Section of Environment, Energy, and Resources
American Bar Association

Environment, Energy, and Resources Law: The Year in Review 2018

Chapter 9 · Superfund and Natural Resource Damages Litigation

Chapter 9 • SUPERFUND AND NATURAL RESOURCE DAMAGES LITIGATION
2018 Annual Report[1]

I. SUPERFUND: ADMINISTRATIVE AND REGULATORY DEVELOPMENTS

As part of omnibus appropriations legislation, Congress rewrote section 103(e) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[2] in order to make an important change exempting farmers from otherwise applicable hazardous substance release reporting obligations related to air emissions of hazardous substances from animal wastes. The rewritten subsection also continues to provide that the handling, application, and storage of registered pesticides by an agricultural producer are not subject to release reporting under CERCLA section 103.[3] In the new language, "air emissions from animal waste (including decomposing animal waste) at a farm," are now exempt from hazardous substance release reporting.[4]

This statutory air emission exemption overruled the D.C. Circuit's 2017 decision in Waterkeeper Alliance *v.* EPA.[5] That decision struck down an EPA administrative exemption from required release reporting for airborne releases of reportable quantities of ammonia, hydrogen sulfide, and other hazardous substances from farm animal wastes, as arises from waste lagoons on farms.[6]

The EPA implemented the new statutory language by rule and proposed additional adjustments to harmonize the CERCLA statutory exemption on agricultural air emissions with emergency release reporting provisions of the Emergency Planning and Community Right-to-Know Act (EPCRA).[7]

In a controversial December 2017 decision published in the Federal Register on February 21, 2018, and now challenged before the D.C. Circuit, the EPA announced that no financial assurance rule was necessary for the hard rock mining industry.[8] The EPA

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[1]Russell V. Randle, Miles & Stockbridge, P.C. Washington, D.C.; John Barkett, Shook Hardy & Bacon, LLP Miami, FL. This chapter reviews significant 2018 CERCLA decisions and developments. The views expressed are the authors own and not necessarily those of their firms or clients. The authors thank Van P. Hilderbrand, Jr. of Miles & Stockbridge PC in Washington, D.C. for his able editorial help.

[2]42 U.S.C. § 9603(e) (2018). On March 23, 2018, the Consolidated Appropriations Act (Omnibus Bill) was signed into law. Title XI of Division S of the Omnibus Bill, known as the FARM Act, rewrote CERCLA Section 103(e). *See* Consolidated Appropriations Act, 132 Stat. 348, 1147-48, (2018).

[3]42 U.S.C. § 9603(e)(1)(A).

[4]42 U.S.C. § 9603(e)(1)(B).

[5]Waterkeeper All. v. EPA, 853 F.3d 527 (D.C. Cir. 2017).

[6]*Id.* The statutory exemption is now broader than the administrative one rejected by the D.C. Circuit, in that the EPA did regulate Concentrated Animal Feeding Operations (CAFOs), but the statutory exemption appears to exempt them.

[7]CERCLA/EPCRA Administrative Reporting Exemption, 83 Fed. Reg. 37,444 (Aug. 1, 2018) (writing statutory change into regulation) (direct final rule); Emergency Planning and Community Right-to-Know Act, 83 Fed. Reg. 56,791 (Nov. 14, 2018) (proposing adjustments to 40 C.F.R. pt. 355).

[8]Financial Responsibility Requirements Under CERCLA Section 108(B) for Classes of Facilities in the Hardrock Mining Industry, 83 Fed. Reg. 7556 (Feb. 21, 2018) (to be codified at 40 C.F.R. pt. 320).

noted that mine reclamation and bonding regulation by the states and other federal agencies had significantly improved since the enactment of CERCLA, so there was far less risk that such mining operations would leave EPA with unfunded cleanup obligations.[9]

The EPA deleted eighteen sites from the National Priorities List (NPL),[10] while adding fifteen to the NPL.[11] It also proposed to add nineteen sites to the NPL.[12]

In action mandated by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended through the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, the EPA finalized a rule raising civil penalties for CERCLA violations to $55,907 per day.[13]

II. SUPERFUND: JUDICIAL DEVELOPMENTS

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[9] *Id.*

[10] National Priorities List, 83 Fed. Reg. 63,068 (Dec. 7, 2018) (to be codified at 40 C.F.R. pt. 300) (direct final rule); National Priorities List, 83 Fed. Reg. 48,392 (Sept. 25, 2018) (to be codified at 40 C.F.R. pt. 300) (direct final rule); National Priorities List, 83 Fed. Reg. 48,391 (Sept. 25, 2018) (to be codified at 40 C.F.R. pt. 300) (direct final rule); National Priorities List, 83 Fed. Reg. 48,256 (Sept. 24, 2018) (to be codified at 40 C.F.R. pt. 300) (direct final rule); National Priorities List, 83 Fed. Reg. 47,842 (Sept. 21, 2018) (to be codified at 40 C.F.R. pt. 300) (direct final rule); National Priorities List, 83 Fed. Reg. 47,295 (Sept. 19, 2018) (to be codified at 40 C.F.R. pt. 300) (direct final rule); National Priorities List, 83 Fed. Reg. 46,660 (Sept. 14, 2018) (to be codified at 40 C.F.R. pt. 300) (direct final rule); National Priorities List, 83 Fed. Reg. 46,408 (Sept. 13, 2018) (deleting West Vermont Drinking Water Contamination Site as a result of court vacatur of 2016 listing rule for the Site; adding five sites to NPL) (to be codified at 40 C.F.R. pt. 300) (direct final rule); National Priorities List, 83 Fed. Reg. 46,117 (Sept. 12, 2018) (to be codified at 40 C.F.R. pt. 300) (direct final rule); National Priorities List, 83 Fed. Reg. 42,224 (Aug. 21, 2018) (to be codified at 40 C.F.R. pt. 300) (direct final rule); National Priorities List, 83 Fed. Reg. 38,263 (Aug. 6, 2018) (to be codified at 40 C.F.R. pt. 300) (direct final rule); National Priorities List, 83 Fed. Reg. 35,566 (July 27, 2018) (to be codified at 40 C.F.R. pt. 300) (direct final rule); National Priorities List, 83 Fed. Reg. 35,555 (July 27, 2018) (to be codified at 40 C.F.R. pt. 300) (direct final rule); National Priorities List, 83 Fed. Reg. 23,374 (May 21, 2018) (to be codified at 40 C.F.R. pt. 300) (direct final rule); National Priorities List, 83 Fed. Reg. 6981 (Feb. 16, 2018) (to be codified at 40 C.F.R. pt. 300) (direct final rule); National Priorities List, 83 Fed. Reg. 5210 (Feb. 6, 2018) (to be codified at 40 C.F.R. pt. 300) (direct final rule); National Priorities List, 83 Fed. Reg. 5209 (Feb. 6, 2018) (to be codified at 40 C.F.R. pt. 300) (direct final rule).

