

REACHING KUMBAYA: OVERCOMING THE OBSTACLES TO SUCCESSFUL MEDIATION OF ENVIRONMENTAL DISPUTES

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Many an experienced neutral with an otherwise stellar record of resolving complex disputes has found multi-party environmental cases to pose particularly thorny challenges. Most challenging, perhaps, are pollution cases arising under the federal Superfund law, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),¹ and its state law counterparts. Because of CERCLA's expansive liability scheme, a typically very large amount in controversy, and uncertain case law, Superfund cases can be difficult to resolve amicably once they are launched. After reviewing the potential roadblocks to a successful mediation, this article will discuss the tools available to those attempting to mediate disputes. Those who read past the halfway point will be rewarded with a prediction of what everyone will argue at your next CERCLA mediation.

We are now 38 years into litigation under CERCLA, originally passed in late 1980 and substantially amended in 1986. The statute's famously broad liability scheme imposes retroactive, strict, and sometimes joint and several liability upon four categories of parties with ties to hazardous substance disposal, including current and past owners of contaminated sites, plus those who "arranged for the disposal of hazardous substances"—"generators" in Superfund parlance—and those who transported the hazardous substances, if they selected the disposal site.² The statute's broad definition of "hazardous substances" includes pretty much every substance regulated by another federal statute, except for petroleum and its constituents, plus a host of naturally occurring metals.³ There are a few complete defenses to liability set forth in 42 U.S.C. § 9607(b) that we will

gloss over, since most of them don't work and if you had one you wouldn't be reading about how to settle your Superfund liability.⁴

How CERCLA Works, and Sometimes Doesn't

CERCLA generates both government enforcement and private-party litigation.⁵ Neither the involvement of the U.S. Environmental Protection Agency (EPA) nor a formal listing of a site on the National Priorities List (NPL)⁶ is a precondition to liability or private-party litigation.⁷ The government can (but need not) conduct cleanup work itself and sue to recover the costs; EPA in particular tries to avoid directly funding cleanup where a solvent liable party can be located.⁸ EPA generally takes action only at federally listed sites, where its involvement will necessarily generate an administrative record that will be invoked by private-party litigants seeking to prove or disprove that the work was conducted in accordance with Superfund guidance. The same is true to a lesser extent at non-federal sites, if the working parties opt to involve the state counterpart to EPA.

Because EPA enforcement sites tend to be easier to resolve—if for no reason other than brutal efficiency—this article will focus on mostly private-party sites. Whether a subset of liable parties is willing to take on fieldwork directly depends upon how the government wields its sticks and carrots plus a variety of factors including relative culpability and the hope a privately funded remedial investigation and feasibility study may produce a more cost-effective remedy or at least data that will implicate others. The biggest stick, available to the United States but not states, is the ability to issue a unilateral administrative order, not subject to pre-enforcement review. Failing to comply with such an order without "sufficient cause" can lead to daily penalties, treble damages, or both. What constitutes sufficient cause other than non-liability or a demonstrably crazy remedy is unclear, but if that is your issue you have bigger problems than can be solved by reading this article.⁹ The best-tasting carrot is contribution protection, or immunity from further civil litigation, which arises under 42 USC § 9613(f) upon settlement with the United States or a state. Pocketing contribution protection provides comfort to settling

parties who desire to avoid further litigation and litigation advantage to those who plan to keep litigating.

CERCLA's Challenges to Successful Mediation

So, what challenges does CERCLA pose to a successful settlement, mediated or otherwise?

Moldy or Uncertain Facts

First, there is a paucity of evidence regarding relative culpability at many Superfund sites, particularly at the mediation stage. The acts of contamination giving rise to many hazardous substance sites occurred not only to the passage of CERCLA in December 1980, but prior to the existence of any significant federal environmental regulation and, hence, record-keeping. Hazardous waste disposal was essentially not regulated at the federal level until the 1976 passage of the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* (RCRA). EPA regulations requiring manifesting hazardous waste shipments did not take effect until 1980. The modern version of the Clean Water Act took shape only a bit earlier, in 1972. Meanwhile, industrial operations that contributed to contamination addressed today can date back to the early 20th century. Many sites with groundwater contamination were first impacted by the post-World War II explosion in the use of solvents. With little or no federal record-keeping available, the available evidence may consist of those environmental records required by the vagaries of state and local law, facility purchase or production records, and the recollections of now-elderly employees. There are, of course, some useful surrogates—tonnage records for metal reclamation facilities, production data and perhaps wastewater discharge volumes for sediment sites, and perhaps solvent purchase records for VOC-impacted groundwater sites. But those hoping to apply a robust evidentiary record to a precise allocation formula are bound to be frustrated.

