The 2011 Case Law Update
CERCLA/RCRA/MERLA

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A. Cost Recovery, Contribution and Administrative Action

1. *Celanese Corp. v. Martin K. Eby Construction Co.* Accidentally causing damage to a pipeline did not result in arranger liability under CERCLA.

In *Celanese Corp. v. Martin K. Eby Construction Co.*, 620 F.3d 529 (5th Cir. 2010), the Fifth Circuit rejected a claim that a party had "arranger" liability, when the offending party did not have the intent to release or dispose of a hazardous substance.

In 1979, a pipeline installer employee from Eby Construction Co. struck and damaged a pipeline belonging to Celanese Corp. with a backhoe while installing a new pipeline. The Celanese pipeline was used to transport methanol. According to Celanese, the impact from the backhoe dented the pipeline and later stress corrosion caused methanol to leak from the pipeline. Celanese discovered the leak in 2002 when distressed vegetation was observed on the land above its pipeline, fixed the pipeline and cleaned up the site including the recovery of over 232,000 gallons of methanol.

Celanese sued Eby under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Texas Solid Waste Disposal Act (SWDA), Texas' Superfund law. The Court found that Eby was not liable as an arranger under CERCLA or SWDA because Eby did not know that it had damaged the Celanese pipeline and because Eby was not a "responsible person" under SWDA. Celanese appealed, arguing that Eby's conscious disregard of its duty to investigate was tantamount to intentionally taking steps to dispose of methanol.

The Fifth Circuit rejected Celanese's argument, and upheld the district court ruling. The Court held that Eby was not an arranger and found that Eby did not intentionally damage the pipeline. The Court cited the recent U.S. Supreme Court ruling in *United States v. Burlington Northern & Santa Fe Ry. C.,* 520 F.3d 918, (9th Cir. 2008), rev'd Burlington, 556 U.S. _____, 129 S.Ct. 1870, 173 L.Ed.2d 812 (covered in previous two years' updates), in which the U.S. Supreme Court declined to impose arranger liability on a defendant who arranged for the shipment of hazardous chemicals. The Fifth Circuit noted that in *Burlington Northern* the Supreme Court held that intentional steps are needed and knowledge of contamination alone was insufficient to establish arranger liability. The Fifth Circuit ruled that if the Supreme Court did not impose arranger liability when the party took steps to ship hazardous materials, the Fifth Circuit cannot impose arranger liability when the defendant here did not know it had struck the pipeline.

* Special thanks to Moss & Barnett, P.A., attorney Jeff Lin for his assistance in assisting with the preparation of these materials.

2. *Team Enterprises, LLC. v. Western Investment Real Estate Trust, et. al.* A manufacturer of a dry cleaning PCE recapture filter did not have arranger or transporter liability under CERCLA.

In *Team Enterprises, LLC. v. Western Investment Real Estate Trust, et. al.*, 2010 WL 3133195 (E.D. Cal. 2010), a dry cleaning company sued the a number of parties, including a manufacturer of a dry cleaning perchloroethylene (PCE) recapture filter used at the business, for clean up and remediation costs. PCE was apparently discharged to a drain and resulted in contamination. The suit claimed liability based on a number of claims, including CERCLA liability for arrangers and transporters. The District Court granted summary judgment against the dry cleaner.

The Court ruled that the dry cleaner, a One Hour Martinizing franchise, did not raise sufficient factual issues to sustain its suit against the manufacturer. The dry cleaner claimed that the manufacturer's knowledge that the two-stage filter and still device designed to capture PCE for reuse produced waste water was enough to sustain CERCLA liability. A small amount of wastewater is generated during use of the machine, but the manufacturer provided no instructions as to handling of that material. The Court rejected the dry cleaner's argument, saying that knowledge alone is insufficient to prove that the manufacturer had intended or "planned for" the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of a useful product. The Court relied on *Burlington Northern*, for the proposition that CERCLA arranger and transporter liability requires "intentional steps to dispose" by a party.

This case represents a straightforward application of *Burlington Northern* with regards to CERCLA arranger and transporter liability.

3. *U.S.A. v. Aerojet Gen. Corp.* Ninth Circuit held that non-settling parties had a right to intervene.

In *U.S.A. v. Aerojet Gen. Corp.*, 606 F.3d 1142 (9th Cir., 2010) , the Ninth Circuit held that a non-settling potentially responsible party (PRP) had a right to intervene to oppose a consent decree incorporating a settlement that would bar contribution from the settling PRPs.

