Superfund and Natural Resource Damages Litigation Committee Newsletter

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MESSAGE FROM THE CHAIR
John F. Gullace

Superfund is undergoing an unprecedented level of scrutiny from the Trump administration. Whether this scrutiny will result in long-term, fundamental changes to how Superfund is administered by the U.S. Environmental Protection Agency (EPA) remains to be seen. On May 22, 2017, EPA Administrator Pruitt established an EPA task force to “provide recommendations . . . on how the agency can restructure the cleanup process, realign incentives of all involved parties to promote expeditious remediation, reduce the burden on cooperating parties, incentivize parties to remediate sites, encourage private investment in cleanups and sites and promote the revitalization of properties across the country.” Pruitt Memorandum (May 22, 2017). The ABA SEER Superfund and Natural Resource Damages Litigation Committee will continue to closely track these developments in Washington and will strive to provide its committee members with up-to-date news alerts, articles and programming on these developments, and other topics of interest to its members. If you have suggested topics for the committee to address this coming ABA year, please feel free to contact me with your topic ideas. On behalf of the committee leadership, thank you for your membership.

John F. Gullace, Esquire
Manko, Gold, Katcher & Fox, LLP

MESSAGE FROM THE VICE CHAIRS
Kate Campbell, Brian Ferrasci-O’Malley, and Carolyn L. McIntosh

Welcome to the Superfund and Natural Resource Damages Litigation Committee’s third and final newsletter issue of the 2016–2017 ABA calendar year! This issue provides four topical reads for our committee members. In the first article, our very own Kirk O’Reilly writes about the use and potential limitations of modeling to set remedial limits at contaminated sediment sites—an issue that EPA recently addressed in its 2017 memorandum setting forth updated risk management principles for the remediation of such sites. In the second article, Bonnie Barnett and Leigh Bausinger from Drinker, Biddle & Reath LLP team up to discuss the potentially significant paradigm shift presented by EPA's 2017 memorandum, and to compare the updated principles set forth therein with the “Horinko Principles” that have been in place for the past 15 years.

In our third article, we switch ground to talk about best practices for estimating and disclosing environmental liabilities, with Scott Shock from Exponent and John Rosengard from Environmental Risk Communications, Inc., summarizing for our readership which accounting references are current and which are not, and how best to inform and advise clients on this important topic. Finally, Brent Owen from Squire Patton Boggs, addresses the U.S. Supreme Court’s June 26, 2017, decision denying New Mexico’s bid to secure the Court’s original jurisdiction, for only the 147th time, in a case against Colorado involving the 2015 Gold King Mine spill. Many thanks to our authors, and we hope you enjoy!
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EPA AND GAO REITERATE THE NEED FOR CAUTION WHEN USING MODELS TO SET REMEDIAL LIMITS
Kirk O’Reilly
Exponent

In 2002, the U.S. Environmental Protection Agency (EPA) published “Principles for Managing Contaminated Sediment Risks at Hazardous Waste Sites.” In a 2016 Report to Congressional Requesters, the Government Accountability Office (GAO) evaluated how these principles were being applied at Superfund sediment sites. Partially in response to the GAO report, EPA published a memorandum clarifying risk management recommendations (U.S. EPA, 2017. OLEM Directive 9200.1–130). The purpose of this article is to discuss issues raised in these documents related to the use of models to set remedial goals.

A key driver for remediation at many sediment sites is risk associated with the presence of polychlorinated biphenyls (PCBs) in fish. To set sediment concentration limits, site managers assume sediment is the primary source of PCBs in fish, and then, using a food web model to characterize current relationships between sediment and fish tissue concentrations, they assume the model can predict sediment concentrations that will result in target tissue concentrations.