Superfund Remedies Are Bound to Be Costly, but How Costly Can Be Uncertain

A second layer of uncertainty arises because of the nature of the Superfund remedy selection process itself. Superfund remedies come in three sizes: expensive, really expensive, and unimaginably costly. And it takes some time and study to figure out what size fits. Added to cleanup cost expenses are natural resource damages, or damages for restoration or replacement of natural resources (wildlife and their habitat, for instance) caused by hazardous substance releases. State, tribal, and certain federal trustees have standing to seek recovery for these harms.¹⁰

While there are quicker options for addressing acute, short-term risks (for instance, lead-contaminated drinking water in Flint, Mich.), long-term cleanup actions are usually selected after completion of a lengthy remedial investigation (where and what is the pollution?) and feasibility study (what are the options for cleaning it up?).¹¹ Selecting Superfund remedies—in essence, determining the amount in controversy—can be both a science and an art. The Superfund statute itself does not establish specific numeric cleanup criteria, instead calling for EPA to select remedies that “ensure protection of public health and the environment,” considering among other things risk and performance standards that are either directly applicable or “relevant and appropriate.”¹² (The unwieldy acronym for these imported cleanup criteria is “ARARS.”) EPA’s blueprint for investigating and remediating

contamination is set forth in the National Contingency Plan, 40 CFR Part 300 (NCP), and of course the agency has no shortage of guidance. Much like environmental assessments and impact statements under the National Environmental Policy Act, however, the NCP provides more guidance on what to think about when selecting the remedy than what the remedy should necessarily be.

Groundwater Remedies: Expensive to Really Expensive. Take, for one example, a site with contaminated groundwater. Once you figure out what levels of which contaminants are present, selection of a remedial action is not simply a matter of comparing the detecting levels to a list of uniform CERCLA cleanup criteria. Rather, the cleanup goals—and, more importantly, when and where they are to be met—are selected based upon site-specific conditions including risk and end uses of the impacted groundwater. Needless to say, selecting the cleanup goal for groundwater delivered directly to a public drinking water system is easy: the applicable standards would be those set for drinking water under the federal Safe Drinking Water Act.¹³ For purposes of a mediation, then, the parties could assume that the amount in controversy would include the capital cost of buying treatment equipment and thereafter operating it for 30-50 years. Environmental engineers can and do readily estimate those numbers, albeit with some margin of error.

In the absence of a current drinking water use, reaching agreement on the urgency of active treatment and hence the amount in controversy is much more difficult. EPA guidance states that cleanup goals need only be achieved over a “reasonable time frame,” and further that “a restoration time frame of 100 years may be reasonable for some sites and excessively long for others.”¹⁴ Slower is cheaper, and the trend is away from reflexively demanding more expensive pump-and-treat remedies and toward *in situ* approaches including natural attenuation and biodegradation.¹⁵ Site variability and evolving agency attitudes make it impossible to identify the cost of the “average” groundwater cleanup. For purposes of inoculating the uninitiated against sticker shock, however, in July 2009, the Government Accountability Office estimated that 151 of the 1,397 sites then on the NPL would cost more than \$50 million to remediate.¹⁶

Sediment Remedies: Really Expensive to Unimaginably Costly. Presenting even greater uncertainty are sites involving contaminated sediments, whose ranks include rivers impacted by some combination of metals, mercury, and the persistent and formerly ubiquitous polychlorinated biphenyls (PCBs) (for instance, New York’s Hudson River and Onondaga Lake, Wisconsin’s Fox River, and Michigan’s Kalamazoo River). One of the technical challenges to sediment remediation is not doing more harm than good by stirring up buried contaminants. If there is a “typical” sediment remedy, its components usually would include excavating or containing contaminated river banks, dredging shallow and highly contaminated sediments that still pose a risk to fish, and actively or passively ensuring that the rest become entombed. Although Superfund risk guidance assumes that kids will eat contaminated dirt, the same is not true of contaminated, underwater sediments. Rather, the pathway evaluated is consumption of fish whose tissues contain the contaminants.¹⁷ What to excavate and what to cap depends on the agencies’ evaluation of what is necessary to eliminate unhealthy exposure to fish and those who ultimately consume them.

Until a final remedy is selected, significant sediment contamination sites are even more difficult to amicably resolve. And the cost of cleaning them up is typically even more staggering. For instance, on Jan. 3, 2017, EPA issued its Record of Decision for a 10-mile stretch of the Portland Harbor Superfund Site. Among other things, EPA's selected remedy called for dredging 215 acres of impacted sediment, capping an additional 365 acres, and excavating 123,000 cubic yards of impacted river bank. EPA reported that the net present value of this approach—not even the most expensive of those evaluated—was \$1,054,200,000, discounted over 13 years at 7 percent.¹⁸

For a second example, the Eastern District of Wisconsin recently approved a consent decree allocating an estimated \$1.34 billion in cleanup work and natural resource damages regarding the Fox River. NCR and its affiliate Appvion, who both supported the decree, committed to bearing 65 percent of the estimated expenditures, or \$876 million. Georgia-Pacific agreed to a 12 percent share estimated to be worth \$164 million.¹⁹ Only a handful of parties have the sophistication and wherewithal to engineer a settlement of this magnitude. That is one reason why large contaminated sediment cases occasionally buck the trend toward settling large civil cases.