In *Aerojet*, the U.S. Environmental Protection Agency (EPA) sought cost recovery from a number of parties to clean up contamination in the San Gabriel Basin, a groundwater reservoir that is a drinking water source for more than one million people in Los Angeles County. In 2000 the EPA issued a Record of Decision prescribing a 30 year groundwater remedial plan at a projected cost of $14 million.

CERCLA bars contribution claims against PRPs that have obtained administratively or judicially approved settlements with the government. CERCLA provides an incentive for PRPs to settle by leaving non-settling RPRs liable for all of the remaining response costs not paid by the settling PRPs. In *Aerojet*, a group of parties opted to settle and pay $4.7 million toward a fund for the cleanup. By 2007 the $14 million cleanup estimate had increased to $26 million and EPA indicated that an additional $46 million will be needed

to remediate newly discovered perchlorate contamination. Another group of non-settling PRPs sought to intervene. The District Court denied the petition to intervene and the group appealed.

The Ninth Circuit held that because the non-settling PRPs may be held liable for the entire amount of response costs minus the amount paid in a settlement, the applicants have a sufficient interest in the amount of any judicially-approved settlement. The Ninth Circuit joins the Eighth Circuit and Tenth Circuit in permitting intervention in CERCLA Section 113 actions.

4. *Lyondell Chemical Co. v. Occidental Chemical*
Lower court committed error by admitting an expert report relying on evidence submitted solely for settlement purposes.

In *Lyondell Chemical Co. v. Occidental Chemical*, 608 F.3d 284 (5th Cir. 2010), the Fifth Circuit ruled that the lower court committed error by admitting an expert report relying on evidence submitted solely for settlement purposes.

In the late 1960's and early 1970's a disposal company hauled hazardous waste generated by petrochemical facilities in the Houston Ship Channel and dumped the waste at a site called Turtle Bayou. The Turtle Bayou site was originally defined by EPA as 500 acres but later it was expanded to include the area of extent of contamination and land needed for remediation. In the early 1980's the EPA began investigation into the contamination, and ordered Lyondell and others to investigate releases at the site. After the disposal company dissolved, the EPA sued the company's largest customers for recovery of their costs. Customer Lyondell Chemical Co. settled with the government in 1998. In turn, Lyondell sued other parties for cost recovery and sought "apportionment" under CERCLA Section 107 and "contribution" under CERCLA Section 113 from parties including Occidental Chemical. The district court held that Occidental Chemical was liable and allocated a percentage of costs to Occidental. In allocating the costs, the court relied on an expert's report used in Lyondell's settlement with the EPA.

The Fifth Circuit ruled the lower court erred by admitting an expert report relying on evidence submitted in an earlier administrative proceeding solely for settlement purposes. The case was reversed in party and remanded to the lower court.

5. *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*
Cost recovery for a settling party under Sec. 113 and summary judgment standard.

In *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112 (2nd Cir., 2010), Niagara Mohawk owned and operated a manufactured gas plant at a site in New York. The company sold most of the site in 1951. Coal tar, used in the production of manufactured gas, was found in soils at the site. Niagara Mohawk settled with New York authorities by entering into a Consent Decree in 2003. In 2008 Niagara Mohawk sued to

recoup its costs from other parties who either owned, had interests in or operated on the former plant site.

The Second Circuit ruled that a party who settled with the government may seek contribution from other parties under CERCLA Section 113, but not under Section 107.

Section 113 provides a right of contribution to PRPs that have settled their CERCLA liability with a state or the United States through either an administrative or judicially approved settlement. Section 107 allows complete cost recovery under a joint and several liability scheme where one potentially responsible party can potentially be accountable for the entire amount expended to remove ore remediate hazardous substances. The Court also ruled that a party need not establish the precise amount of hazardous material discharged or prove with certainty that a PRP defendant discharged the hazardous material to get their CERCLA claims past the summary judgment stage. The Court also held that compliance with a state Consent Decree was sufficient to prove adherence to the National Contingency Plan.

EPA submitted an amicus brief supporting Niagara Mohawk's position noting: "States play a critical role in effectuating the proposes of CERCLA." The Court noted the State's role is "not only critical, but autonomous."

6. *United States v. Saporito*
Liability for EPA response costs imposed on lessor of equipment.