One of EPA’s risk management principles is: “Carefully Evaluate the Assumptions and Uncertainties Associated with Site Characterization Data and Site Models.” The guidance recommends that site managers carefully evaluate and describe the uncertainties and limitations of models, including food web models, used to extrapolate future site conditions, stating that “the calibration of models at large or complex sites should be peer reviewed consistent with the Agency’s peer review process as described in its Peer Review Handbook.” The handbook describes a formal process of peer review for technical work used to support decisions with the potential for significant economic impact. A critical question to consider is whether the model is appropriate for its intended use. A food web model commonly used at Superfund sites was developed to evaluate bioaccumulation in aquatic ecosystems under steady state conditions (Arnot & Gobas, 2004. Envtl. Tox. & Chem. 23:2343), not to predict the effect of sediment remediation.

The 2016 GAO report highlighted differences in how EPA headquarters and different regions consider and use food web models. While all noted technical challenges, some regions consider the models sufficiently predictive to support site management decisions including setting remedial goals. Other regional officials realized that given the unclear relationship between the sediment and fish tissues concentrations, setting remediation targets based on models may not result in desired improvements in the level of contamination in fish. Headquarters staff expressed concern that since site managers have a need to make predictions, some project teams have ignored uncertainties and have used food web models as if they accurately forecast the future.

In its response to the GAO report, EPA updated the above-mentioned risk management principle to: “Consider the limitations of models in predicting future conditions for purposes of decision making.” The agency acknowledges that technical uncertainties limit a model’s ability to accurately depict future conditions and that EPA documents have sometimes presented predictions of future sediment and fish concentrations “with a degree of certainty that fails to account for the inherent unknown accuracy of those predictions.” The discussion of models concludes with the statement that “[s]ince the accuracy and uncertainty of future projections are generally not known, the use of and comparisons among quantitative endpoints (e.g., time to achieve a sediment or biota contaminant level) should be made with a high degree of caution, if at all.” These conclusions are consistent with a technical evaluation by the U.S. Army Corp of Engineers’ Research and Development Center that found food web models applied at Superfund sites have little predictive power (Gustavson et al. 2011. ERDC TN-DOER-R17).
The Record of Decision (ROD) for the Portland Harbor Superfund site, issued within a week of the updated guidance, failed to follow the agency’s own recommendations. Uncertainties and limitations associated with developing remedial goals based on use of a food web model are not sufficiently described in either the ROD or the Portland Harbor Feasibility Study. Reviewing the site’s administrative record, I could find no evidence that the modeling exercise was subject to the type of peer review recommended in EPA’s 2002 Principles document. Concerns about uncertainties inherent in EPA’s use of the food web model were raised in public comments to the Proposed Plan. In its response published in the ROD, EPA implied that since it only approved a modeling approach developed by others, it need not defend its use. In contrast to the conclusion presented in EPA’s 2017 guidance that the predictive ability of such models is unknown, the ROD claimed that the model established appropriate predictive relationships between sediment and fish tissue concentrations to support development of remedial goals.

The use of models to predict future tissue concentrations can result in expectations with potentially legal implications. As described in the ROD for the Hudson River CERCLA site (U.S. EPA 2002), sediment transport and bioaccumulation models were used together to estimate the time required to meet risk-based concentration targets as part of the remedial alternatives evaluation and selection. Using an approach that emulated EPA’s model, National Oceanic and Atmospheric Administration scientists evaluated post-remediation data and concluded that reaching target fish tissue concentrations will take longer than EPA predicted (Field et al. 2016. Sci. Total Env’t. 557:489). This controversy was not lost on state regulators. In 2016, letters to the EPA’s regional administrator, New York attorney general, and Commission of the New York State Department of Environmental Conservation have requested that the agency expand the scope of its current five-year review and reevaluate key issues related to risks associated with fish consumption. The AG also requested that EPA withhold issuing a Certificate of Completion of Remedial Action absent EPA’s finding that the ROD’s remedial action objectives have been met and that the selective remedies are protective. In a May 2017 letter to EPA Administrator Pruitt, members of New York’s congressional delegation noted the failure of fish concentrations to decrease as predicted in their request that the agency require additional remediation.

