



## District Court Rejects Hercules' Divisibility of Harm Defense for Vertac Site Liability

In a Memorandum Opinion and Order entered on March 31st, the U.S. District Court of the Eastern District of Arkansas reaffirmed its earlier finding that Hercules Incorporated is jointly and severally liable for CERCLA response costs for the Vertac Chemical Plant Site in Jacksonville, Arkansas. *United States v. Vertac Chemical Corp.*, -- F.Supp.2d --, 2005 WL 820488 (E.D.Ark., 2005). At issue were the cleanup costs incurred by the government with respect to thousands of drums of hazardous waste, above ground media (including tanks, vessels, plant equipment, plant buildings, shredded trash and pallets), soils, foundations, underground utilities, various off-site areas, groundwater and two municipal landfills.

The 93-acre Vertac Site was originally a federally-owned munitions factory. Around 1948, the site was purchased by Reasor-Hill Corporation, which used it to produce insecticide and herbicide products. Hercules bought the site in 1961 and continued the production of herbicides. Hercules buried thousands of drums of pesticide and herbicide wastes left by Reasor-Hill. Until late 1964, Hercules released untreated wastewater directly into Rocky Branch Creek. These wastes included dioxin. In 1964, it constructed a waste water pretreatment system that failed to remove the dioxin. Dioxin is also a byproduct of the manufacture of Agent Orange, which Hercules produced for DOD from 1964-1968. Hercules buried drums containing hazardous wastes from its own operations. The drums were stored prior to burial, and leakage occurred at the point of storage and during transportation. In 1971 Hercules leased the site to Transvaal, Inc., who then purchased the site in 1976 and reorganized as Vertac Chemical Corporation. Vertac did not bury its own drums of hazardous wastes, and when it abandoned the site in 1987, it left behind about 29,000 drums. Over 15,000 of those were stored outside and exposed to the elements. Consequently, many of them were failing.

In the opinion, the Court rejected Hercules' divisibility of harm argument with regard to the Vertac Site, but agreed with Hercules that it had no liability with regard to the Rogers Road Landfill. Hercules had appealed the favorable 1999 cost recovery judgment by the Court partly on the grounds that its divisibility of harm argument had not been adequately considered. The Eighth Circuit Court of Appeals agreed and remanded the case back to the District Court to "address evidence supporting divisibility in light of the proper legal standards." *United States v. Hercules, Inc.*, 247 F.3d 706, 719 (8<sup>th</sup> Cir., 2001).

To prove that the harm was divisible, Hercules had to demonstrate that there was a reasonable basis for apportionment of a single harm, or that there were distinct harms. In its attempt to do so, Hercules argued that it was not liable for the incineration of more than 28,000 dioxin-contaminated drums of waste found on-site, because the drums were accumulated at least three years after it sold the property to Vertac. The Court found that these drums "most likely contained soil contaminated by Hercules' operations ...."

Furthermore, the Court found that the equipment that was used to manufacture both 2,4-D and 2,4,5-T and that produced dioxin was cross-contaminated by both Hercules and Vertac. Thus, Hercules could not show that it did not produce the hazardous substances in the drums, or that these hazardous substances were distinguishable from those produced by Vertac. Hercules also argued that it was not the source of the contaminants in the above ground media and so was not responsible for the costs incurred with respect to them. The Court held that Hercules failed to show that it was not the source of these contaminants. Hercules also sought to apportion the harm to soils, foundations, underground utilities, off-site areas, and groundwater on the basis of the volume of the relevant hazardous wastes that Hercules and Vertac produced during the years that each of them owned the plant. The Court rejected this argument on the grounds that there was no direct correlation between evidence of production volumes based on sales records and the volume of wastes released at the Site.

Although the Court also found Hercules jointly and severally liable for the response costs at the related Jacksonville Municipal Landfill Site, Hercules did succeed in convincing the Court that it was not liable for the cleanup costs at the Rogers Road Landfill Site. The Court found that the evidence supported Hercules' contention that it did not dispose of wastes at that landfill, and the United States was directed to submit a proposed final judgment against Hercules with the Rogers Road response costs removed. Co-defendant Uniroyal Chemical Ltd. (now Crompton Co./Cie.) was again found jointly and severally liable for response costs at the Vertac Site. However, the Court reaffirmed its 1999 contribution-allocation judgment between Hercules and Uniroyal, which allocated 2.6% of the liability for Vertac Site response costs to Uniroyal and the remainder to Hercules.