In *U.S. v. Saporito*, 684 F. Supp.2d 1043 (N.D. Ill., 2010), EPA spent $1.5 million cleaning up hazardous substances at a Chicago plating company. The federal government initiated a cost recovery against James Saporito who operated the plant for five years. The Court ruled that the lessor operator of equipment at a contaminated metal plating facility was liable as an owner under CERCLA.

In *Saporito*, the cousin of a business owner purchased equipment used in the business and leased it back to the company. The cousin also worked at the company as a Vice President, had control over the operation and management of the equipment and was responsible for environmental regulatory filings. EPA inspections revealed 58 vats and tanks of chemicals, and 464 containers holding liquids and sludges. Plating wastes were spilled on the floors and large areas of the concrete floor had corroded exposing the soil below. The Court rejected Saporito's argument that liability should be shifted to others and that apportionment was proper under *Burlington Northern*. The Court noted there was only one cause for the releases: the plating process itself. The Court ruled that Saporito was the owner of the equipment and had a sufficient "connection" to the facility under CERCLA as an "owner" to establish liability. The Court found Saporito liable for the cleanup costs.

This case demonstrates the inherent dangers of a small family business operating in a heavily regulated area. Intertwining of ownership and operations among family members may result in CERCLA liability.

7. *General Electric v. Lisa Jackson*
EPA's unilateral administrative orders are constitutional.

In *Gen. Elec. Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010), General Electric ("GE") challenged the constitutionality of the EPA's statutory authority under CERCLA to issue unilateral administrative orders ("UAOs"). The D.C. Circuit denied the challenge and upheld the constitutionality of UAOs.

Under CERCLA, the EPA has four options for cost recovery: 1) it may negotiate a settlement with the PRP; 2) it may conduct the cleanup with Superfund money and seek reimbursement from PRPs by filing suit; 3) it may file an abatement action in federal district court to compel PRPs to conduct the cleanup; or 4) it may issue an UAO instructing PRPs to clean the site. To use its UAO authority, EPA must first make an "imminent and substantial endangerment" finding related to the identified release. Failure to follow an UAO may expose the PRP to fines of $37,500 per day. If the recipient fails to respond and the EPA steps in, a recipient may face punitive damages of up to three times the agency's costs.

Due to its size and scope of its operations, GE has received at least 68 UAOs over the years, and challenged the constitutionality of UAOs. GE was also participating in response actions at 79 active CERCLA sites where UAOs may be issued. GE argued that it really had no choice but to comply or face severe penalties before having any opportunity to be heard on the legality and rationality of the UAO. GE also argued that by refusing to comply and allowing the EPA to sue, GE risked severe damage to its reputation and stock price. GE cited *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, S2 L.Ed. 714 (1908) and argued that companies are coerced into compliance with UAOs.

The Court rejected GE's arguments and denied the appeal. The Court held that GE's reputation and stock price are not constitutionally protected and that CERCLA's sufficient cause and willfulness defenses protect PRPs from unwarranted fines and damages.

8. *United States v. Washington State Department of Transportation*
Designing a highway drainage system qualifies a party as an "arranger" under CERCLA.

In *United States v. Washington State Department of Transportation*, 716 F.Supp. 2d 1099 (W.D. Wash. 2010), the EPA sued the Washington State Department of Transportation ("Washington") for cost recovery under CERCLA. EPA maintained that Washington's design of a highway drainage system in Tacoma, Washington released hazardous substances into the environment. EPA contended that highway runoff containing phthalates, heavy metals and petroleum hydrocarbons entered into waterways and accumulated in sediments. EPA spent $6.8 million on the cleanup and noted that response costs will continue in the future.

In response to a motion for summary judgment, Washington argued the stormwater discharges were federally permitted releases, it did not hold title to the highway property

and that third parties were responsible for the releases. The Court rejected Washington's defenses, found the Washington is a potentially responsible party as an "arranger" under CERCLA. The Court reasoned that the Washington is an arranger because it designed the drainage system and had the ability to redirect, contain, or treat the contaminated runoff.

Washington argued that it is exempt from CERCLA liability because it had a permit to build the highway and had obtained stormwater permits. Washington also claimed third party defense available under CERCLA. The Court said there was insufficient evidence to decide these issues on summary judgment.

This case is ongoing, but the Court ruled on summary judgment that Washington is a liable PRP as an arranger under CERCLA's definition.