Superfund Sites Typically Feature Lots of Parties, Some of Whom May Be Quite Confused

That brings us to a third challenge at many sites: the presence of dozens or even hundreds of potentially responsible parties, some used to the drill and some not. This is an extreme example, but a potentially responsible party group at the Chemetco, Ill., waste recycling facility recently sued 3,500 parties.²⁰ The Roosevelt Irrigation District sued an even 100 in a groundwater contamination case in Phoenix.²¹ In the late 1980s, defendants in litigation regarding two NPL-listed landfills in Connecticut sought leave to add 1,151 third parties.²²

The Case Law Is Clearer Than It Used to be, But Remains Unsettled

Moreover, we are only now reaching the point where the courts are close to harmony on important legal issues. For instance, there has long been legal and factual uncertainty regarding when parties can be held jointly and severally liable—obviously an important factor in determining the settlement value of a case. That is particularly true in cases brought by other private parties rather than the government. Congress expressly declined to call for joint liability, instead instructing the court in legislative history to adopt the standard of liability under the Clean Water Act as modified by “evolving principles of common law.” That has, in essence, led the courts to evaluate the appropriateness of joint liability under the Restatement (Second) of Torts § 433.

The first several decades of Superfund litigation saw many defendants try and fail to meet their burden of demonstrating divisibility of harm—that is, that the hazardous substances they disposed of caused a harm distinct from that created by those of others. A considerable amount of case law bad for defendants was created at sites such as landfills or waste recyclers where everyone's hazardous substances were commingled. Those facts typically resigned the party with the burden of proof to defeat. Eventually many came to view litigating with the United States a likely lost cause, and instead began seeking settlements that would improve their litigation posture as to other parties.

The desire to avoid the burden of proof generated several decades of litigation about the litigation rights available to one liable

party when suing another. The original 1980 version of CERCLA subjected liable parties to a right-of-cost recovery not only to the United States, states, and Native American tribes that had incurred cleanup costs, but also to “any other person.” The only express difference was that nongovernmental parties were (and are) required to affirmatively prove their costs were incurred consistent with the national contingency plan. The original CERCLA did not contain a right of contribution to those who did not incur cleanup costs.

In 1986 Congress amended CERCLA to add express rights on contribution to defendants “during or following a civil action” (42 U.S.C. § 9613 (f)(2)) and to those who have settled with the United States or a state (42 U.S.C. § 9613 (f)(3)(B)). Alas, Congress failed to clarify whether the new, express rights of contribution were the exclusive remedy for working parties who incur direct cleanup costs and claim the right to seek cost recovery under § 107. Given the typical factual uncertainty at Superfund sites, this issue was heavily litigated. The § 113 plaintiff bears the burden of proving fair contribution on the plaintiff²³ while a party asserting a claim under § 107 could at least assert a claim for joint liability in good faith. At the same time, many liable parties began filing claims for both contribution and cost recovery, figuring that one of the two theories must be available.²⁴

Ultimately the courts of appeal uniformly held that liable party status alone precluded parties who had incurred cleanup costs directly seeking from cost recovery under § 107. The attempted use of § 107 by working but liable parties largely died with denial of *certiorari* in *Pinal Creek Group v. Newmont Mining*,²⁵ when attorney for petitioner John Roberts could not persuade four justices to take up the issue.²⁶ Denial of *certiorari* in *Pinal Creek* reinforced the custom of filing claims for contribution whenever liability was threatened.

That custom died after an attorney named Dale Stephenson actually read §113 and argued that contribution under § 113 only provides a right of contribution under two precise circumstances—during or not available as a matter of course to all caught in the CERCLA net, but only under the two circumstances enumerated in the statute. Eventually the issue reached the Supreme Court, where numerous parties argued against a narrow construction of § 113, noting that the courts of appeal had already deprived them of the right to proceed under § 107. Those policy arguments fell flat, and the Court ruled in 2004 in *Cooper Industries, Inc. v. Aviall Industries, Inc.*,²⁷ that parties who voluntarily incur cleanup costs without settling or being sued have no right to seek contribution under § 113, having met neither of the express preconditions.

That ruling left liable but working parties with *no* CERCLA remedy and eviscerated the theory that liable party status alone eliminates the ability to seek cost recovery under § 107. It became inevitable that the Court would take a case addressing that issue, and it finally did so in 2007 *United States v. Atlantic Research Corp.*²⁸ There, the Court held that liable parties who directly incur cleanup costs can, indeed, seek recovery of them under § 107.²⁹ In other words, the Court should have listened to private citizen John Roberts in 1998.

Because CERCLA would be no fun if all the uncertainty was eliminated, the Court declined to resolve whether liable parties could invoke § 107 cost recovery if they also were eligible to seek contribution under § 113. Stated another way, the unresolved issue was whether costs directly “incurred” but under the compulsion of a government settlement were amenable to a § 107 claim.³⁰ (Most lower courts have since held that parties with a right of contribution cannot seek cost recovery instead.)³¹ Since the Court also assumed

without deciding that liability under § 107 can be joint and several, that left many with a sense of unease.³²

The Court finally provided some relief on that score in *Burlington Northern v. United States*,³³ an opinion rebuking the Ninth Circuit and everyone else for being too hard on defendants seeking to avoid joint liability. Reminding the lower courts of the Restatement (Second) of Torts, the Court noted that defendants could avoid joint liability by demonstrating either divisibility of harm or a reasonable basis for apportioning it. Moreover, instructed the Court, defendants could do so based upon the “simplest of factors.” It is unclear whether the lower courts have taken that instruction fully to heart, but in settlement negotiations and mediation private parties certainly have.

Making Mediation Work Nonetheless

So, how does one deal with these uncertainties in the mediation context?