While this article raises questions about specific applications of food web models, the purpose is not to argue that they cannot be useful in evaluating the behavior of chemicals in the environment. The issue is whether and how they should be used in managing contaminated sediment sites. Benefits of the EPA Principles and the GAO report are that they describe a process that EPA site project managers should follow if models are used in setting remedial limits and provide agency guidance language that potentially responsible parties can cite in negotiations. A useful approach for identifying and evaluating technical concerns is the EPA peer-review process whose use is recommended in the 2002 Principles. Such an independent evaluation can focus on the applicability of the model for its proposed purpose, the science underlying model assumptions, and how to characterize the resulting uncertainty for decision makers and stakeholders. Whatever process is used, it is important that this requirement be met: “The uncertainties and limitations of site characterization data, and qualitative or quantitative models (e.g., hydrodynamic, sediment stability, contaminant fate and transport, or food-chain models) used to extrapolate site data to future conditions should be carefully evaluated and described.”

Kirk O’Reilly, PhD, JD, a Senior Managing Scientist in Exponent’s Environmental Sciences Practice, has 28 years of experience developing strategic approaches for managing liabilities associated with both large and small contaminated sites. Dr. O’Reilly is past chair of the ABA’s Superfund and NRD Litigation Committee, a Fellow of the American Bar Foundation, and a member of the Washington State Bar.
EPA’S ELEVEN CERCLA PRINCIPLES 2.0: PARADIGM SHIFT OR OLD WINE IN A NEW BOTTLE?
Bonnie Allyn Barnett, Esq. and Leigh Bausinger, Esq.
Drinker Biddle & Reath LLP, Philadelphia, Pennsylvania

Introduction

In February 2002, Environmental Protection Agency (EPA) Assistant Administrator Marianne Lamont Horinko issued a memorandum entitled “Principles for Managing Contaminated Sediment Risks at Hazardous Waste Sites” (OSWER Dir. 9285.6-08) (EPA 2002). This memorandum established 11 principles, now colloquially known as the “Horinko Principles,” aimed at ensuring consistency in remedial decision making across CERCLA sediment sites throughout the country.

That same month, the Hudson River Record of Decision was issued. And over the next decade and a half, Records of Decision were issued in some of the largest CERCLA sediment megasites in the country, including the Gowanus Canal in New York in September 2013, the Lower Duwamish Waterway in Washington State in November 2014, the Lower Passaic River in New Jersey in March 2016, and the Lower Willamette River, Portland Harbor, in Oregon in January 2017. The total cost of the cleanups at these sites will easily exceed $4 billion.

With that backdrop, in January 2017, EPA issued an updated set of principles, drawing on what it termed “lessons learned” since the publication of the Horinko Principles. That memorandum, authored by EPA Assistant Administrator Mathy Stanislaus and somewhat awkwardly titled “Remediating Contaminated Sediment Sites—Clarification of Several Key Remedial Investigation/Feasibility Study and Risk Management Recommendations, and Updated Contaminated Sediment Technical Advisory Group Operating Procedures” (OLEM Dir. 9200.1-130) (EPA 2017), also contains 11 principles. While EPA notes that these 2017 Principles are not intended to supersede the Horinko Principles (or any other CERCLA guidance), a comparison is both inevitable and potentially useful in divining EPA’s current thinking as remedial costs at sediment megasites continue to skyrocket.

A Dose of Realism

One of the more remarkable aspects of the 2017 Principles is what appears to be an implicit recognition of the impossibility of total remediation at many sediment sites. As the agency and the regulated community add to the growing body of technical information, it has become increasingly apparent that contamination at large sediment sites is influenced by a complex web of variables, some of which extend beyond the site in question. Understanding background contaminant levels, nearby reference sites, and the influence of non-CERCLA factors is an important step in setting remedial objectives that are realistic and implementable. The 2017 Principles appear to advocate for this approach:

EPA recognizes that, because of site conditions, background contamination and the current limitations of available remedial technologies, achieving protective fish tissue or sediment concentrations may take many years to achieve, or may not be possible within a reasonable time frame . . . In instances where risks unrelated to the CERCLA release exist, the site’s risk reduction expectations . . . should generally be based on contaminant concentrations in fish and sediment that are achievable by remedial action. (2017 Principles at 7)

