significantly affect the total cleanup costs. For example, the case at hand could be distinguished from situations where multiple responsible parties have each released only a small quantity of hazardous substances that, in isolation, would have little impact on the overall costs of cleaning up a site. In such a situation a court could reasonably allocate a portion of the response costs to each of the parties. In this case, however, the Sixth Circuit observed that the companies comprising KRSG released exponentially more PCBs into the river than did Rockwell, such that Rockwell’s release would have essentially no effect on the ultimate cleanup costs for the Superfund Site.

KRSG further argued that, even if Rockwell did not have to pay any future cleanup costs, it should nevertheless be allocated a portion of the RI/FS costs because “CERCLA authorizes the allocation of investigation costs to any party that created a reasonable risk of contaminating a site.” The Sixth Circuit distinguished the two cases that KRSG relied upon for this proposition, explaining that neither of the cases held that once a party is found to be subject to liability for investigation costs a share of those costs must necessarily be allocated to the party in a

contribution action. The Sixth Circuit stated that a district court has broad discretion to allocate the costs of an RI/FS and that, in this case, the District Court's determination to allocate none of the RI/FS costs to Rockwell was based on its finding that KRSG was responsible for more than 99.9% of the PCBs in the river.

KRSG finally argued that the failure to allocate costs to Rockwell after finding that it had released PCBs to the river defeated the central purpose of CERCLA – to encourage prompt cleanups – and would encourage parties to litigate in hope of achieving a zero allocation instead of voluntarily joining in the investigation or settling. The court disagreed, observing that the allocation of response costs is very fact-intensive; such that a zero-allocation in one case should not encourage parties to reject reasonable settlement offers or risk the inherent uncertainties of litigation in other cases.

#### **Amount Of PCBs Released By Rockwell**

The decisive factor in the District Court's allocation of response cost was the relative quantities of PCBs released by the parties. The District Court found that Rockwell had likely released less than a total of 20 pounds of PCBs into the river, while, in contrast, the KRSG members had released several hundred thousand pounds of PCBs into the river. KRSG did not contest that its members released massive amounts of PCBs into the river, however, it contested the conclusion that Rockwell had only released a small amount.

The District Court relied upon the testimony of Rockwell's expert witness in determining the amount of PCBs Rockwell released. Rockwell's expert estimated the concentration of PCBs in the oils released by Rockwell into the river by multiplying the volume of oils estimated by KRSG's expert witness to have been discharged by Rockwell into the river by the concentration

of PCBs in the oils that remained in the groundwater at Rockwell's Allegan plant. Rockwell's expert determined that those remaining oils contained no more than 0.000035% PCB.

KRSG challenged Rockwell's expert's opinion on several bases. First, it contended that he could not accurately estimate the amount of PCBs released by Rockwell without having the expertise to predict how the oils would react once discharged into the river. The Sixth Circuit found no merit in this argument because KRSG failed to explain why such expertise was needed – the mathematical method employed by Rockwell's expert required an assessment of only the amount of oil discharged and the amount of PCBs in that oil, it did not require an assessment of how the PCBs would travel or change once in the river.

KRSG next argued that the District Court erred by accepting Rockwell's expert's estimate on the concentration of PCBs in the oil discharged by Rockwell and should have relied on KRSG's expert's estimate of either 5% or 50% PCB concentration, depending on the type of oil. The Sixth Circuit found that the District Court reasonably rejected KRSG's expert's opinion on the basis of testimony from Rockwell's expert that it would be "physically impossible" for oils containing PCB at such a high concentration to be reduced to the concentration of only 0.000035% that was found in the groundwater at the Rockwell plant. In addition, KRSG's expert's estimate failed to take into account that Rockwell also used water-soluble oils that might not have even contained PCBs.

KRSG finally argued that the Rockwell expert's opinion was rebutted by other evidence that showed that Rockwell in fact released a large quantity of PCBs into the river. For this argument, KRSG relied on several sediment samples collected from the river that showed elevated levels of PCB "Aroclor 1254," the type of PCB in the oil used at Rockwell's Allegan plant. KRSG relied on a total of 7 such samples, one of which was collected 1.7 miles from

Rockwell's plant. The Sixth Circuit found that the District Court properly concluded that the seven samples were of limited probative value, given that they represented less than three percent of the approximately 300 samples collected by Rockwell's expert in "areas of the river in which oils would be expected to accumulate downstream of Rockwell."

### **Relative Toxicity And Cooperation Factors**

KRSG challenged the District Court's determination that neither the relative toxicity of the PCBs released by the parties nor their cooperation with regulatory authorities offered any guidance as to the appropriate allocation of response costs between the parties.

KRSG first contended that the District Court erroneously found that the PCBs released by the KRSG members and Rockwell were of approximately the same toxicity. KRSG maintained that PCB Aroclor 1254, the type released by Rockwell, was more toxic than the PCB Aroclor 1242 released by the KRSG members because Aroclor 1254 bioaccumulates at a higher rate in fish. KRSG asserted that this fact was significant because concerns about PCB levels in fish were "driving" the cleanup. The Sixth Circuit stated, however, that the District Court had a reasonable basis for treating both types of PCBs as equally toxic, given that MDEQ treats all types of PCB the same because they all contain toxins and also because MDEQ issues fish consumption advisories without distinguishing between the types of PCBs. The Sixth Circuit further stated that, in light of the huge disparity in the relative amounts of PCBs released by the parties, a determination that Aroclor 1254 was somewhat more toxic than Aroclor 1242 likely would not have altered the court's allocation.

KRSG finally argued that the District Court's consideration of the cooperation factor was "deficient" because Rockwell did not fully cooperate with the regulatory authorities. The Sixth

Circuit stated that District Court, in fact, found “a lack of full cooperation by *both* parties” and observed that KRSG offered no rebuttal to the court’s determination that it too did not fully cooperate with the regulatory agencies.

Consequently, the Sixth Circuit affirmed the District Court’s allocation of no response costs to Rockwell. It should be noted, however, that one of the three circuit court judges filed a concurring opinion in which he stated that, although he agreed with the judgment reached in the court’s main opinion, he felt that the outcome of the case presented “a troubling anomaly.” Although not directly acknowledging KRSG’s argument that it was illogical for Rockwell to be liable under CERCLA yet allocated no costs, the concurring judge expressed concern that Rockwell, although acknowledged to have polluted, escaped with paying nothing because its PCB release was “sufficiently inconsequential.” The concurring judge concluded:

Granted, Rockwell’s PCB release was minimal. However, [CERCLA] imposes strict liability for *any* release that causes a plaintiff to incur response costs. Although the equitable analysis of [the contribution provision of CERCLA] provides for judicial discretion with regard to the cost apportionment among PRPs [“potentially responsible parties”], the statutory purposes of CERCLA and the principles of equity require that each PRP pay its fair share of response costs, no matter how large or small. Indeed, no PRP should pay more than their fair share, but neither should any party pay less. Here, however, Rockwell pays nothing.

Accordingly, by not allocating any response costs to a known polluter, the outcome in this case contravenes the important remedial purposes of CERCLA. Nevertheless, because I believe that the discretion regarding allocation of costs should remain with the district court, I join in this courts conclusion despite a rather pinched view of the statute . . . .

***Kalamazoo River Study Group v. Rockwell International Corp.***, 274 F.3d 1043 (Dec. 18, 2001)

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