What Sort of Mediator Might Help?

For the parties, the threshold question is what sort of mediator is best suited to the particulars of your site. Selecting the right one requires an understanding of what it will take each party’s decision-makers to accept a settlement. There are some sites where the work is so expensive that no settlement will be possible now or perhaps even later, either because the uncertainties are too great or because the bureaucratic risk of proposing to management that it write a huge check is insurmountable. There are others where the impediment to settlement is the absence of information, where a mediator can help solve the impasse by facilitating informal discovery, or where settlement can be reached after each party has the opportunity to vent about how unfair the Superfund is. There are others where the corporate decision-maker merely needs to hear from an experienced neutral with gravitas—say, a former judge or a greyhead with decades of Superfund experience—that settlement at a particular level makes economic sense. Each site is different, and each site’s variables demand different skill sets.

At single-location sites like waste recycling facilities or landfills, the mediator’s job is likely to be to ensure that a large number of relatively small parties fairly exchange volumetric information or a proxy for it, and then do the math. Among many others, mediators with an enforcement or forensic accounting background are perfect for this role. The trick at these sites is to ensure that small parties’ demand for precision does not render the entire process cost-ineffective. Complex sites where the parties would benefit from a reality check on their litigation risk may call for a mediator with an encyclopedic knowledge of CERCLA case law. At sites where the attorneys understand the litigation risk but the client needs political coverage to recommend a hefty settlement rather than wait to be compelled by the court, a former judge can come in handy. And sometimes a new face with the necessary skill set can bring a fresh perspective to the conflict and new tools to facilitate a settlement.³⁴

What Sort of Mediation Process Makes Economic Sense?

Superfund mediations run the gamut from one-day, shoot-from-the-hip affairs to months-long processes that involve information exchange, briefs, and expert witness reports. One sign of a good mediator is that he or she asks the parties what process they think might help resolve disputes that otherwise would have to be litigated. Assuming impasse, is the problem a factual vacuum, a dispute

about the application of mostly agreed facts, a disagreement between experts, or the failure of the parties to acknowledge litigation risk?

The impediment to reasonable settlement should dictate the process.

It is common for outside counsel to reach agreement on process issues before the first meeting of the parties with the mediator. Consider the potential value of having a kickoff meeting, in person and with clients, before the process is agreed. Mediation will only succeed if it produces an acceptable outcome at a lower cost. If you and your adversaries can’t even agree on what process is due, then it might be time to pull the plug.

Conversely, discussing the relative merits of different mediation approaches is a good opportunity to build trust with the mediator and the opposing party. Opposing counsel may have told his client that you are stupid, untrustworthy, afraid of the facts, or all of the above. The goal of mediation is to persuade the other side that your view of the relative risks of litigation is the correct one. Displaying a command of the facts and the law while dispassionately discussing how much process is economically rational is the first step to getting there.

With a complex case, it can be tempting to provide the mediator with every conceivably relevant document and decide later what’s important. Providing every last scrap of material in the case does not assist the mediator in identifying issues whose resolution is the impediment to settlement. Even at the earliest state of actual or threatened litigation, you should be able to identify which facts, legal issues, or technical disputes likely will be key. Designing a mediation is not so different than trial preparation. Take advantage of this opportunity; it will help make the mediation more successful and will help identify necessary steps to take should the mediation fail.

Reduce the Agreed Process to Writing

Reducing the agreed process to writing is important to avoid belated disagreements and to minimize the chances that confidential mediation materials may be discovered. Federal Rule of Evidence 408 is a bar to admitting evidence of settlement discussions, but not necessarily an impediment to third-party discovery. And the interested third parties might include the government itself. Apparently to conduct a reality check on claims in negotiations, some years ago EPA requested that parties to a mediation regarding the Kalamazoo River Superfund Site provide the agency with copies of the information and briefs they had exchanged. The parties agreed to do so while asserting the materials were enforcement confidential. Parties that had not participated in the mediation thereafter filed a Freedom of Information Act request for the materials. Because EPA was reluctant to defend the case, the mediating parties ultimately consented to production of the materials. The written mediation agreement should also cite your state’s version of the Uniform Mediation Act. And if there is already pending litigation, conduct the mediation pursuant to a stipulated order.

Determining the Scope of the Mediation

Don’t bite off more than you can chew. The first hints of potential liability at multiparty Superfund sites usually come in the form of a request for information and, thereafter, a general or special notice of liability. Typically the government will demand that some or all of the noticed parties fund at least the remedial investigation/feasibility study (RI/FS), if not the yet-to-be-determined remedy. If the government’s notice letter cast a wide net, then dozens of smaller or *de minimis* parties come out of the woodwork, contest their liability, and/