*For additional information, contact James L. Turner, EPA Region 6, ORC, (214) 665-3159.*

## **Johnson Sworn In as EPA Administrator**

On May 2, Stephen Johnson became EPA Administrator. In a statement to EPA employees, Johnson said that he was "humbled and honored" to be selected by President Bush to lead the Agency. He encouraged transparency in EPA decision-making and noted that the United States has become an example internationally for how "environmental success and economic growth can go hand-in-hand." He also recommended blending "innovation, flexibility and collaboration at the local, state, national, and international levels" to address future challenges.

Johnson, a 24-year veteran of the Agency, has served as EPA's Acting Administrator since January 28.

## In Memoriam: EPA Region 4 On-Scene Coordinator Gerald Foree

EPA Region 4 On-Scene Coordinator (OSC) Gerald Foree died April 4 following a vehicle accident in Anniston, Alabama, where he was assigned to a lead removal site. Foree had worked for EPA for 18 years. Matt Taylor, Acting Branch Chief of the Region 4 Emergency Response Removal Branch, described Foree as a “gregarious, fun-loving guy” with an “exuberant personality.”

Foree began working for EPA while attending Morehouse College in Atlanta, Georgia. He graduated with a degree in chemistry and continued to work with the Agency, eventually becoming an OSC and serving in that capacity for the last eight years. He is survived by a wife, Shaundra, and a daughter, Robyn Little. Family and friends gathered for a celebration of his life on Friday, April 8 at Voices of Faith Church in Stone Mountain.

The EPA OSC website is hosting an online forum where those who knew Foree can leave messages for his family. The forum can be accessed at: [https://www.epaosc.net/viewforum.asp?site\\_id=1492](https://www.epaosc.net/viewforum.asp?site_id=1492).

*For additional information, contact Matt Taylor, Acting Branch Chief, Region 4 Emergency Response Removal Branch, [taylor.matt@epa.gov](mailto:taylor.matt@epa.gov).*

## Congressional Hearing Highlights Potential Areas of Improvement in Brownfields Redevelopment

In an April 5 congressional hearing, the Government Accountability Office (GAO) testified that stakeholders believe current EPA brownfields redevelopment efforts could be improved with the addition of several actions, including the implementation of performance measures to track progress and the creation of incentives for private parties to invest in redevelopment.

The testimony before a subcommittee of the House’s Committee on Government Reform was based on a December 2004 GAO report on EPA’s brownfields redevelopment efforts. The report pointed out that EPA provides the majority of its funds to initial site cleanup activities, such as site assessments, and that EPA has not yet implemented a way to fully measure redevelopment progress. The report said that stakeholders suggested, among other things: the elimination of a Brownfields Act provision that makes EPA funding inaccessible to anyone who purchased a brownfield site before January 2002; the review of revolving loan funds and why they are underutilized; and the implementation of a federal tax credit to offset part of developers’ federal income tax with remediation expenditures. In addition, the GAO suggested the creation of additional measures to track redevelopment progress.

In his opening statement at the hearing Subcommittee Chairman Michael Turner (R-Ohio) said that brownfield sites are abandoned and unused due to federal environmental laws and regulations that encourage the abandonment of contaminated property, and that there must be a federal response to a federally-created problem. Chairman Turner introduced the Brownfields Revitalization Act (H.R. 4480) last year in hopes of encouraging brownfield redevelopment by addressing what he views as the two greatest impediments to such actions: liability and cost. H.R. 4480 includes two principal components: a tax credit of up to 50% for remediation expenses in certain poverty-impacted areas; and 100% liability relief for potentially responsible parties (PRPs) who pay for at least 25% of a cleanup. Chairman Turner said he plans to reintroduce an improved version of the bill this year.

John B. Stephenson, GAO's Director of Natural Resources and Environment, testified that EPA has taken steps to respond to the report's recommendations. For example, EPA has begun work on a data collection tool that will document the progress of state voluntary cleanup programs in its evaluation measures. Brownfields Program officials are also working with personnel in other EPA program offices to measure the total number of acres revitalized through EPA efforts.

Thomas Dunne, EPA's Deputy Assistant Administrator for the Office of Solid Waste and Emergency Response (OSWER), pointed out that since the passing of the Brownfields Law in January 2002, EPA has worked to develop brownfields job training grants, created a tax incentive to encourage private investors, and collected data from grant recipients for evaluation purposes. Dunne also emphasized that EPA is committed to addressing the recommendations in the GAO report. He stated that in response to the report, EPA has already requested an expansion of the number of brownfields sites eligible for federal funding and prepared a report addressing GAO's questions about the revolving loan funds.