[11] National Priorities List, 83 Fed. Reg. 46,408 (Sept. 13, 2018) (adding five sites to NPL) (to be codified at 40 C.F.R. pt. 300) (direct final rule); National Priorities List, 83 Fed. Reg. 22,859 (May 17, 2018) (adding six sites to NPL) (to be codified at 40 C.F.R. pt. 300) (final direct rule); National Priorities List, 83 Fed. Reg. 2549 (Jan 18, 2018) (to be codified at 40 C.F.R. pt. 300) (direct final rule).

[12] National Oil and Hazardous Substances Pollution Contingency Plant, 83 Fed. Reg. 46,660 (Sept. 14, 2018) (proposing addition of six sites to NPL) (final direct rule); Food and Drug Administration, 83 Fed. Reg. 23,918 (May 17, 2018) (proposing addition of three sites to NPL); National Priorities List, 83 Fed. Reg. 2576 (Jan.18, 2018) (proposing addition of ten sites to NPL) (to be codified at 40 C.F.R. pt. 300).

[13] Civil Monetary Penalty Inflation Adjustment Rule, 83 Fed. Reg. 1190 (Jan. 10, 2018) (to be codified at 40 C.F.R. pt. 19) (direct final rule).

A. Constitutional Issues, Jurisdiction, and Standing

In *United States Oil Recovery Site PRP Group v. Railroad Commission*,[14] the Court of Appeals for the Fifth Circuit dismissed CERCLA claims against several Texas state agencies and state universities, holding that the claims were barred by the Eleventh Amendment.[15] The court held that these entities were entitled to immunity for CERCLA claims, even though they were alleged to be performing proprietary functions and even though the Texas Commission on Environmental Quality was participating in the site cleanup as a regulator along with the federal EPA.[16] The Court of Appeals declined to allow claims under the Texas counterpart statute to CERCLA to proceed on theories of supplemental or pendent jurisdiction, since the sovereign immunity finding removed the basis for federal jurisdiction.[17]

In *Giovanni v. U.S. Department of the Navy*,[18] the Court of Appeals for the Third Circuit reinstated a state law medical monitoring claim against the Navy that had been dismissed by the district court for lack of jurisdiction under Section 113(h) of CERCLA.[19] Section 113(h) bars challenges to Superfund remedies, and the district court had held that the claim for medical monitoring and for health assessments of persons exposed to the contaminated groundwater would interfere with implementation of the Navy's chosen remedy to address groundwater contamination of the plaintiffs' wells. The Court of Appeals reversed as to the medical monitoring claim, but upheld the dismissal of the claims for a health assessment or health effects study by the Center for Disease Control.[20] In reaching this conclusion, the Third Circuit acted consistently with prior decisions by the Ninth and Tenth Circuits as to the permissibility of medical monitoring claims under state law in the context of CERCLA cleanups.

B. Elements of Liability

1. Facility Definition

In *Genuine Parts Co. v. EPA*,[21] the Court of Appeals for the D.C. Circuit reversed the placement of an Indiana site on the National Priorities List (NPL), holding that EPA had not explained its application of the Hazard Ranking Scoring system when it calculated the number of people potentially exposed to contaminated groundwater while failing to explain why it ignored or failed to respond to substantial evidence that there was a continuous clay layer between the shallow contaminated zone, and the lower aquifer used for drinking water.[22] In *Sunnyside Gold v. EPA*,[23] the D.C. Circuit upheld the listing of the

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[14]U.S. Oil Recovery Site Potentially Responsible Parties Grp. v. R.R. Comm'n Tex., 898 F.3d 497 (5th Cir. 2018).

[15]"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

[16]*U.S. Oil Recovery*, 898 F.3d at 502-503.

[17]*Id.* at 503.

[18]Giovanni v. U.S. Dep't Navy, 906 F.3d 94, 100-01 (3d Cir. 2018).

[19]42 U.S.C. § 9613(h) (2018).

[20]*Giovanni*, 906 F.3d at 115, 121.

[21]Genuine Parts Co. v. EPA, 890 F.3d 304 (D.C. Cir. 2018).

[22]*Id.* at 313-14.

[23]Sunnyside Gold Corp. v. EPA, 715 F. App'x 7 (D.C. Cir. 2018).

Bonita Peak Mining District (BPMD) on the NPL in an unreported decision. The BPMD includes multiple mining sites, including the location of the 2015 Gold King Mine accident, where EPA supervised actions resulted in an unintended release of millions of gallons of contaminated mine water to the Animas River.

2. Release Reporting

As noted above, Congress amended CERCLA to exclude from mandatory release reporting certain kinds of airborne releases of hazardous substances from farm operations.

3. Hazardous Substance Definition

In *LCCS Group v. A.N. Webber Logistics, Inc.*, the district court denied a motion for summary judgment where there were material factual disputes about whether hazardous substances contained in partially set resins were mobile:[24] "[W]hen the disposed-of waste is not itself a hazardous substance and the waste contains hazardous substances which are irretrievably bound within the waste, a CERCLA plaintiff cannot make out its *prima facie case*."[25]

4. Pleading Requirements

In *Hicksville Water District v. Philips Electronics*,[26] the district court rejected arguments that CERCLA claims for response costs were required to be pled with "particularity." The court held that an allegation that contamination migrated from the defendant's site into the plaintiff's adjacent well resulted in the incurrence of response costs was sufficient to state a CERCLA claim and that there was no requirement at the pleading stage for greater particularity.[27]

C. Liability of Particular Parties

1. Owners and Operators

In *New Mexico v. U.S. EPA*,[28] the district court held that the EPA's contractor at the Gold King Mine site was sufficiently alleged to be a site operator where the contractor was alleged to have "conduct[ed] operations specifically related to the pollution." The contractor was onsite and conducting work that resulted in the 2015 accidental discharge of acid mine drainage and heavy metals to the Animas River.[29]

In *MRP Props., LLC v. United States*,[30] the court denied a motion to dismiss a claim of operator liability. The focus of the motion was on "disposal" as used in Section 107(a)(2) of CERCLA in connection with an oil refinery alleged controlled by the United States