Party	Typical Goals	Available Sticks	Available Carrots	Typical Challenges	Reasonable Goals and Outcomes
EPA or State	Abatement of any imminent risk; timely completion of remedial investigation and feasibility study and then implementation of remedial action without need to front costs.	Threat of litigation with claim for joint liability; unilateral administrative order not subject to pre-enforcement review under 42 U.S.C. § 9606 (EPA only).	Ability to seek information from non-participating parties under 42 U.S.C. § 9604 (e); possible mixed funding or work carve-out; covenant not to sue; contribution protection under 42 U.S.C. § 113 (f) (2); establishment of administrative record useful for litigation against recalcitrant for private parties who conduct RI/FS; consideration of passive remediation approaches.	Significant parties hiding in the weeds/not shooting the volunteers, particularly as site expands; legal uncertainty regarding whether vehicle for obtaining contribution protection (consent order or consent decree) is detrimental to litigation posture of working parties.	Focus first on immediate control of off-site releases posing current risk; break large sites with commingled contaminants into multiple operable units; defer demanding commitment to implement until after RI/FS is complete and remedy selected.
Natural Resource Trustees	Restoration or replacement of impaired natural resources	Threat of litigation with significant liability, although several only; risk of presumption of correctness when trustee completes assessment work.	Possible mixed funding or devotion of technical resources to joint effort; coordination where multiple trustees are impacted.	Complex science; uncertainty about residual natural resource damages pending selection of remedial action.	Resolution of NRD issues subsequent to remedial action issues.
Relatively Larger Liable Parties	Avoidance of litigation or administrative order; development of reasonable and cost-effective remedy; collection of data necessary to implicate recalcitrant parties; certainty.	Ability to threaten other private parties with litigation; lobbying government for enforcement against recalcitrant.	Willingness to front cost of RI/FS or natural resource damage assessment in the near term and to fund the work in the longer term.	Lack of participation by other culpable parties; uncertainty about cost and finality.	Splitting large sites into distinct operable units that reflect to some extent different sources; settling first on performance of RI/FS; carve-out of work or some past costs for enforcement against recalcitrants.
Relatively Smaller Liable Parties	Avoidance of direct enforcement or private-party litigation.	None.	Money.	Inability of working parties to price settlement value until after remedy selection; effective veto over separate settlement with government held by RI/FS funders; unwillingness of private parties to include defense and indemnity absent exorbitant premium.	Settlement with working group in exchange for sum certain, with premium and reduction of awards provision but not indemnity; possible parallel settlement with government to facilitate contribution protection.

or indignantly demand to be released from all liability in exchange for payment of a small sum certain. Usually the government will decline to engage these parties, suggest they form a group, and refer them to the bigger players.

In this common scenario, realistically all that can be mediated in the near term is how to fund the RI/FS work. At large sites with multiple operable units, there may be more than one, funded by a slightly different cast of characters. The government will almost certainly demand that the parties agree to fund the RI/FS work regardless of its cost. The best you can do may be to fund the work on an interim basis and reallocate the costs later. You will not be surprised to hear that those who have greater culpability favor a *pro rata* interim allocation, and vice versa. At this stage, many RI/FS funders view attempts by *de minimis* parties to make a tiny contribution to be more trouble than it is worth.

It is generally several years before the RI/FS work is done and at least another year thereafter before the government officially

selects a remedy after soliciting public comment. EPA does so via a document called a record of decision (or, for short-term emergency actions, an action memorandum).

Assuming there is to be a settlement, some group of parties needs to agree to implement the selected remedy. The government again will expect those agreeing to implement the remedy to do so regardless of cost. And even those cost estimates have, at the outset, a range of uncertainty. Reaching final agreement on remedial action costs at major sites is likely to take longer than the government is willing to wait for a work commitment, necessitating another interim allocation.

What Arguments to Expect

Because the lower courts have been slow to get the hint from *Burlington Northern* that they need to work harder on divisibility and apportionment, CERCLA case law doesn't provide much guidance regarding what to argue in mediation. The earliest litigated cases

continued on page 67

generally allocated liability based upon the so-called “Gore Factors,” which don’t get you very far. Those factors—listed in an unsuccessful amendment proposed by then Rep. Al Gore—called for costs to be allocated based upon factors such as the amount and toxicity of hazardous substances disposed, cooperation with the government, and others.³⁵

Do not despair. Even at the most complex sites, private parties are finding ways to reach a reasonable apportionment. Of paramount importance at least in negotiated settlements is the doctrine of “cost-causation”—i.e., cleanup costs should be absorbed by those whose hazardous substances require those costs to be incurred. To be sure, many older CERCLA opinions stress that CERCLA imposes liability based upon a relaxed causation element. But that test for mere liability does not preclude parties from recognizing obvious grounds for allocation or apportionment.

At large sediment sites, it’s hard to argue that a downstream party should pay for upstream cleanup it could not logically have caused. The same is true of commingled groundwater sites. Perhaps, for mere liability purposes, a court might assume that commingled groundwater contamination located across miles is a single harm. In the private-party world, that does not deter the parties from settling on a cost-causation basis. The nature of the remedy provides a simple basis for doing so. For instance, metals and volatile organic compounds (VOCs) require different treatment technologies. The parties that released metals requiring that treatment can readily be assigned that cost. Even for commonly released contaminants like VOCs, better fingerprinting technologies can now supplement the traditional methods of groundwater fate-and-transport modeling.