A summary of the GAO testimony is available online at: <http://www.gao.gov/cgi-bin/getrpt?GAO-05-450T>. GAO's report, *Brownfield Redevelopment: Stakeholders Report That EPA's Program Helps to Redevelop Sites, but Additional Measures Could Complement Agency Efforts*, is available online at: <http://www.gao.gov/cgi-bin/getrpt?GAO-05-94>.

*For additional information, contact Robert Kenney, Senior Counsel, [kenney.robert@epa.gov](mailto:kenney.robert@epa.gov).*

## **Superfund Commemorating 25<sup>th</sup> Anniversary with Photo History Project**

EPA is collecting photographs for the 25<sup>th</sup> anniversary of the Superfund program. EPA will use select photos to complement an oral history project and to create an image archive, and two photos from each EPA region will be included in a traveling exhibit scheduled to begin December 2005.

The photos can be of landscapes or people connected with Superfund sites. On the entry form that should accompany the photo, submitters are asked to provide a basic description of the photo and indicate which of the following categories the photo falls under: People and Places, Emergency Response, Use of Technology, Reuse/Redevelopment, or Before and After. Only low resolution digital images with minor image editing (e.g., minor color and tone changes or removal of dust and scratches) should be submitted. If a photo is selected, EPA will request a high resolution electronic file of the photograph.

The complete guidelines for submitting photos and the entry form are available on Superfund's 25<sup>th</sup> Anniversary Photograph History Project website at: <http://www.epa.gov/superfund/action/process/photo/index.htm>. Photos must be received by July 1, 2005.

## **Man Sentenced in Idaho Illegal Paint Disposal Case**

On March 10, 2005, the U.S. District Court for the District of Idaho sentenced Robert Patrick Mominee to five months in prison plus five months in-home detention and a \$1,000 fine for illegally transporting hazardous waste, a violation of the Resource Conservation and Recovery Act.

Mominee was an employee of Ponderosa Paint. Together with his father-in-law, Paul Woods, Mominee planned to illegally dispose of 4,500 gallons of waste paint materials. The two men were caught after they transported the waste to Wood's home in Wilder, Idaho and burned some of it in a pit. Burning waste paint materials in this manner may pollute groundwater and emit toxic chemicals into the air. The owner of Ponderosa Paint, Dennis Ellis, offered to pay Mominee and Woods \$1 for every gallon of waste paint removed from his business in order to save nearly \$150,000 in disposal fees.

Several State and Federal entities investigated the case including EPA's Criminal Investigation Division in Boise, the FBI, and the Idaho Department of Environmental Quality.

*For additional information, contact Peter Rosenberg, [rosenberg.peter@epa.gov](mailto:rosenberg.peter@epa.gov).*

## **Citizen's Guide to Institutional Controls Released**

On April 7, 2005, EPA issued "Institutional Controls: A Citizen's Guide to Understanding Institutional Controls at Superfund, Brownfields, Federal Facilities, Underground Storage Tanks, and Resource Conservation and Recovery Act Cleanups" (OSWER 9255.0-98). The document was a collaborative effort of several Office of Solid Waste and Emergency Response offices (including the Office of Superfund Remediation

and Technology Innovation, Office of Brownfields Cleanup and Redevelopment, Office of Solid Waste, Office of Underground Storage Tanks, and Federal Facilities Restoration and Reuse Office) and the Office of Site Remediation Enforcement in the Office of Enforcement and Compliance Assurance. The guide is intended to complement existing EPA program guidance and provide communities with a plain language guide to institutional controls (ICs).

ICs are legal or administrative tools (e.g., permits, deed notices, and easements) put in place at sites to ensure protection of human health. The question-and-answer style guide defines and discusses different types of ICs and explains when they are used; identifies who may be involved in implementing, monitoring, and enforcing ICs; addresses questions about potential reuse and redevelopment; and encourages citizens to help select appropriate ICs and ensure their successful implementation. Input on the guide was provided by OSWER offices and OSRE, the Office of General Counsel, the Regional program staff and attorneys, and several organizations outside of EPA.

The final document is available online at:

<http://www.epa.gov/superfund/action/ic/guide/index.htm>.

For additional information, contact Marisa Guarinello, Office of Superfund Remediation and Technology Innovation, [guarinello.marisa@epa.gov](mailto:guarinello.marisa@epa.gov).