[24]LCCS Grp. v. A.N. Webber Logistics, Inc., No. 16 C 5827, 2018 WL 4489587, at *5 (N.D. Ill. Sept. 19, 2018).
[25]*Id.*
[26]Hicksville Water Dist. v. Philips Elec. N. Am. Corp., No. 2:17-CV-04442, 2018 WL 1542670 (E.D.N.Y. Mar. 29, 2018).
[27]*Id.* at *11-12.
[28]New Mexico v. EPA, 310 F. Supp. 3d 1230, 1245 (D.N.M. 2018).
[29]*Id.* at 1243-46.
[30]MRP Props., LLC v. United States, 308 F. Supp. 3d 916 (E.D. Mich. 2018).

before and during World War II. The court held that since "disposal" is defined by reference to the Solid Waste Disposal Act, and in that Act, "disposal" includes "leakage" or "spilling," operator liability is not limited to "intentional decision making concerning 'whether, when, and how' waste is disposed of."[31]

2. Generators, Transporters, Arrangers

In *New Mexico v. U.S. EPA*,[32] the district court also held that the EPA's contractor at the Gold King Mine site was sufficiently alleged to have arranged for disposal of hazardous substances because the "allegations allow a reasonable inference that the sole purpose of the agreement between EPA and [its contractor] was for [the contractor] to participate in the disposal and treatment of a no-longer useful, hazardous substance."[33] The work by the contractor with a subcontractor handling a settling pond was sufficient to meet the statutory language that the disposal be "by any other party or entity."[34] Liability claims against the same contractor that it was a "transporter" were held to be sufficiently alleged where the contentions were that the contractor directed the flow of contaminated water to settling ponds.[35] That alleged direction satisfied the site selection requirement.

3. Parent/Shareholder and Successors

In *U.S. v. Pioneer Natural Resources*,[36] the district court addressed corporate successor liability under CERCLA and Texas law, in a case involving the United States' cost recovery claims against several related oil and gas exploration companies. The court found that a merger transferred a former entity's CERCLA liabilities to the succeeding entity. The court rejected arguments that a failure to list several prior subsidiaries in what was transferred did not overcome language in the new articles of incorporation, stating that the new entity took on the liabilities of the prior parent company.[37]

D. Joint & Several Liability

These issues are addressed in most of the allocation and divisibility decisions discussed below.

E. Private Cost Recovery

1. Contribution (113) v. Cost Recovery (107)

In *Cooper Industries v. Spectrum*,[38] Spectrum alleged both a section 107 cost recovery and a section 113(f) contribution claim, but the former was dismissed. Spectrum had entered into an Administrative Settlement Agreement and Order on Consent (ASAOC)

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[31] *Id*. at 932
[32] *New Mexico v. EPA*, 310 F. Supp. 3d at 1230.
[33] *Id.* at 1248.
[34] *Id.* at 1249.
[35] *Id.* at 1251-53.
[36] United States v. Pioneer Nat. Res. Co., 309 F. Supp. 3d 923 (D. Colo. 2018).
[37] *Id.* at 931-33.
[38] Cooper Indus., LLC v. Spectrum Brands, Inc., No. 2:16 CV 39 CDP, 2018 WL 6018752, at *1 (E.D. Mo. Nov. 16, 2018).

with EPA that stated that the settlement "constitutes an administrative settlement pursuant to which Spectrum has . . . resolved liability to the United States within the meaning of sections 113(f)(2) and 112 (h)(4) of CERCLA."[39] The district court held that this text was sufficient to bring the settlement within section 113(f)(3)(B),[40] thus limiting Spectrum to a contribution action.[41]

Cooper Crouse-Hinds LLC v. Syracuse[42] involved two plaintiffs (CI and CCH) operating under separate consent orders. A 2004 order did not contain any language resolving CI's liability so CI was allowed to proceed with a section 107 action.[43] CCH's order, however, contained a resolution of CCH's liability upon issuance of a Certificate of Completion by the state regulatory agency.[44] The district court recognized the circuit split on the issue of whether a consent order that conditionally resolves a party's CERCLA liability triggers the requirement to proceed with a contribution action under section 113(f)(3)(B).[45] Since the parties had not briefed the issue thoroughly, the court postponed deciding whether CCH was limited to a contribution claim.

In *Refined Metals Corp. v. NL Industries*,[46] the district court held that a Consent Decree under the Resource Conservation and Recovery Act and Clean Air Act satisfied CERCLA's requirement in section 113(f)(3)(B) of an administrative or judicially approved settlement that resolves a person's liability to the United States or a state, thereby limiting Refined Metals to a contribution claim.[47] The court was not persuaded that a reservation in the decree of rights under CERCLA or Indiana's state superfund law made any difference in the application of the text of section 113(f)(3)(B).[48] The court further held that a clause

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[39] *Id.* at *3.

[40] Section 113(f)(3)(B) provides: "A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2)." 42 U.S.C. § 9613(f)(3)(B). Section 113(f)(2) insulates party from a contribution claim where the party enters into a settlement with the United States or a State in an administrative or judicially settlement. 42 U.S.C. § 9613(f)(2).

[41] *Cooper*, 2018 WL 6018752, at *11.

[42] Cooper Crouse-Hinds, LLC v. Syracuse, No. 16-CV-1201 (MAD/ATB), 2018 WL 840056 (N.D.N.Y. Feb. 12, 2018).

[43] *Id.* at *5-6.

[44] *Id.* at *6.

[45] "*Compare* Fla. Power Corp. v. FirstEnergy Corp., 810 F.3d 996, 1001 (6th Cir. 2015) (holding that consent orders in the case 'do not resolve plaintiff's liability because resolution of liability is conditioned on plaintiff's performance and does not take immediate effect'); *and* Bernstein v. Bankert, 733 F.3d 190, 210 (7th Cir. 2013) (holding that the plaintiff had not resolved its liability with EPA because the consent order's release of liability was conditioned the plaintiff's complete performance); *with* Asarco LLC v. Atl. Richfield Co., 866 F.3d 1108, 1125 (9th Cir. 2017) (holding that a PRP resolves its liability to the government where a settlement agreement decides the PRP's obligations with certainty and finality, and a 'covenant not to sue or release from liability conditioned on completed performance does not undermine such a resolution'). *Id.* at *6.

[46] Refined Metals Corp. v. NL Indus., Inc., No. 1:17-CV-02565-SEB-TAB, 2018 WL 4592110 (S.D. Ind. Sept. 25, 2018).

[47] *Id.* at *6.