Relatedly, Principle #4 recognizes the practical need to gather data to understand the connection between site contaminants and risk, as well as potential confounding factors, noting that “an adverse response in a tested sediment may not definitively inform whether a site-related hazardous substance is a source of toxicity.” (2017 Principles at 5)

Reference sites are of particular use in this exercise “to help identify and distinguish between site-related risk drivers and ubiquitous stressors.” (Id.)
The 2017 Principles’ endorsement of reference sites and background concentrations makes practical sense in theory, but the rubber meets the road when particular reference sites must be selected. Regional contamination that exceeds the boundaries of a particular Superfund site must be considered in reference site selection negotiations among EPA, community stakeholders, and potentially responsible parties charged with implementing cleanups. Areas of high regional contamination from multiple sources—such as the Newark Bay Complex, implicating the Passaic River, Berry’s Creek, the Hackensack River and Newark Bay itself—present particular challenges that remain unresolved. How will the need for practicality and realistic goals at individual sites be integrated with adequate protection of human health and the environment? Are reference sites still useful when they ultimately end up within a Superfund site?

Another facet of realism raised by the 2017 Principles is the express recognition of the limitations of modeling: “Regardless of their sophistication and level of complexity, models are simplifications of the complex environmental processes and the time and spatial scales over which the processes occur.” (2017 Principles at 8) The principles go on to very clearly warn against falling victim to the false precision offered by models in making remedial decisions and, in particular, in predicting future outcomes. (See, e.g., 2017 Principles at 8.) Given the proliferation of the use of modeling at megasites, this is an important reminder of the proper place of models as one of many tools in the toolbox, but not the definitive answer to all remedial questions.

Adapting to Adaptive Management

The Horinko Principles planted an important tent pole in outlining the benefits of an “iterative approach,” particularly at complex sediment sites. (See Horinko Principles at 5.) Pilot testing, early actions, and interim actions were all referenced as mechanisms for implementing an iterative approach aimed at risk-based remedies.

The 2017 Principles seek to retool that iterative approach with a heavy emphasis on adaptive management. Principle #8 contains specific steps for project managers to use in implementing an adaptive management approach. The link between early actions targeting the most heavily contaminated source areas and the potential for increased use of less invasive remedial strategies, such as monitored natural attenuation, is a concept woven throughout the 2017 Principles.

Some EPA regions have already begun to embrace this approach. For example, EPA Region 2 is very deliberately taking an adaptive management approach at Berry’s Creek in northern New Jersey. There, the contemplated remedy likely will take the form of multiple phased RODs, addressing particular areas of the site first with follow-up monitoring to evaluate remedial effectiveness and determine the scope and extent of any subsequent RODs.

A recent example, however, shows that there is still work to be done before adaptive management is fully integrated into the remedial toolbox. At the lower Willamette River, part of the Portland Harbor site, Region 10 initially proposed a plan that involved an iterative approach for the 10-mile stretch of river. That plan favored more limited dredging with additional dredging and remedial action to be determined based on monitoring results over time. However, that plan faced significant public comment, advocating for a more aggressive cleanup. The final ROD adopted the more aggressive plan, resulting in a much larger dredge project. Rather than the initially proposed seven-year project costing $746 million, EPA estimated that cleanup specified in the ROD will take 13 years and cost $1.05 billion.

It remains to be seen whether and how adaptive management will be implemented. Will it become a basis for ultimately requiring more remedial intervention performed in multiple stages? Or will early actions really be given the time and space needed to seriously evaluate the results of source control to determine whether it is effective at risk reduction? Under a truly adaptive approach, robust
pre- and post-action monitoring will be used to determine the need for any additional targeted remedial actions. But it takes a level of patience on the part of both the regulators and the public, and it’s unclear whether adaptive management will be given the time it needs to succeed.

**Stakeholders Take a Step Back?**

The Horinko Principles put significant emphasis on the involvement of stakeholders. One of the principles’ stated purposes is to encourage the consideration of “the societal and cultural impacts of existing sediment contamination and of potential remedies through meaningful involvement of affected stakeholders.” (Horinko at 1) Principle #2 states it most succinctly—“Involve the Community Early and Often.” (Horinko at 3) Mechanisms like Technical Assistance Grants are specifically referenced in calling for EPA project managers to actively seek out community input.