Perhaps the king of complex sites is Onondaga Lake in upstate New York, whose sediment has been impacted by a century of industrial discharges—some directly into the lake, some indirectly via tributaries, and still others indirectly via discharge into the publicly owned treatment works. In turn, the Onondaga remedy calls for dredging contaminated sediment in widely dispersed areas. It is a complex technical problem, but one amenable to potential resolution on a cost-causation basis. Could my discharges into the city sewer reasonably have contributed to a quadrant requiring dredging? Which particular contaminant is driving the need for dredging in that area?³⁶

Managing the Expectations of the Huddled Masses, Yearning to Breathe Free

Everyone’s primary goal in resolving CERCLA liability is certainty. Depending upon enforcement posture, that can be hard to come by, given continuing legal uncertainties and the actions of the government. The potential vehicles for obtaining that are a covenant not to sue from the government, the contribution protection that arises from settling with the government, and a cash-out settlement with the working private parties containing a release and perhaps a defense and indemnity provision.

After placating the government’s demand for technical work, the working parties typically will then engage the non-working ones. They will, of course, want a direct release of liability and defense and indemnity from the working parties, plus a covenant not to sue and contribution protection from a settlement with the government. All for \$100.

Here, again, is where the mediator needs to manage expectations.

Since the working parties inevitably will be required to accept the uncertainty that the remedy will cost more than expected, they will be in no mood to do favors for those avoiding that burden. They will also enjoy some leverage with the government. The government cares more about getting the work funded than it does about easing the fears of smaller, non-working parties.

This is usually the point at which the working parties tell the smaller ones that they are unwilling to settle for a sum certain unless the selling party pays a premium, typically 50 percent or so. The working parties likely will also say they are unwilling to provide defense and indemnification in exchange for a modest contribution. They may suggest instead a reduction-of-awards provision, in which they agree not to pursue against anyone else liability attributable to the settling party. In the face of that provision, a rational non-settling party would opt to try the empty chair rather than seek direct contribution from the settling party.

If history is any guide, then the smaller parties will respond by threatening instead to give their money to the government in order to obtain contribution protection and cut off the working parties’ claims. Here the mediator again needs to explain the cold, hard world of CERCLA. First, the government is unlikely to enter into any settlement that would jeopardize its main goal of getting the remedy funded. Second, the working parties will have made clear that the deal is off if the government settles with parties they intend to sue. Third, it’s far from clear that settling with the government would work.

Settling with the government provides contribution protection only to the extent for “matters addressed” in the settlement, or “covered matters” for short. The government can certainly settle its own claims for oversight costs and the like. And it can also cut off claims for costs to be incurred by a different group of private parties over their objection. In practice, EPA will do so only in the context of an agreement that also contains a commitment by the settling parties to conduct related work. The one example that comes to mind is an administrative settlement between EPA Region 4 and a group of foundries at the Anniston Lead and PCB sites. At the time of the settlement, those parties were subject to claims by Monsanto successors Solution and Pharmacia, who had agreed to conduct work as well. Over their objection, EPA entered into a settlement agreement that provided the foundry defendants with contribution protection, which the foundries then used to obtain summary judgment.³⁷ But EPA did so only after finding that the foundries’ liability at the PCB site was *de minimis*, and only as part of an agreement in which the foundries agreed to conduct residential lead and PCB cleanup valued at approximately \$45 million. That’s a far cry from expecting the government to take your \$150 check and solve your problems. Even then, there would be residual legal uncertainty about whether contribution protection can bar claims properly brought under § 107.

continued on page 74



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(“Without maintaining corridors to larger priority areas or a clustered group, isolation of small priority areas could lead to regional loss of Greater Sage-Grouse.”).

⁷⁷SECRETARIAL ORDER 3353, GREATER SAGE-GROUSE CONSERVATION AND COOPERATION WITH WESTERN STATES (2017).

⁷⁸SAGE-GROUSE REVIEW TEAM, REPORT IN RESPONSE TO SECRETARIAL ORDER 3353 (2017) [hereinafter ZINKE REPORT], https://www.doi.gov/sites/doi.gov/files/uploads/so_3353.pdf.

⁷⁹Notice of Intent to Amend Land Use Plans Regarding Greater Sage-Grouse Conservation and Prepare Associated Environmental Impact Statements or Environmental Assessments, 82 Fed. Reg. 47,248 (Oct. 11, 2017).

⁸⁰Memorandum Opinion, *Otter v. Jewell*, No. 1:15-cv-1566, ECF 67 (D.D.C. Jan. 5, 2017).

⁸¹See *BLM Cancels 10 Million Acre Sagebrush Focal Area Withdrawal Proposal*, BUREAU OF LAND MGMT., <https://www.blm.gov/press-release/blm-cancels-10-million-acre-sagebrush-focal-area-withdrawal-proposal> (last visited Mar. 31, 2018).

⁸²See SECRETARIAL ORDER No. 3360, RESCINDING AUTHORITIES INCONSISTENT WITH SECRETARY'S ORDER 349, “AMERICAN ENERGY INDEPENDENCE” (2017).

⁸³See 80 Fed. Reg. at 59,871, 59,887.

⁸⁴See 80 Fed. Reg. at 59,934.

⁸⁵Continuing local and rangewide population declines also suggest the bird could be on the path to an eventual ESA listing. See *supra* notes 37-42 and accompanying text. It is also worth noting that it was unusual for the USFWS to rely so heavily on prospective actions, in deciding that “adequate regulatory mechanisms” were now in place.

⁸⁶82 Fed. Reg. at 47,249.