[48] *Id.* at *4-5.

in which the United States and Indiana unconditionally covenanted not to sue Refined Metals satisfied section 113(f)(3)(B).[49]

Hobart Corp. v. Dayton Power & Light Co.[50] presented an unusual section 107/113 issue. Plaintiffs were signatories to two ASAOCs, requiring them to remediate the Superfund site in issue. They received contribution protection in that decree.[51] Defendants were two non-settling parties whose properties were part of the Superfund site.[52] Plaintiffs sued in cost recovery and contribution, but the district court had dismissed the cost recovery claim.[53] In response, the two defendants made section 107 cost-recovery counterclaims, in one case for costs incurred in response to a Unilateral Administrative Order, and in the other case for groundwater monitoring.[54] Defendants' response costs, however, related to "covered matters" for which plaintiffs had contribution protection under the ASAOCs.[55] Plaintiffs moved to dismiss the section 107 counterclaims. They argued that because they had brought a contribution claim under section 113(f), and the elements of a contribution claim and relevant defenses are based on the requirements of section 107(a), the language "during or following any civil action under . . . section 9607(a)of this title" must be construed to include plaintiffs' section 113(f) contribution claims. Thus, since a counterclaim would "follow any civil action" under "section 9607(a) of this title," defendants were limited to a contribution claim for the response costs that they incurred, even though they would be unable to recover because of plaintiffs' contribution protection under the ASAOCs.[56] The court agreed with this interpretation.[57] It was also not persuaded that equity should permit a section 107 claim against plaintiffs who had agreed in the ASAOCs to remediate the site, thus promoting "CERCLA's goal of timely cleanup of hazardous waste sites."[58]

2. Effect of Settlement

In *NJDEP v. American Thermoplastics*,[59] the district court held (in an unpublished decision) that judicially approved settlements in bankruptcy court in 1986 with EPA and with the New Jersey Department of Environmental Protection—each for $50,000—barred later CERCLA claims by third party defendants for $11 million in response costs brought in connection with the same NPL site many years later.[60] The district court relied upon section 113(f) of CERCLA and held that the settling parties were entitled to contribution protection, and thus, dismissal of the later third-party CERCLA claims against them.[61]

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[49] *Id.* at *6.
[50] Hobart Corp. v. Dayton Power & Light Co., 336 F. Supp. 3d 888 (S.D. Ohio 2018).
[51] *Id.* at 891, 893, 898.
[52] *Id.* at 893, 899.
[53] *Id.* at 897.
[54] *Id.* at 893-94, 899.
[55] *Hobart Corp.*, 336 F. Supp. 3d at 893.
[56] *Id.* at 894-95.
[57] *Id.* at. 896, 899-901.
[58] *Id.* at 897.
[59] New Jersey Dep't Envtl. Prot. v. Am. Thermoplastics Corp., No. 98-CV- 4781, 2018 WL 3536090 (D.N.J. July 23, 2018).
[60] *Id.* at *9-13.
[61] *Id.* at *13.

F. Allocation and Indemnification

In a CERCLA contribution action, *Georgia-Pacific Consumer Products LP v. NCR Corporation*,[62] the district court addressed the allocation for response costs incurred by Georgia Pacific among four parties—Georgia Pacific, International Paper, Weyerhaeuser, and NCR—for clean-up of the Kalamazoo River and Portage Creek in Southwest Michigan. NCR manufactured carbonless copy paper (CCP) that contained Aroclor 1242, a polychlorinated biphenyl (PCB). The court had earlier determined that NCR was liable as an arranger for disposal. The other three entities were paper companies with mills on the river. They recycled CCP "broke" (unusable CCP) and trim, and the resulting wastewater discharge to the river caused PCB contamination in sediments.[63] Georgia Pacific had incurred $49,666,881.67 in non-time-barred,[64] allowable response costs.[65] After a trial, the district court assigned 40% to Georgia Pacific, 40% to NCR, 15% to International Paper, and 5% to Weyerhaeuser. In an initial critical finding of fact, the court determined that no party was "uniquely culpable."[66] The court also rejected divisibility claims, whether based on PCB loading or geographic location.[67] In the latter case, the court recognized that certain mills could not have contributed to certain upstream contaminated sediments and that all of the mills could have been responsible for downstream contaminated sediments.[68] But an expert's effort to parse the site geographically was rejected by the court because it "presumes more certainty than is possible at this site."[69] Instead, the allocation covered the site as a whole with geographic matters taken into account as part of the single overall allocation.[70] Since there was uncertainty over the shape of what remedies will actually apply, the court also limited its allocation to past costs, leaving for "when remediations" are "more concrete" the issue of allocating future costs.[71]

After rejecting the allocation methodology of NCR (in large part because it ignored benefits derived by NCR from selling CCP broke and trim) and Georgia Pacific (because it was "too legalistic and more mathematically precise than an allocation in this case can actually be"),[72] the court applied the Gore and Torres factors in rendering a "single overall allocation."[73] The court then described the basis for its allocation. As to NCR, the court focused on knowledge and intent that resulted in arranger liability; culpability in keeping its use of PCBs "out of the press or regulator cross-hairs"; and development of the process that allowed the paper mills to use CCP as a feedstock, but resulted in most of the PCBs

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[62]Georgia-Pacific Consumer Prod. LP v. NCR Corp., No. 1:11-CV-483, 2018 WL 1556418 (W.D. Mich. Mar. 29, 2018).
[63]*Id.* at *1.
[64] In an earlier ruling, the district court had barred certain of Georgia Pacific's costs. *Id.* at *10.
[65]*Id.* at *10-11.
[66]There was a bit of mudslinging. The paper mills accused NCR of "hiding" evidence that Aroclor 1242 was toxic. *Id.* at *16. NCR accused the paper mills of using the river as an "open sewer." *Id.* at *17.
[67]*NCR Corp.*, 2018 WL 1556418 at *19-22.
[68]*Id.* at *21.
[69]*Id.*
[70]*Id.*
[71]*Id.* at *22.
[72]*Id.* at *23-24.
[73]*NCR Corp.*, 2018 WL 1556418 at *24.

being emitted in the wastewater.[74] As to Georgia Pacific, the court focused on the size of its mill, the volume of PCBs released, and the relative contribution potential of its discharges, while discounting Georgia Pacific's cooperation based on a state regulatory witness's testimony about the frustrations the State had with certain study proposals.[75] As to International Paper, the court focused on its relative degree of involvement, the volume of PCBs discharged, and the failure of proof that a mill pond trapped all solids discharged by the mill. As for Weyerhaeuser, the court focused on the lower volume of PCBs discharged, and a general consideration of the Gore and Torres factors.[76]