The 2017 Principles, on the other hand, are noticeably more restrained in advocating for stakeholder involvement. None of the principles directly discusses the role of the community in any meaningful way, instead favoring more technically focused priorities. Indeed, the only arguable mention of stakeholder involvement is in Principle #11, which highlights the need to consider federally authorized navigation channels—and the largely commercial entities that use them—when selecting among remedial alternatives at CERCLA sediment sites. This shift in emphasis cannot avoid the legal requirements of the National Contingency Plan but may be somewhat instructive of EPA’s current view of the importance of stakeholder involvement at large in technically complex sediment megasites.

**Conclusion**

The 2017 Principles raise the potential for a real paradigm shift in the remediation of complex sediment Superfund sites. They recognize the practical limits of current science and technology in achieving sometimes impossibly low cleanup standards in a realistic time frame. Adaptive management—in the form of early source control—was a concept in the original Horinko Principles, but it has not been implemented often. It remains to be seen whether it is a concept whose time has truly come, as we look for more efficient and effective ways of managing risks posed by sediment megasites, especially in light of the new administrator’s emphasis on the Superfund program and desire to weigh in on costly sites.

Bonnie Barnett Esq., is a partner in the Philadelphia office of Drinker Biddle & Reath, where she combines an active Superfund and environmental litigation practice with regulatory counseling and transactional work.

Leigh Bausinger, Esq., is a senior associate in the Environment & Energy Group in the Philadelphia office of Drinker Biddle & Reath. Her practice includes regulatory and litigation matters under a host of environmental statutes, including CERCLA.
HAZARDS OF RELYING ON SUPERSEDED ACCOUNTING REFERENCES FOR ENVIRONMENTAL LIABILITIES: IMPLICATIONS IN NEGOTIATIONS, BUDGETING, AND DISCLOSURE RELATED TO SUPERFUND SITES
Scott Shock
Exponent
John Rosengard
Environmental Risk Communications, Inc.

If you wanted to read the key accounting literature on environmental liabilities, you wouldn’t need to buy a book or hire a CPA to read over your shoulder. If you printed out the relevant pages, there would be fewer than a hundred. It might take several uninterrupted hours to read them. You would just need to put in the time.

That may be asking too much for some people, but if you did take the time, what would you find? The basics include these key concepts:

1. **Bias toward recognition instead of deferral.** Liabilities should be booked, monitored, and discharged as efficiently as possible. This is the same general approach as for pensions, medical benefits, and other types of long-term liabilities.

2. **Revenue matching principle in full effect.** The cost to produce today’s revenue should be fully burdened with all relevant costs. Pushing certain costs off to the next generation due to complexity, optimism, or convenience will fail.

3. **No limits on time horizon.** Just because a cost will hit in 2030 or 2070 doesn’t mean it can be overlooked or omitted from an evaluation.

4. **Stable rules without heavy CPA enforcement.** For a number of reasons, now is an optimal time to make the transition to more complete evaluation of environmental liabilities; recognizing patterns (e.g., for reserves and spending) and managing to consistent outcomes helps everyone measure similar liabilities in similar ways.

Meanwhile, accounting standards have been modified over the last 20 years to increase transparency and improve the reliability of financial statements. Changes include:

1. **A new type of environmental liability.** “Asset Retirement Obligations” (AROs) were adapted from the oil/gas exploration industry for the electric utility industry in 2001 and now apply to all U.S. companies; for governmental agencies, this starts in 2018. In less than 20 years, companies that thought of environmental liabilities as Superfund sites now see their Resource Conservation and Recovery Act (RCRA) closures, demolition, and other end-of-asset-life expenses in a new way.

2. **Acknowledgment that there are obligations.** Obligations are different from commitments, contingencies, and guarantees, and some sites have characteristics of more than one liability type.

3. **Preference for present value and fair value measurement methods.** Presume an orderly market, and keep searching for the arm’s length price for a liability. “Probable and reasonably estimable” are still building blocks, but liability value is rarely the same as a three-year budget.