9. *Ash Grove v. Liberty Mutual*
An EPA Section 104(e) letter triggers an insurer's duty to defend under Oregon law.

In *Ash Grove v. Liberty Mutual*, 2010 WL 3894119 (D. Or. Sept. 30, 2010), a federal district court in Oregon ruled that an EPA Section 104(e) information request letter triggers an insurer's duty to defend under Oregon law. EPA typically sends information request letters after exhausting its public information sources and identifying former site owners and operators. The information gathering process can go on for years.

Failure to comply with an EPA information request may subject a party to penalties of up to $32,500 per day of continued noncompliance. Responding to such requests can be a burdensome process.

In this case, Ash Grove Cement Co. was identified as a PRP at the Portland Harbor Superfund Site. After initially receiving a letter from a group of potentially responsible parties, EPA sent Ash Grove a Section 104(e) letter along with 82 information requests. The letter contained language which indicated that failure to respond would result in exposure to penalties. Ash Grove had comprehensive general liability coverage between 1963 and 1986 under which insurer agreed to indemnity against claims for property damage and defend any "suit" that brings such claims. Ash Grove claimed it spent $750,000 in responding to the information request and other demands by the EPA and other entities involved with the site. Ash Grove tendered a claim to its insurer, Liberty Mutual, and requested reimbursement for these costs. The insurance company denied the claim, saying the Section 104(e) letter was not a "suit." Ash Grove filed suit for a declaratory judgment.

The Court ruled for Ash Grove, finding that the EPA's Section 104(e) letter constituted an "action" because the EPA letter demanded Ash Grove do something required by law or risk being fined. Therefore, the Court ruled that letter was equivalent to a suit seeking damages triggering the insurance company's duty to defend.

II. Resource Conservation and Recovery Act

A. Significant RCRA Cases

1. *USA v. Magnesium Corp. Of America*
Exemptions of mineral processing wastes under the Bevill Amendment could change, based on EPA's interpretation being ruled tentative.

In *USA v. Magnesium Corp. Of America*, 616 F.3d 1129 (10th Cir., 2010), the Tenth Circuit vacated a district court decision favoring a mining company, U.S. Magnesium , a successor of Magnesium Corp. of America.

U.S. Magnesium mines and processes magnesium with an anhydrous process at a plant on the western shore of the Great Salt Lake and generates various mineral processing wastes that are subject to regulation under Subtitle C of the Resource Conservation and Recovery Act (RCRA). The Bevill Amendment directed EPA to further study their regulations and exempt mineral processing wastes from the full RCRA regulatory scheme. EPA had claimed that U.S. Magnesium's handling of wastes had violated RCRA. The company argued that its wastes were exempted by the EPA's prior interpretations. The company argued that the EPA could not change the applicable exemptions without a formal notice and comment period.

The Court ruled that the EPA's original interpretation with the exemptions, was tentative and that the EPA was at liberty to adopt a reasonable interpretation of that regulation without providing public and seeking notice and comment.

2. *Raritan Baykeeper Inc v. NL Indus. Inc*
RCRA citizen suit dismissed.

In *Raritan Baykeeper Inc v. NL Indus. Inc*, 713 F.Supp.2d 448 (D.N.J., 2010), the district court dismissed a RCRA citizen suit on primary jurisdiction and abstention grounds. The Court ruled that because remediation was already being undertaken by the New Jersey Department of Environmental Protection, state-court review of the issues was available to the plaintiff.

Raritan Baykeeper filed suit under Section 7002 of RCRA and Section 505 of the Federal Water Pollution Control Act seeking remediation of contaminated sediments in the Raritan River located adjacent to a site formerly owned by NL Industries. From 1935 until 1982, NL manufactured titanium dioxide pigments for use in various projects. NL operated a system of lagoons covering 15 acres that were used for containment and settling before plant and storm water runoff was discharged to the Raritan River pursuant to a New Jersey permit. NL completed studies of the river sediments under an administrative order and found sediments from upstream sources (notably other nearby CERCLA sites) were present near the NL site. The New Jersey Department of Environmental Protection (NJDEP) acknowledged that the NL site contributed to the

contamination of the sediments, but determined that any remedial actions in this area of the river should be part of a regional approach.

The Court ruled that the doctrine of primary jurisdiction applied to the claims. Further, because the Court did not want to disrupt New Jersey's regulatory scheme for environmental protection, *Buford* abstention was appropriate.