In *Valbruna Slater Steel Corp. v. Joslyn Mfg. Co.*,[77] plaintiff current owner/operator–brought a cost recovery claim for just over $2 million against defendant, which had formerly owned and operated the site in issue for about fifty years. Defendant filed a contribution counterclaim.[78] Plaintiffs incurred response costs following entry into a Prospective Purchasers Agreement (PPA) with the Indiana Department of Environmental Management that resulted in a site remediation. Plaintiffs had bought the property out of a bankruptcy. The court subtracted $500,000 paid by plaintiff into an escrow fund created under the PPA, calling it part of the purchase price, and then allocated 75% of the remaining costs of $1.5 million to defendant because (1) they were responsible for the contamination, and (2) blatantly avoided liability and refused to assist with the cleanup despite "knowing it was responsible for contaminating the Site for an extensive period."[79] Plaintiff had sought a zero allocation but the court assigned it 25% because it paid a discounted purchase price and voluntarily assumed some of the environmental cleanup risk, and would be the only party that benefitted from the cleanup.[80]

Asarco LLC v. Atlantic Richfield Co.[81] was a contribution action between a former landlord and tenant. Asarco operated a lead smelting operation from 1888 to 2001. Atlantic Richfield's predecessor (Anaconda) operated a zinc fuming operation on land leased from Asarco from 1927 to 1972. Both parties released arsenic into groundwater.[82] Asarco incurred response costs of about $111 million.[83] Asarco's expert offered three strategies to determine Anaconda's contribution of arsenic to groundwater, recommending adoption of the second strategy that assigned a 41% share to Atlantic Richfield.[84] The district court decided to credit Asarco's expert over Atlantic Richfield's expert, but adopted the third strategy, which allocated 25% of Asarco's costs to Atlantic Richfield. In that strategy, Asarco's expert delineated two plumes and calculated the square footage of each. Based on review of site operations, the expert then assigned percentage responsibility for each plume to Asarco and Atlantic Richfield, taking into account periods of ownership of the entire plume areas and the respective periods of operations.[85] Because of Atlantic

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[74] *Id.* at *25.
[75] *Id.* at *26.
[76] *Id.* at *27-28.
[77] Valbruna Slater Steel Corp. v. Joslyn Mfg. Co., 298 F. Supp. 3d 1194 (N.D. Ind. 2018).
[78] *Id.* at 1195.
[79] *Id.* at 1204.
[80] *Id.* at 1201, 1204.
[81] Asarco LLC, v. Atl. Richfield Co., No. CV 12-53-H-DLC, 2018 WL 3122340 (D. Mont. June 26, 2018).
[82] *Id.* at *1-3.
[83] *Id.* at *6.
[84] *Id.* at *20.
[85] *Id.* at *20-22.

Richfield's lack of cooperation with governmental officials and misrepresentations to the EPA and Asarco, the court added an additional $1 million award to Asarco.[86]

ExxonMobil Corporation v. United States[87] involved a number of allocation-methodology summary judgment determinations in preparation for a 2019 trial on allocation. That trial will address responsibility for response costs incurred by Exxon to address environmental impacts from the production, at two oil refineries and two chemical plants, of avgas and other materials needed during World War II and the Korean War.[88] In a summary judgment motion, the United States was seeking a zero or *de minimis* share of responsibility. The motion was denied because of factual disputes and competing expert opinions.[89] As for methodology, the parties agreed that the court should: (1) assign "shares of waste to the various years of plant operation, particularly for the years in which there was United States involvement during the wartime periods and when it was an owner and operator of part of the facilities (referred to as the "Plancors"); (2) determine "the portion of costs that are associated with the periods of United States involvement and are attributable to production of war materials"; and (3) equitably divide "the portion of wartime-related costs that are subject to allocation, based on the parties' respective degrees of involvement with the wartime production activities and other equitable factors."[90] The parties' views then diverged resulting in the following reconciliation by the court: (1) response costs would be divided into four time periods (1928-41 (Exxon only); 1942-45 (wartime production of avgas and other war materials); 1946-1955 (both Exxon and the United States were involved); and 1956 to the present (Exxon only);[91] (2) a production based approach using throughputs (the amount of oil and rubber produced) would be used as a surrogate for the amount of waste generated; (3) the court adopted the Federal Circuit's analysis[92] of a wartime contract that contained language identical to the contract between Exxon and the United States[93] in concluding that cleanup costs associated with non-avgas products produced in conjunction with avgas products would be included in the allocation;[94] (4) for the allocation itself, the Gore and Torres factors would be used, along with the following factors: (a) the "knowledge and acquiescence of the United States in the contamination-causing activities,"[95] (b) the "value of the contamination-causing activities to furthering the national defense efforts,"[96] (c) the "parties respective roles as operations at the refineries and chemical plants,"[97] (d) the existence of an indemnification agreement

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[86] *Id.* at *31.
[87] Exxon Mobil Corp. v. United States, 335 F. Supp. 3d 889 (S.D. Tex. 2018).
[88] *Id.* at 889.
[89] *Id.* at 930-33.
[90] *Id.* at 935.
[91] *Id.* at 940-41.
[92] Shell Oil Co. v. United States, 896 F.3d 1299 (Fed. Cir. 2018).
[93] The Exxon-United States contract, like the Shell-United States contract, provided that the United States would pay for "charges . . . incurred 'by reason of the production, manufacture, sale [,] or delivery'" of avgas. The Court of Federal Claims broadly interpreted the phrase "by reason of" to include acid waste disposed of "by reason of" the avgas contracts and allocated 100 percent of wartime cleanup costs to the United States. 896 F.3d at 1305.
[94] *Id.*
[95] *Exxon*, 335 F. Supp. 3d at 944.
[96] *Id.* at 945.
[97] *Id.*

as reflecting on the parties' intent to allocate liability,[98] and (e) Exxon's post-war waste-reduction improvements.[99]

The court also decided that it would enter a declaratory judgment allocating future costs at cleanup units where Exxon had already incurred past costs on the same basis as the court allocates past costs following the bench trial.[100] With respect to adjacent water bodies and other areas of contamination, the court held that a declaratory judgment was premature because Exxon "ha[d] not yet determined the amount and source of the contamination, taken response actions, or incurred past cleanup costs."[101]

TDY Holdings, LLC v. United States[102] supersedes the opinion issued in 2017[103] that was covered in the 2017 *Year-in-Review*. This amended opinion does not change the analysis or outcome. The district court's judgment allocating 100% of the cleanup costs to the plaintiff was vacated and the matter remanded for consideration of circuit precedents on the government's responsibility for wartime-related waste disposal.[104]