Thus, there are now five types of environmental liabilities to be considered: asset retirement obligations, environmental obligations (also referred to as environmental remediation liabilities), commitments, contingencies, and guarantees. Recognition, estimation, and disclosure of these types of environmental liabilities are addressed in a format useful for non-accountants in ASTM standards E2137-17 (Standard Guide for Estimating Monetary Costs and Liabilities for Environmental Matters, available at https://www.astm.org/Standards/E2137.htm) and E2173-16 (Standard Guide for Disclosure of Environmental Liabilities, available at https://www.astm.org/Standards/E2173.htm). These standards were substantially updated in 2016/2017 to capture current best practices from the accounting literature.
The evolution in accounting standards and associated methods has resulted in a situation where not all users are up-to-date with their practices for recognizing, estimating, and disclosing environmental liabilities. The following summarizes several recent significant changes to generally accepted accounting principles:

- Superseded reference: FASB 5 (1975)—Environmental liabilities as “contingencies”
- Current Reference: ASC 410 & 450 (2009)—Enforceable “obligations” redefine what is “probable and reasonably estimable”
- Superseded reference: FASB 143 (2001)—Asset Retirement Obligations (AROs)
- Current Reference: ASC 410-20 (2009)—AROs can come from normal, safe operation of an asset; a spill or accident is not a pre-condition
- Superseded reference: SOP 96-1 (1996)—Environmental Remediation Liabilities (ERLs)
- Current Reference: ASC 410-30 (2009)—Environmental remediation liabilities are now generally “obligations,” separate from “contingencies”

Articles are written, presentations given, and advice and guidance offered based on outdated and superseded accounting references. What are the implications of this kind of error? How might it impact companies relying on that advice or those superseded references? How might it impact outcomes at multiparty Superfund sites, for example? And how might that impact capital stewardship and shareholder value?

Publicly available company reporting data show an upward trend of environmental liabilities, especially given the significant growth in asset retirement obligations. These data provide evidence that past practices are not resulting in good forecasting of environmental liabilities, nor are they resulting in good capital stewardship.

At multiparty Superfund sites, the use of outdated and superseded references (and associated thinking) may lead to predictably bad outcomes, as illustrated by the following examples.

**Example—Decision to Defer Cleanup:** A Fortune 500 company determines its strategy as a potentially responsible party (PRP) in a large expensive Superfund cleanup is to defer the work for over 15 years and to self-insure counterparty risk. During that time, the plume expands and the other PRPs regularly file for bankruptcy. By making the decision to defer work, the company eventually faces both a higher cost and a higher allocation. Combined, the liability grows at triple the rate the company anticipated when they made their initial decision to defer response.

**Example—Decision to Defer Recognition:** A utility is building a rate case. By deciding to defer recognition or booking of certain long-term liabilities, the utility misses out on achieving higher immediate recovery before any assets are spun off. Eventually, when costs are recognized and paid, all recovery opportunities have been lost.

**Example—Decision to Ignore Remedy Failure Risk:** Following a cost-conscious decision to use monitored natural recovery at a multiparty sediment site, a company learns that regulators are changing the cleanup levels for two contaminants of emerging concern found in the sediment. The new remedy will be more expensive. By failing to analyze and include the risk and associated cost for remedy failure during a cash-out process for smaller parties, the remaining PRPs shoulder a greater share of the liability and will also be responsible for resetting community expectations about a required remedy.

**When Is Use of Generally Accepted Accounting Principles for Environmental Liabilities Tested?**

An enterprise has its capital stewardship of environmental liabilities tested regularly:
At a strategic transaction, like a merger, spinoff, or business shutdown; environmental liability estimates are reset based on free market pricing (i.e., fair value measurement methods), and impediments to repurposing assets change quickly.

During audits, when accountants ask why liabilities are not responding to spending.

In budgeting, when an enterprise decides how and why to discharge specific liabilities.

During end-point selection, when an enterprise decides what “done” or “clean enough for now” means to them.

Through human resources and knowledge management challenges, when an enterprise decides what lessons to live by and what lessons to endlessly relearn.