## In The Courts

### District Court Allows Liable Party to State a Claim Under Section 107(a) of CERCLA

#### ***Vine Street LLC v. Keeling*, 2005 U.S. Dist. LEXIS 4653 (E.D.Tex. March 24, 2005)**

*By David Dowton, Office of Site Remediation Enforcement*

On March 24, 2005, the U.S. District Court for the Eastern District of Texas denied, in part, a defendant's motion to dismiss for failure to state a claim and held that the plaintiff, a potentially responsible party that undertook a voluntary cleanup, is able to state a claim under Section 107(a) of CERCLA.

Vine Street LLC ("Vine") owns property contaminated with chemicals that allegedly were released from dry-cleaning machines operated in a laundromat on the site. In addition to claims against prior owners, Vine sued Dow Chemical, the manufacturer of dry-cleaning fluid, under CERCLA and state law. Vine brought a claim under both Section 107(a) and 113(f) of CERCLA. Citing the Supreme Court's recent decision in *Cooper Ind. v. Aviall Services* (125 S. Ct. 577 (2004)), the district court dismissed Vine's claim for contribution under Section 113(f) because Vine Street had not been sued under

Section 106 or 107(a) or legally compelled to incur cleanup costs. The Court, however, concluded that although Vine was liable as an owner under the statute, it found that the “unique circumstances of this case” would not bar Vine from bringing a claim under Section 107(a).

The Court acknowledged that most courts have held that a liable party cannot state a claim under Section 107(a) but noted that in all of those cases the issue was whether a potentially responsible party with a claim under Section 113(f) could concurrently bring a claim under Section 107(a). Here the situation is different, according to the Court, as Vine has no recourse under Section 113(f) since it performed a voluntary cleanup in the absence of an action under Section 106 or 107. The court reasoned that a liable party that voluntarily works to remedy environmental contamination should not have to wait to be sued in order to recover cleanup costs and therefore, Vine can bring a claim under Section 107(a).

*For additional information, contact David Dowton, Office of Site Remediation Enforcement, (202) 564-4228.*

## **7<sup>th</sup> Circuit Allows Citizen Suit Challenging EPA Cleanup in *Frey v. EPA* (Frey II)**

*By Clarence Featherson, Office of Site Remediation Enforcement*

On April 6, 2005, the United States Court of Appeals for the Seventh Circuit (the 7th Circuit), in *FREY v. EPA*, F.3d, 2005 WL767057 (7th Cir. 2005) reversed an Indiana district court’s decision and will allow a citizen’s suit to proceed under CERCLA Section 113(h)(4) challenging an EPA cleanup of three Superfund sites in Indiana. The sites are contaminated with polychlorinated biphenyls (PCBs), dioxin, and other toxic chemicals. The suit was filed by Sarah Frey, Kevin Enright, and the organization Protect Our Woods (collectively referred to as "Frey").

CERCLA’s Section 113(h)(4) permits a plaintiff to challenge cleanup efforts at Superfund sites when a response action is completed. See *Frey v. EPA*, 270 F.3d 1129, 1133 (7th Cir.2001) (Frey I). Frey argued that her suit met the statutory criteria for a citizen’s suit because EPA and performing potentially responsible parties (PRPs) have completed the designated remedial action under EPA’s administrative record of decision (ROD) for the three sites (cleanup of PCBs) and have not yet selected further remedies.

The district court held that Frey's action was (still) premature because EPA made it clear that it is studying further cleanup options for the three sites challenged in the lawsuit: Lemon Lane Landfill, Neal's Landfill, and Bennett's Dump. The 7<sup>th</sup> Circuit, however, reversed the district court’s decision and ruled that because EPA failed to provide any objective referent by which to measure its progress. The 7<sup>th</sup> Circuit said in its analysis that EPA needs to deal with the issue of whether the record shows that only a stage of the remedial action has been completed or if it shows that an entire remedial measure has

been completed. The question arose because Viacom, PRP for the site, had completed certain targeted excavation at the site, but EPA is actively considering how to deal with water treatment and sediment removal for the site. Viacom is conducting investigations to provide technical data necessary to inform this decision

The court's concern was that EPA could study the water and sediment contamination for an indeterminate period of time without taking any remedial action and totally preclude judicial review. The court said that for EPA to delay the suit, it must point to some objective referent that commits it and other responsible parties to an action or plan. The court stated that no such objective evidence exists in this record. The 7<sup>th</sup> Circuit specifically focused on the fact that there is no timetable or other objective criterion by which to assess when EPA's amorphous study and investigation phase may end. It stated that EPA cannot preclude review by simply pointing to ongoing testing and investigation, with no clear end in sight.