In a rare event, the Third Circuit vacated an allocation judgment in *Trinity Industries v. Greenlease Holding Co*.[105] Relying on Trinity's expert, the district court had allocated 45 separate "Impact Areas" using the sum of square feet or cubic yards impacted depending upon the type of response action taken. The court added the square feet or cubic yards in each Impact Area and multiplied the sum by the percentage assigned to Trinity or Greenlease for each Impacted Area. It then summed the resulting products and divided them by the total square feet plus cubic yards for all of the Impact Areas, resulting in an allocation of 17% to Trinity and 83% to Greenlease.[106] The court then reduced Greenlease's share for three reasons. First, a third party (Commerce Park) had left waste oil that Trinity remediated. However, Trinity did not establish the amount of response costs incurred for this response action. So the court reduced Greenlease's allocation by 6%. Second, while an indemnity in issue was found to have no legal force, the district court thought it had equitable force based on the district court's reading of *Beazer E. Inc. v. Mead Corp.*—resulting in a reduction of 5%. Finally, because Trinity enjoyed the benefit of a remediated property, the district court reduced Greenlease's share by another 10%, resulting in a revised allocation of 38% to Trinity and 62% to Greenlease.[107] The court of appeals held that the district court erred in combining area with volumes in computing the allocation for each Impact Area: "[A] volumetric-centered approach is only appropriate where the evidence supports a finding that one standardized volumetric unit correlates with a standardized per unit measure of cost."[108] With respect to the indemnity-reduction, the court of appeals remanded for a further explanation of why an indemnity that has no legal effect still should be considered as an equitable allocation factor.[109] Finally, as to the reduction for the benefit received by Trinity, the appellate court remanded again because

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[98] *Id.* at 946.
[99] *Id.* at 948.
[100] *Id.* at 949.
[101] *Id.* at 950.
[102] TDY Holdings, LLC v. United States, 885 F.3d 1142 (9th Cir. 2018).
[103] TDY Holdings, LLC v. United States, 872 F.3d 1004 (9th Cir. 2017).
[104] Three sentences were modified in the amended opinion, but none have substantive-law significance. 885 F.3d at 1142.
[105] Trinity Indus., Inc. v. Greenlease Holding Co., 903 F.3d 333 (3d Cir. 2018).
[106] *Id.* at 347.
[107] *Id.* at 348.
[108] *Id.* at 358-59.
[109] *Id.* at 361-62.

the record did not establish what the property value was after the remediation in relation to the property value before the remediation.[110]

Asarco v. Union Pacific Railroad Company[111] is an unusual contribution action. Asarco paid $482,143,000 to the EPA to resolve its CERCLA liability for Operable Unit 3 at the Bunker Hill Superfund Site in the Coeur d'Alene Basin in Idaho. It brought a contribution action against Union Pacific. Prior litigation had established that Asarco had a 22% share of site costs.[112] The parties' experts battled over the future site costs. If the court credited Asarco's expert, Asarco had paid more than its proportionate share, and if the court credited Union Pacific's expert, Asarco paid less than its proportionate share, and thus, could not pursue a contribution action. The court credited Union Pacific's expert, ending the litigation.[113] The court also determined that Asarco had released its contribution claim in a prior settlement between the parties.[114]

The Ninth Circuit addressed divisibility of harm in *Pakootas v. Teck Cominco Metals, Ltd.*[115] The Tribes of the Colville Reservations were awarded $8.25 million in response costs for Teck's releases of industrial waste from its lead and zinc smelter to the Canadian portion of the Columbia River. Those wastes migrated in the river across the border into the United States where the Tribes hold fishing rights and equitable title to the riverbed of a portion of the river.[116] Relying on expert testimony, Teck offered three theories of apportionment: (1) the amount of dissolved metals leaching from metal slag disposed of by Teck in relation only to the six metals associated with Teck's waste, and not in relation to all contaminants of concern; (2) net "flux" of contaminated sediment in surface water; and (3) mass of metals released by various sources.[117] The Ninth Circuit first held that it was Teck's burden to produce "evidence showing divisibility of the entire harm caused by Teck's wastes combined with all other River pollution—not just the harm from sources of Teck's six metals alone."[118] The court of appeals then held that Teck did not meet its burden:

> [O]nce the State identified mixing of Teck's metals with non-metal pollutants, Teck was required to rebut the presumption that these pollution hotspots caused greater harm than the sum of the individual pollutants, each of which may be so widely dispersed as to be harmless on its own. Teck did not carry its burden of showing that the harm is theoretically capable of apportionment by simply

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[110] *Id.* at 362-63.

[111] Asarco, LLC v. Union Pac. R.R. Co., No. 2:12-CV-00283-EJL, 2018 WL 3599967 (D. Idaho July 26, 2018).

[112] *Id.* at *2. (citing *Coeur d'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094 (D. Idaho 2003)).

[113] *Id.* at *7-8, *17.

[114] *Id.* at *6, *8, *20.

[115] Pakootas v. Teck Cominco Metals, Ltd., 905 F.3d 565 (9th Cir. 2018).

[116] *Id.* at 571-73. In an earlier decision the Ninth Circuit determined that because Teck's waste had "come to be located" in the United States, CERCLA was applicable and covered Teck as an arranger for disposal. *Pakootas v. Teck Cominco Metals, Ltd.,* 452 F.3d 1066, 1074, 1082 (9th Cir. 2006).

[117] *Pakootas*, 905 F.3d at 587-88.

[118] *Id.* at 590-91.

> 'considering the effects of its waste in isolation from the other contaminants at a site.'[119]

The Ninth Circuit also held that Teck's volumetric approach to apportionment could not serve as a reasonable basis for dividing the harm where Teck did not establish a relationship between waste volume and the harm at the site.[120] The court offered two reasons for its holding. First, volume contributions did not account for geography—where contamination was located in river sediments, and thus, could not serve as a proxy for the harm.[121] Second, they also did not account for the time when wastes entered the river when the evidence showed that older wastes "may present less of a need for cleanup than more recently disposed wastes."[122]

G. Defenses

1. Act or Omission of Third Party: Innocent Landowner

In *California Dept. Toxic Substances v. Westside Delivery*,[123] the Court of Appeals held that the purchase of property at a tax sale did not make the purchaser an innocent landowner under CERCLA section 101(35) because under California law (where the land was situated) there was a "contractual relationship" between purchaser and prior owner, even though the land was conveyed by tax authorities to the purchaser and not directly from the former owner to the new owner.