Summary

Accounting guidance for estimating and disclosing environmental liabilities has evolved over time. Some practitioners are still using superseded accounting references, which poses significant risks. Two recently updated ASTM standards (E2137 and E2173) make the information from various accounting sources more accessible to non-accountant users so those users can better inform and advise their clients on environmental liabilities recognition, estimation, and disclosure.

The environmental liabilities estimation and decision analysis methods provided in the updated ASTM standards can be applied in a variety of contexts to make better decisions and improve capital management (e.g., in transactions, due diligence, post-merger accounting, fair value measurement implementation, divestment support, cost recovery and counterparty valuation support, shareholder litigation, and bankruptcy/liquidation). These standards provide an excellent resource for understanding and applying the current accounting literature and avoiding the pitfalls of providing inappropriate or outdated advice based on superseded references.

Here are some next steps you may wish to take to improve management of environmental liabilities for you or your clients:

- Read your company’s (or your client’s) reserve policy
- Read ASC 410
- Review the tools and guidance in ASTM E2137 and E2173
- Recommend updates to the reserve policy
- Monitor changes to estimates and performance over time
- Track improvements to capital management that can result from explicit handling of uncertainties and decisions in environmental liabilities management
- Consider that deferral of cleanup, deferral of recognition, or a minimal reserve estimate may not be in your company’s (or your client’s) best interest

The use of outdated and superseded references (and associated thinking) may lead to bad outcomes for companies with environmental liabilities such as those that arise at multiparty Superfund sites. Conversely, a proactive approach that addresses decisions and uncertainties using current best practices will typically lead to better outcomes when managing environmental liabilities at complex sites (and across portfolios).

Scott Shock is a Senior Managing Engineer with Exponent’s Environmental Sciences Practice in Bellevue, Washington.

John Rosengard is President of Environmental Risk Communications, Inc., in Oakland, California.
COLORADO DEFEATS NEW MEXICO’S ORIGINAL ACTION ASSERTING CLAIMS FOR THE GOLD KING MINE SPILL AT THE U.S. SUPREME COURT
Brent R. Owen
Squire Patton Boggs

On June 26, 2017, the U.S. Supreme Court declined New Mexico’s petition seeking to institute an original action against the state of Colorado for the Gold King Mine spill. The Gold King Mine spill occurred in August 2015 after a contractor for the U.S. Environmental Protection Agency (EPA) breached a collapsed mine portal at the Gold King Mine in the mountains near Silverton, Colorado. The breach released roughly three million gallons of acidic mine water into the Animas River. The accident garnered national attention because, for a time, it turned portions of the Animas River yellow from the oxidation of dissolved iron in the escaped water.

An original action in the U.S. Supreme Court is a lawsuit between states. Invoking that rare procedure—for only the 147th time since the Constitution’s adoption—New Mexico sought to hold Colorado liable for the Gold King Mine spill. New Mexico argued that contamination from abandoned mines in Colorado has polluted New Mexico’s rivers and caused New Mexico economic harm. New Mexico asserted claims under the complex provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 et seq., and the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6901 et seq. New Mexico also sought analogous relief against Colorado under federal interstate common law.

The state of Colorado, led by Solicitor General Fred Yarger, Deputy Solicitor General Glenn Roper, and Colorado litigation team Senior Assistant Attorneys General William V. Allen and Kathleen Spalding, and assisted by a Squire Patton Boggs team, led by Carolyn McIntosh and Peter Gould, along with Alex Arensberg, Wes Reed, and Brent Owen, successfully argued that the U.S. Supreme Court should not entertain New Mexico’s novel lawsuit. As explained in Colorado’s briefing, New Mexico’s RCRA claim failed because a CERCLA response action had been initiated to address the relevant hazardous substance release. See 42 U.S.C. § 9613(h) (CERCLA) (“No Federal court shall have jurisdiction . . . to review any challenges to removal or remedial action. . . .”). These prohibitions prevent “lawsuits that might interfere with the expeditious cleanup efforts.” McCellan Ecological Seepage Situation v. Perry, 47 F.3d 325, 329 (9th Cir. 1995).