3. *U.S. v. Reis*
Corporate officer's RCRA conviction affirmed.

In *U.S. v. Reis*, 366 Fed. Appx. 781, 2010 WL 601403 (9th Cir. 2010), the Ninth Circuit affirmed a conviction of Randall Reis, the Chairman of the Board and Chief Executive Officer of MR3 Systems, Inc., under RCRA's criminal provisions. The Court found the officer could not hide behind the corporation and avoid prosecution and ultimate conviction.

Reis operated a chemical manufacturing facility in Butte, Montana from late 1999 until December 2001 when the facility closed. In January, 2001 MR3 notified Montana it was a hazardous waste generator. Montana conducted inspections and documented illegal storage of hazardous wastes. MR3 apparently ignored Montana's directives to comply. Reis assured Montana authorities that he was making arrangements to dispose of the waste.

Equipment was repossessed and the wastes were placed in the parking lot. The federal authorities charged Reis and the company with criminal violations of RCRA as "persons" subject to hazardous waste regulations. MR3 Systems, Inc., ceased to legally operate as a corporation in 2007.

The defendant appealed his conviction under RCRA Section 6928(d)(2)(A), arguing that the government could charge and obtain a conviction against either the company or him individually, but not both. The Ninth Circuit rejected this argument. The Court ruled that the government did not rely on the responsible corporate officer doctrine, or any other theory of derivative liability to establish his guilt. The government proved each element of the crimes with respect to Reis individually and that Randall Reis had knowledge of the illegal storage of hazardous waste, and that he participated in the day-to-day management of the facility, that he was warned that the company needed a permit for the hazardous waste, and that he had the power and control to prevent or remedy the violation.

The conviction of the individual was upheld.

III. Current Minnesota Cases

A. CERCLA Cases

1. *Regents of the University of Minnesota v. Union Pacific Railroad Company and Vertellus Specialties Inc.*
Cost recovery action in the redevelopment context.

In *Regents of the University of Minnesota v. Union Pacific Railroad Company*, Case No. 0:11-cv-00056-ADM-JJK, the University of Minnesota is suing Union Pacific Railroad Company and Vertellus Specialties Inc., for recovery of $7.7 million in response costs for the cleanup of the site at TCF Bank Stadium, the University's new football stadium.

Union Pacific is the successor company to former owners of the land at the site and operated a rail yard on 23 acres at the site. Railroad operations allegedly released polycyclic aromatic hydrocarbons (PAHs), arsenic, lead and mercury to the soil and groundwater. From 1903 to 1919 Republic Creosoting Company leased a portion of the site, operated a wood treating facility at the site where wood used in railroad ties, street paving blocks, and telephone poles was treated. These operations released creosote and PAHs to the soil and groundwater.

The University purchased the land in 1990. Union Pacific's predecessor agreed to conduct studies of the environmental conditions and cleanup PAHs and other contaminants "to a degree acceptable to the Minnesota Pollution Control Agency." The purchase agreement also contained an indemnity. In 1994 and 1995 Union Pacific conducted a MPCA approved cleanup of the creosote pit, but not the entire property. The MPCA issued a "Limited No Action Letter" indicating contaminated soils may be present in other areas of the site. The MPCA also acknowledged that groundwater remained impacted. The University originally placed a temporary asphalt parking surface over the land in 1996. In 2002, the University began the process of building a new football stadium at the site. Later the University entered the Voluntary Investigation and Cleanup (VIC) Program and completed investigations and response actions that were approved by the MPCA. In building the stadium, the University incurred over $7.7 million in costs to address the PAHs and other contamination present at the site.

The University filed suit in federal district court and brought claims against the defendants under CERCLA, MERLA, and contractual indemnification to recover its response costs. The case is pending before the Honorable Ann Montgomery.

B. MERLA Cases

1. *Minnesota v. 3M Company*
Suit for recovery of natural resource damages.

In *Minnesota v. 3M Company*, Civil File No. 27-CV-10-28862, the State of Minnesota, its Attorney General and Commissioners of the Pollution Control and Natural Resources

and the City of Lake Elmo are suing 3M Company for damages arising from perfluorochemicals (PFCs) used in the manufacture of 3M's products.