2. Necessary and Consistent with NCP

In *ExxonMobil Corporation v. United States*,[124] the court determined that the extensive involvement of the states of Texas and Louisiana in ExxonMobil's clean up activities was sufficient to establish ExxonMobil's compliance with the NCP.[125] ExxonMobil was aided by the court's determination that its response actions were removal and not remedial, thus reducing the number of applicable NCP provisions.[126]

3. Statutes of Limitation

ExxonMobil Corporation v. United States[127] addressed the United States' argument that the statute of limitations had run on ExxonMobil's claims. Whether the response

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[119] *Id.* at 593 (quoting *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 187 (2d Cir. 2003). The court of appeals elaborated its holding by applying Alcan again: "[Teck] ignored the likelihood that the cumulative impact of its waste [mixture] exceeded the impact of the [mixture's] constituents considered individually, and neglected to account for the [mixture's] . . . physical interaction with other hazardous substances already at the site." *Id.* at 594 (quoting *Alcan*, *supra*, at 187).
[120] *Id.* at 595 (citing *United States v. Monsanto*, 858 F.2d 160, 172, n.27 (4th Cir. 1988).
[121] *Id.* at 595.
[122] *Id.* at 596.
[123] Cal. Dep't Toxic Substances v. Westside Delivery, 888 F.3d 1085 (9th Cir. 2018).
[124] Exxon Mobil Corp. v. United States, 335 F. Supp. 3d 889 (S.D. Tex. 2018).
[125] *Id.* at 919.
[126] *Id.* at 919-20.
[127] *Id.* at 889.

actions in question were remedial or removal was outcome determinative.[128] The district court concluded that ExxonMobil's cleanup actions at two "facilities are appropriately characterized as a series of removal activities that constitutes a single removal action at each facility."[129] The court considered "permanence, time-sensitivity, the complexity of the problem and of the action, the comprehensiveness of the action, and the cost of the action, as well as the CERCLA definitions and the National Contingency Plan examples," in reaching its conclusion.[130] The removal actions were not yet completed. Hence, the statute of limitations does not bar Exxon's claims.[131]

In *Refined Metals Corp. v. NL Industries*,[132] the district court dismissed a contribution claim that was not brought within three years of entry into a Consent Decree that resolved Refined Metals' liability to the United States and Indiana, at least in part.[133] The court rejected the argument that the claim survived because the response actions required under the decree had not yet been completed within three years of filing of the action.[134]

In *United States v. Raytheon Company*,[135] the district court granted a motion to dismiss the contribution claim of the United States Navy for response costs incurred in remediating chlorinated solvents in groundwater at the Naval Weapons Industrial Reserve Plant in Bedford, Massachusetts.[136] The Navy began a pump-and-treat remedy in 1995, and it issued a Record of Decision (ROD) in 2010.[137] The court rejected the argument that the issuance of the ROD established that prior response actions represented a removal action.[138] After reviewing the facts that the Navy had treated 97 million gallons of water and had been in operation for about 20 years, the court decided that the response action was remedial in nature.[139] Thus, under 42 U. S. C. § 9613(f)(2)(B), a suit had to be brought within six years "from the time the pump-and-treat system was begun."[140]

In *Abner v. U.S. Pipe & Foundry Co LLC*,[141] the district court denied summary judgment dismissing personal injury claims allegedly arising from exposure to contamination. The court interpreted section 309(b), concerning the "federal commencement date," holding that where EPA had begun a CERCLA response action that EPA action effectively re-set the clock for statute of limitations purposes, even though the personal injury plaintiffs did not themselves have a CERCLA response cost claim.[142]

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[128] *Id.* at 916.
[129] *Id.*
[130] *Exxon Mobil Corp.*, 335 F. Supp. 3d at 916.
[131] *Id.*
[132] Refined Metals Corp. v. NL Indus., Inc., No. 1:17-CV-02565-SEB-TAB, 2018 WL 4592110, at *1 (S.D. Ind. Sept. 25, 2018).
[133] *Id.* at *6.
[134] *Id.*
[135] United States v. Raytheon Co., 334 F. Supp. 3d 519 (D. Mass. 2018).
[136] *Id.* at 522.
[137] *Id.*at 522-23.
[138] *Id.* at 526.
[139] *Id.*
[140] *Id.* at 527.
[141] Abner v. U.S. Pipe & Foundry, Co., No. 2:15-CV-02040-KOB, 2018 WL 522771 (N.D. Ala. Jan. 23, 2018).
[142] *Id.* at *6.

4. Other Defenses and Challenges

In *United States v. Atlantic Richfield*,[143] the district court declined to allow citizens groups to intervene in a complicated CERCLA case which had been closed for two years. In that case, a Consent Decree (CD) mandating certain cleanup measures and resolving many EPA claims for cost recovery had been publicly noticed and found to be fair, adequate, and reasonable. Two years later, affected citizens sought to intervene under Fed. R. Civ. P. 24 and CERCLA section 113(i).[144] The district court held that such intervention was untimely,[145] even though contamination of many residential areas was alleged to be worse than EPA had understood when the CD was submitted for court approval. The court noted EPA's extensive outreach efforts with the affected community before and after the filing and approval of the CD.

H. Recoverable Response Costs (Including Attorney's Fees)

In yet another in the line of Fox River opinions, *United States v. NCR Corporation*,[146] the district court faced a unique CERCLA question. The United States had received settlement dollars from a number of parties and allocated more than $100 million to the Natural Resource Damage Assessment and Restoration (NRDAR) fund maintained by the U.S. Department of the Interior for natural resource damages (NRD) caused by the release of polychlorinated biphenyls (PCBs) to the site. The EPA had a remaining CERCLA claim of unreimbursed response costs totaling about $32 million. It was seeking these costs from a remaining defendant (Gladfelter) that had already been held to be jointly and severally liable. Gladfelter argued that the amount transferred to the NRDAR fund exceeded actual NRD by more than $32 million, and thus, its liability should be zero under section 113(f)(2), which allows a non-settling party to reduce its potential liability "by the amount of the settlement" entered into by other parties.[147] The United States argued that section 113(f)(2)'s reduction-of-liability text only applied to response costs, not NRD, paid in settlement. Based on the plain meaning of the text, the district court disagreed.[148] It allowed

[143]United States v. Atl. Richfield Co., 324 F.R.D. 187 (N.D. Ind. 2018).
[144]42 U.S.C. § 9613(i) (1980).
[145]*Atlanta*, 324 F.R.D. at 191, 194.
[146]United States v. NCR Corp., No. 10-C-910, 2018 WL 708334 (E.D. Wis. Feb. 5, 2018).
[147]*Id.* at *2. "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement." 42 U.S.C. § 9613(f)(2) (1980) (emphasis omitted).
[148]"While it is true that Section 113(f)(1) specifically references 'response costs,' the same is not true of Section 113(f)(2). The government has offered no reason why the settlement provision should be construed so as to limit its effect in such a manner. The fact that money received in settlement may be for different claims and is to be allocated to separate funds for different purposes is not a reason to ignore the plain meaning of the statute. More importantly, to adopt the government's construction of the statute would insulate the government's allocation and use of settlement proceeds from any form of judicial review. The government would be able to minimize or even eliminate Section 113(f)(2) reductions by simply allocating all or most of the proceeds to NRDAR funds." *NCR*, 2018 WL 708334 at *4.