To reach this conclusion, the court considered the suggested reading of the text of CERCLA Section 113(h) to preclude citizen suit review before a response action "selected" by EPA is complete. Once the "selected" action is complete, CERCLA Section 113(h) does not apply. The court found that EPA had completed the "selected" excavation remedy through its ROD process, but had not based on record of this case "selected" the water treatment and sediment removal actions. Thus, in this case, plans for groundwater and sediment actions cannot reasonably be characterized as later stages of the excavation and there is no evidence of any kind, according to the court, that EPA will be doing anything specific in the future with this site.

The court stated, "We conclude only that there must be some objective indicator that allows for an external evaluation, with reasonable target completion dates, of the required work for a site. (Although we are sure that EPA would not try to avoid the statute by submitting a 100-year plan, we note that such a target date would obviously be unreasonable.)"

### **Background**

On April 20, 2000, Sara Frey and other plaintiffs filed a citizen suit under CERCLA challenging various aspects of the cleanup of three related hazardous waste sites in the Bloomington, Indiana area. On January 13, 2003, EPA filed a motion for summary judgment on the grounds that the remedial actions being challenged were not complete (EPA is presently conducting investigations and is in the process of deciding what additional remediation needs to be taken) and thus, the plaintiffs' challenge is barred by CERCLA Section 113 (h)(4). In granting EPA's motion for summary judgment, the court expressly rejected the plaintiff's position that it may sue when one stage of the remedial action is complete, but before further action has been taken. The court cited its decision in Frey I (also involving Sara Frey) which held that CERCLA Section 113(h)(4) (although allowing judicial review of operations and maintenance after remediation is complete) bars litigation when EPA is undertaking "active steps" to implement a remedy.

*For additional information, contact Clarence E. Featherson, Office of Site Remediation Enforcement, (202) 564-4234.*

## **Tidbits**

### **Memo Reaffirms Commitment to Cost Recovery**

On April 5, the management of the Office of Enforcement and Compliance Assurance, the Office of Solid Waste and Emergency Response, and the Department of Justice's Environment and Natural Resources Division sent a memo to the Regional directors reaffirming EPA and DOJ's commitment to cost recovery. The memo was signed by OECA Acting Assistant Administrator Thomas Skinner, OSWER Deputy Assistant Administrator Thomas Dunne, and DOJ ENRD Assistant Attorney General Thomas Sansonetti. The memo asserts that cost recovery provides money to the Superfund Trust Fund for use at other sites and reinforces EPA's "Enforcement First" strategy which encourages potentially responsible parties (PRPs) to perform the work at Superfund sites. Recovering costs when PRPs have been identified is also a stated goal of CERCLA. The memo stressed efficiency in cost recovery and encouraged the Regions to focus on cases with past costs over \$200,000.

A Superfund 120-Day Study requested by Acting Deputy Administrator Stephen Johnson in 2004 suggested that senior management in EPA and DOJ "affirm their commitment to cost recovery."

### **Collaborative Cleanups: Revitalizing America's Communities - May 23-24, 2005**

Please join us May 23 and 24, 2005 at the Keystone Resort in Keystone, Colorado for a community-based meeting on collaborative solutions to complex cleanups. Hosted by EPA, this meeting will explore how federal, state and local cleanup agencies and communities can collaborate to better integrate complex, multi-site cleanups with large scale revitalization and community development planning.

For more information and to register, visit the conference website: <http://ems-mx4.sradev.com/uri-ocp/index.cfm>

## **Calendar**

**May 23-24, 2005**

Collaborative Cleanups

<http://ems-mx4.sradev.com/uri-ocp/index.cfm>

Keystone, CO

**May 23-27, 2005**

National Association of Remedial Project Managers (NARPM) Meeting

<http://www.epanarpm.org/narpm2005/home.htm>

Phoenix, AZ

**July 12-15, 2005**

2005 Community Involvement Conference and Training

<http://www.epancic.org/2005/overview.cfm>

Buffalo, NY

## Glossary

EPA	Environmental Protection Agency
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
DOD	Department of Defense
DOJ	Department of Justice
ENRD	Environment and Natural Resources Division
FBI	Federal Bureau of Investigations
ICs	Institutional controls
OECA	Office of Enforcement Compliance and Assurance
OSC	On-scene coordinator
OSRE	Office of Site Remediation Enforcement
OSWER	Office of Solid Waste and Emergency Response
PCBs	Polychlorinated biphenyls
PRP	Potentially responsible party
ROD	Record of decision

## Subscription Information

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We have developed an electronic supplement to the *CleanupNews* print edition called *CleanupNews II*. The print issue will still be available four times a year, and the newsletter will be delivered electronically nine times a year (four issues consisting of the print edition text and five issues consisting of supplemental news).