⁸⁷See *id.*

⁸⁸ZINKE REPORT, *supra* note 78, Appendix A, at 11. Under BLM's planning regulations, the agency may designate a Research Natural Area “for the primary purpose of research and education” if the area contains unique, threatened, or endangered plants or animals, or other representative or outstanding natural features. 43 C.F.R. § 8223.0-5(a).

⁸⁹BLM, OREGON GREATER SAGE-GROUSE PROPOSED RESOURCE MANAGEMENT PLAN AMENDMENT AND FINAL ENVIRONMENTAL IMPACT STATEMENT 5-11 to -12 (2015), available at <https://www.blm.gov/or/energy/opportunity/finais.php> (last visited Mar. 31, 2018) (defining “key research natural area”).

⁹⁰*Id.* at 5-12; see also *id.* at 2-33 (Objective SD 4, providing that BLM will manage “key RNAs, or large areas within the RNAs,” as “undisturbed baseline reference areas for the sagebrush plant communities they represent that are important for greater sage-grouse” and will “allow[] natural succession to proceed”).

⁹¹See SAGE-GROUSE CONSERVATION PARTNERSHIP, THE OREGON SAGE-GROUSE ACTION PLAN 1 (2015), available at <http://www.dfw.state.or.us/wildlife/sagegrouse/> (last visited Mar. 31, 2018) (emphasis on “steering [human disturbance] activities away from the most important and sensitive areas in order to avoid habitat fragmentation and other impacts”).

⁹²OREGON GREATER SAGE-GROUSE PROPOSED RESOURCE MANAGEMENT PLAN AMENDMENT, *supra* note 89, at 2-18 (Table 2-6).

⁹³82 Fed. Reg. 60,759, Notice of Intent To Prepare Two Great-Basin-Wide Programmatic Environmental Impact Statements to Reduce the Threat of Wildfire and Support Rangeland Productivity (Dec. 22, 2017) (BLM proposal to study the use of fuel breaks, fuels reduction, and rangeland restoration to restore sagebrush habitats).

⁹⁴See 80 Fed. Reg. at 59,941.

Environmental Dispute *continued from page 67*

Managing Your Own Expectations

Attorneys can sometimes get so caught up in doing battle on behalf of their client that they lose sight of the fact that it is ultimately their client's case. If each comment you make to the mediator during a caucus session starts with the word “I,” take a deep breath. This isn't about your fee, or your win-loss record, or the fact that you haven't gone to trial in a few months and you really want to, or the fact that, if everything went exactly right, you could ensure that your client escaped any liability whatsoever. Sometimes the other parties make it very easy. Final numbers that are unrealistic make walking away the only rational option. However, if reasonable allocations and funding terms are forthcoming from the other parties, take the time to discuss these with your client and really listen. The client is relying on your expertise to provide the facts and legal analysis needed to evaluate a business decision that is its to make. ☉

Endnotes

¹CERCLA is now found at 42 U.S.C. §§ 9601 *et seq.* The statute was first substantially amended by the Superfund Amendments and Reauthorization Act of 1986 (“SARA”), Pub. L. No. 99-499, 100 Stat. 1613, and has been tinkered with since.

²See, e.g., 42 U.S.C. § 9607 (a) and *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 901 02 (5th Cir. 1993); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268 (3d Cir. 1992); *O'Neil v. Picillo*, 883 F.2d 176, 178 (1st Cir. 1989); *United States v.*

Monsanto Co., 858 F.2d 160, 171 73 (4th Cir. 1988); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1316 17 (9th Cir. 1986).

³At 42 U.S.C. § 9601(14), CERCLA defines “hazardous substances” to include substances regulated as “hazardous wastes” by the Resource Conservation and Recovery Act, as “hazardous substances” or “toxic pollutants” by the Clean Water Act, or as “hazardous air pollutants” by the Clean Air Act, plus polychlorinated biphenyls (“PCBs”) and everything listed in 40 CFR Table 302.4. Petroleum and its naturally refined constituents are expressly exempted.

⁴One notable exception is the defenses provided to “bona fide prospective purchasers” of previously impaired property acquired after January 11, 2002, which allows parties who conduct proper due diligence and exercise due care to knowingly acquire previously contaminated property. This defense was added by Congress through the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 and now codified at 42 U.S.C. § 9607(o) (r). The authors are unable to readily recall anything else useful done by Congress since that date.

⁵CERCLA both provides a mechanism for cleaning up hazardous-waste sites, and imposes the costs of the cleanup on those responsible for the contamination.” *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989) (citation omitted).

⁶The NPL, 40 CFR Part 300, App. B, is EPA's list of the nominally

continued on page 84

most significant uncontrolled hazardous substance sites.

⁷In fiscal year 2013, for instance, EPA spent about \$400 million of its \$1.1 billion of budgeted appropriations on direct cleanup. U.S. Government Accountability Office, Trends in Federal Funding and Cleanup of EPA's Nonfederal National Priorities List Sites, GAO-15-812 (September 2015).

⁸See 42 U.S.C. § 9606 (b); *Solid State Circuits, Inc. v. EPA*, 812 F.2d 383, 391 (8th Cir. 1987) (objectively reasonable basis is necessary to establish sufficient cause defense); 40 CFR 19.4 (inflation-adjusting daily penalties originally set at \$25,000 per day to \$37,500 per day).