Gladfelter the opportunity to show at trial that settlement amounts allocated to NRD exceed actual NRD, with the caveat that if the United States and Wisconsin decide to reassert NRD claims against Gladfelter and prove that NRD exceed what has been collected in settlement, that Gladfelter may be liable for more than the $32 million being sought in response costs.[149]

In *Georgia-Pacific Consumer Products LP v. NCR Corporation*,[150] a CERCLA contribution action, the district court disallowed $643,889 in costs because they were incurred to study natural resource damages, and "$340,059 in costs that are more properly described as advocacy rather than response costs."[151] However, the court rejected the argument that insurance recoveries by Georgia-Pacific offset its response cost claim because (1) Georgia Pacific incurred costs that it could not recover due to a statute of limitations ruling that eliminated some of Georgia-Pacific's costs, "and (2) the insurance settlement involved over 20 sites that are not part of this case."[152]

In *Valbruna Slater Steel Corporation v. Joselyn Mfg. Co.*,[153] the prevailing party parsed through ten years of legal bills to make a claim for about $40,000 in attorneys' fees under *Key Tronic*.[154] The court was unable to determine whether the costs were *Key Tronic*-allowable or litigation related: "the vague billing entries for the work performed throughout the past ten years do not provide sufficient information for the Court to determine whether the expenses were necessary costs of the response or for the purpose of going after defendants to recoup the costs."[155] It directed the parties to confer and plaintiff "to provide a more complete explanation why each expense was incurred and how that meets the standard for payment."[156]

In *Asarco LLC v. Atlantic Richfield Co.*,[157] the district court allowed Asarco to recover attorneys' fees incurred "in refuting Atlanta Richfield and Anaconda's untrue representations to federal and state regulators. As a result of this work, the EPA and the State of Montana are positioned to pursue each company for any necessary and additional environmental cleanup costs related to the Site."[158] The court held that the fees were incurred to identify a potentially responsible party under *Key Tronic*.[159]

CERCLA provides that prejudgment interest begins to "accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned."[160] In *Valbruna Slater Steel Corporation v. Joselyn Mfg. Co.*,[161]

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[149] *Id.* at *5.
[150] Georgia-Pacific Consumer Prod. LP v. NCR Corp., No. 1:11-CV-483, 2018 WL 1556418 (W.D. Mich. Mar. 29, 2018).
[151] *Id.* at *11.
[152] *Id.* at *12. The court added that, "Georgia Pacific paid insurance premiums to help cover events like this, and it encourages prudent insurance coverage to allow the company to receive at least some benefit from the coverage it paid for." *Id.*
[153] Valbruna Slater Steel Corp. v. Joslyn Mfg. Co., No. 1:10-CV-044 JD, 2018 WL 2328447 (N.D. Ind. May 22, 2018).
[154] Key Tronic Corp. v. United States, 511 U. S. 809 (1994).
[155] *Valbruna*, 2018 WL 2328447, at *6.
[156] *Id.*
[157] Asarco LLC, v. Atl. Richfield Co., No. CV 12-53-H-DLC, 2018 WL 3122340 (D. Mont. June 26, 2018).
[158] *Id.* at *33.
[159] *Id.*
[160] *Id.*; 42 U.S.C. § 6907(a) (1976).
[161] *Valbruna*, 2018 WL 2328447, at *1.

the district court held that the accrual date occurred when plaintiff served initial disclosures under Fed. R. Civ. P. 26(a), and cited a specific amount of "at least $1.863 million."[162] Prior demand letters had not set forth a specified amount.[163] The court further held that revisions to the amount claims "d[id] not alter the demand date from interest is calculated."[164]

In *Pakootas v. Teck Cominco Metals, Ltd.*,[165] the court held that certain data collection and analysis costs associated with contamination of the Columbia River incurred by plaintiff Tribe were recoverable response costs because they related to the investigation and movement of hazardous substances, and to the release or threat of release of hazardous substances, and also resulted in the identification of Tech as a potentially responsible party.[166] While these costs also related to the cost recovery litigation brought by the Tribe against Tech, the Ninth Circuit held that having a connection to litigation does not bar recovery of the costs as long as the costs fit within the definition of a removal action under CERCLA.[167] The court of appeals further held that the Tribe was a sovereign entitled to recover its attorneys' fees under section 107(a)(4)(A) of CERCLA as response costs for "enforcement" activities.[168] Finally, the court held that awarding $4.86 million in fees was reasonably proportionate to the award of $3.39 million for investigation costs.[169]

I. Preemption

The district court discussed preemption of state nuisance and natural resource damage claims by CERCLA in *New Mexico v. U.S. EPA*, determining that a decision on preemption of such claims was premature at the motion to dismiss phases without development of the factual record.[170]

J. Miscellaneous

In *New Mexico v. U.S. EPA*, the court also considered the "government contractor" defense to related state tort claims of public nuisance, negligence, and gross negligence related to the 2015 Gold King Mine spill.[171] The issues were deferred until the factual record was further developed.

III. NATURAL RESOURCE DAMAGES

To provide adequate factual context, court holdings with respect to natural resource damages are discussed above in connection with related holdings, particularly regarding

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[162] *Id.* at *7.
[163] *Id.*
[164] *Id.*
[165] 905 F.3d 565 (9th Cir. 2018).
[166] *Id.* at 579-80.
[167] *Id.* at 581-82.
[168] *Id.* at 583-84. Section 107(a)(4)(A) allows for recovery of "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan." 42 U. S. C. §9607(a)(4)(A) (1980).
[169] *Pakootas*, 905 F.3d at 586.
[170] New Mexico v. EPA, 310 F. Supp. 3d 1230, 1253-55 (D.N.M. 2018).
[171] *Id.* at 1255-1266.

cases involving the cleanup and restoration of the Fox River and the Gold King Mine site accidental release.