In 1956, 3M began production of its Scotchgard product and other products containing PFCs at its Cottage Grove, Minnesota facility. 3M allegedly disposed of the waste products and discharged wastewater containing PFCs from the production of Scotchgard at several sites in Minnesota, including a site in Oakdale, Minnesota (which is now a Superfund site), and at the Washington County Landfill located in Lake Elmo, Minnesota. In 2002, Lake Elmo drilled a municipal well, in anticipation of serving future development in the city. In 2006, the Minnesota Department of Health tested and found PFC contamination at the well. The well is presently deemed unusable.

The Attorney General and the Commissioners, in their capacity as trustees for the State's natural resources, are suing 3M in state court under a number of theories, including nuisance, negligence, trespass, and under the Minnesota Environmental Response and Liability Act (MERLA) and the Minnesota Water Pollution Control Act seeking recovery for natural resource damages.

The State alleges that 3M directly and indirectly discharged PFCs into a stream that flows to the Mississippi River. The State alleges that PFCs have contaminated over 100 square miles of groundwater and aquifers that serve as a drinking water source. The State alleges that 3M knew or should have known that disposal of PFCs would reach waters of the State and result in injury, destruction and loss of natural resources including groundwater, surface water, sediments and aquatic life.

3M denies the allegations, except that it produced PFCs, and that its disposal of waste was legal at the time it occurred. The case is pending and in the early stages of discovery.

2. *State of Minnesota ex rel. Northern Pacific Center, Inc. v. BNSF Railway Company*
Owner/operator may be liable for stricter cleanup standards.

In *State of Minnesota v. BNSF*, 723 F.Supp. 1123 (D. Minn. 2010), Northern Pacific Center, a developer filed a cost recovery action under MERLA for costs of remediating a brownfield property to the MPCA's revised standards for lead in soils

BNSF owned 102.5 acres in Brainerd, Minnesota on which it operated a railroad maintenance yard for almost 100 years. BNSF sold a 47 acre portion of the land in 1983. The property was ultimately conveyed to Northern Pacific Center who sought to redevelop the site for commercial and light industrial uses. BNSF, at the direction of the MPCA, conducted investigations through the 1980's and 1990's. The MPCA listed the site, known as the Burlington Northern Car Shops, on the State's Permanent List of Priorities. The site received a score of 38 on the MPCA's Hazard Ranking System (HRS). BNSF remediated the land in 2001 based on the MPCA's established standard of 1,400 ppm for lead in soils as noted in the MPCA's Minnesota Decision Document (MDD). Although the site was listed as a Superfund site, the MPCA did not utilize

MERLA administrative procedures such as issuing a Request for Response Action (RFRA). The MPCA and BNSF did not enter into a Consent Decree formalizing the cleanup actions or cleanup levels.

The plaintiff, Northern Pacific Center (NPC), purchased the property from a subsequent owner and applied for liability assurances through the MPCA's VIC Program. When NPC presented redevelopment plans for the site that involved soil handling and removal, the MPCA determined that NPC was required to cleanup lead impacted soils to a more stringent level of 700 ppm.

NPC incurred significant responses costs and sought recovery under common law, MERLA and the Minnesota Environmental Rights Act (MERA). Prior to commencing the action, NPC obtained authorization from the MPCA for its response costs under Minn. Stat. § 115B.12 of MERLA. The MPCA has determined that it will revise the MDD.

Judge Rosenbaum ruled that NPC's claims under nuisance, trespass, waste and violations of MERA were subject to a six year statute of limitations period. Finding that the plaintiffs were aware of the presence of lead for more than six years, Judge Rosenbaum concluded that the common law and MERA claims were time barred. The defendant was granted summary judgment as to those claims.

With regard to the MERLA claim, Judge Rosenbaum applied the statute of limitations in MERLA, Minn. Stat. § 115B.11, subd. 2, which provides that an action "may be commenced any time after costs and expenses have been incurred but must be commenced no later than six years after initiation of physical on-site construction of a response action." The Court noted that after a 2003 Minnesota Department of Health report, the MPCA mandated soil lead cleanups of 700 ppm at the Brainerd site. NPC completed response actions in 2003, 2005 and 2006 to the lower 700 ppm standard, incurred response costs and received authorization from the MPCA that the voluntary cleanup actions were consistent with MERLA. Judge Rosenbaum denied the railroad's motion for summary judgment of the MERLA claims noting that the costs were incurred well within the six year statute of limitations period.

The case is pending in federal district court. After Judge Rosenbaum's retirement, the Honorable Paul A. Magnuson was assigned the case.

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