⁹42 U.S.C. § 9601 (16).

¹⁰The purpose of such RI/FS is to “assess site conditions and evaluate alternatives to the extent necessary to select a remedy.” 40 C.F.R. § 300.430(a)(2). An RI/FS “generally includes the following activities: project scoping, data collection, risk assessment, treatability studies, and analysis of alternatives.” *Id.*

¹¹42 U.S.C. § 9621.

¹²42 U.S.C. §§ 300f, 300g.

¹³U.S. EPA, *Presumptive Response Strategy and Ex-Situ Treatment Technologies for Contaminated Ground Water at CERCLA Sites*, Directive 9283.1-12, EPA 540/R-96/023 (October 1996); U.S. EPA, *Rules of Thumb for Superfund Remedy Selection*, Directive 540-R-97-013/OSWER 9355.0-69 (August 1997).

¹⁴See, e.g., EPA, Superfund Remedy Report, EPA-542-R-17-001 24 (15 ed. July 2017), (noting decline in selection of pump-and-treat remedies in favor of *in situ* remedies including bioremediation and natural attenuation); GAO, Superfund: Litigation Has Decreased and EPA Needs Better Information on Site Cleanup and Cost Issues to Estimate Future Program Funding Requirements, GAO-09-656 54-55 (July 2009).

¹⁵GAO, Superfund: Litigation Has Decreased and EPA Needs Better Information on Site Cleanup and Cost Issues to Estimate Future Program Funding Requirements, GAO-09-656 54-55 (July 2009).

¹⁶EPA, Exposure Factors Handbook: EPA/600R.052F (2011 ed.).

¹⁷EPA, Record of Decision, Portland Harbor Superfund Site, (Jan. 2011) <https://semsub.epa.gov/work/10/100036257.pdf>.

¹⁸See Decision and Order Approving Revised Consent Decree. Doc. 1205 in *U.S. v. NCR Corp., et al.*, No. #: 1:10-cv-00910-WCG (E.D. Wisc. Aug. 23, 2017); Plaintiffs' Joint Brief in Support of Motion to Enter Revised Proposed Consent Decree, *id.* At Doc. 1189 (March 29, 2017).

¹⁹*Chemetco Site PRP Group v. A Square Systems Group, Inc., et al.*, 3:18-cv-00179 (S.D. Ill.) Filed February 5, 2018.

²⁰*Roosevelt Irrigation District v. Salt River Project, et al.*, 2:10-cv-00290 (D. Ariz.).

²¹See *B.F. Goodrich v. Murtha, et al.*, 815 F. Supp. 539, 541 (D. Conn. 1993) (largely denying motion for leave to join 1,151 third parties and thereafter sua sponte granting summary judgment in favor of many of them). Case filed February 9, 2018.

²²Contribution claims are expressly governed by 42 U.S.C. § 9613(f) (1), which provides that “[T]he court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.”

²³See *Atl. Research Corp. v. United States*, 551 U.S. 128, 139-40, and n.6 (2007) (§ 107(a) permits cost recovery (as distinct from

contribution) by a private party that has itself incurred cleanup costs).

²⁴See *Pinal Creek Grp. v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997), and cases cited therein.

²⁵See *Tomorrow's News Today: The Future of Superfund Litigation*, 46 Ariz. St. L.J. 537, 541-46 (2014).

²⁶543 U.S. 157 (2004).

²⁷551 U.S. 128 (2007).

²⁸*Atl. Research Corp.*, 551 U.S. at 139.

²⁹*Atl. Research Corp.*, 551 U.S. at 139, n. 6.

³⁰See, e.g., *Agere Sys., Inc. v. Advanced Env. Tech. Corp.*, 602 F.3d 204, 228 (3rd Cir. 2010).

³¹*Atl. Research Corp.*, 551 U.S. at 140 n.7.

³²*Burlington N. & Santa Fe Ry. v. United States*, 556 U.S. 599, 614 (2009).

³³Among the most experienced Superfund neutral are John Barkett of Shook Hardy in Miami, perhaps the only person to have literally read every CERCLA case and arguably in need of an additional hobby; Layn Phillips of Phillips ADR in Orange County, a former U.S. Attorney for Oklahoma and District Court Judge who presided over one of the earliest CERCLA trials, *U.S. v. Hardage*, 750 F. Supp. 1460 (W.D. Okla. 1990), *aff'd*, 982 F.2d 1436 (1992), *cert. denied*, 510 U.S. 913 (1993); and, where a technical background helps, Bill Hengimhle of FTI Consulting in Philadelphia. Fresher faces can be found, among other places, through the National Academy of Distinguished Neutrals.

³⁴See, e.g., *United States v. Colo. E. R.R. Co.*, 50 F.3d 1530, 1536 n.5 (10th Cir. 1995).

³⁵See EPA and NY DEP, Record of Decision for Onondaga Lake Bottom Subsite (July 2005), https://www.dec.ny.gov/docs/remediation_hudson_pdf/onondagalakerod.pdf.

³⁶*Solutia, Inc. v. McWane, Inc.*, 726 F. Supp. 2d 1316 (N.D. Ala. 2010), *aff'd*, 672 F.3d 1230 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 427 (2012).