New Mexico’s CERCLA claim failed, Colorado argued, for a number of reasons, including that once a site is under investigation pursuant to CERCLA authority, several of New Mexico’s claims are barred because they would interfere with the CERCLA investigation and remedy decision making. New Mexico’s CERCLA claims against Colorado also failed, Colorado explained, because Colorado does not qualify as a “covered person” under 42 U.S.C. § 9607 for its regulatory work at abandoned mine sites.

Specifically, Colorado—a state—could not be liable as an “operator” because it did not engage in “hands on” participation in the day-to-day management and operations of the mines. See United States v. Dart Indus., Inc., 847 F.2d 144, 146 (4th Cir. 1988). Likewise, Colorado could not qualify as an “arranger” because it did not “own” or “possess” a hazardous substance and “take intentional steps to dispose of” it, as CERCLA requires. 42 U.S.C. § 9607(a)(3).

Colorado additionally argued that New Mexico’s two putative common law claims, one for “public nuisance,” and the other for “negligence and gross negligence,” both failed as a matter of law. Namely, Congress displaced New Mexico’s putative federal common law claims through its enactment of comprehensive environmental statutes, most importantly the Clean Water Act, but also RCRA
and CERCLA. As explained in Colorado’s briefing, the creation of federal interstate common law is “unusual”; whenever a federal statute “addresses a question previously governed by . . . federal common law[,] the need for such an unusual exercise of lawmaking by federal courts disappears.” Milwaukee v. Illinois, 451 U.S. 304, 314 (1981). Most importantly, the U.S. Supreme Court had previously held that the Clean Water Act displaces federal interstate common law claims. See Middlesex Cty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n, 453 U.S. 1, 22 (1981) (“[T]he federal common law of nuisance in the area of water pollution is entirely pre-empted by the more comprehensive scope of the [Clean Water Act]. . . .”).

General policy considerations also militated against the U.S. Supreme Court granting New Mexico’s proposed original action, Colorado’s briefing explained: Colorado should not be held liable for its regulatory activities in remediating and managing abandoned mines. Colorado is a paradigmatic headwater state. Many river systems originate in the mountains of Colorado and flow elsewhere. Further, Colorado is home to approximately 23,000 abandoned mines, including the two implicated by New Mexico’s proposed original action—the Sunnyside and Gold King Mines. New Mexico’s lawsuit could have discouraged Colorado from engaging in remedial activity on abandoned mines because Colorado would thereby face liability for environmental damage associated with its regulatory conduct at such remediated abandoned mines. Further, in light of New Mexico’s pending litigation in the federal district court in New Mexico against EPA, its contractor, and the Sunnyside Mine owners is ongoing. New Mexico v. EPA, No. 16-cv-00465 D. Ct. Doc. 1 (D.N.M. Compl.). Through that lawsuit, New Mexico seeks to hold the defendants jointly and severally liable under CERCLA for costs that New Mexico has incurred and will incur in responding to the Gold King Mine spill and to past and future releases from other mines. New Mexico further seeks under the Clean Water Act, 33 U.S.C. § 1365(h), to compel the EPA administrator to abate pollution from inactive and abandoned mines in the Upper Animas River watershed.

In parallel, remediation efforts at the Gold King Mine are ongoing. Last year, EPA—having taken responsibility for the spill—listed Colorado’s Bonita Peak Mining District (including the Gold King Mine) as a Superfund site. In a statement, EPA’s regional administrator explained the benefit of that listing:

Listing the Bonita Peak Mining District on the National Priorities List is an important step that enables EPA to secure the necessary resources to investigate and address contamination

In dissent, Justice Thomas and Justice Alito would have granted New Mexico’s petition for reasons similar to their dissent in Nebraska v. Colorado, 577 U.S. __, 136 S. Ct. 1034 (2016). In their view, the Court’s exercise of its jurisdiction is not discretionary. Namely, the Constitution provides that “[i]n all Cases . . . in which a State shall be [a] Party, the supreme court shall have original Jurisdiction.” Art. III, § 2, cl. 2. Given this language, and Congress’s similar mandate in 28 U.S.C. § 1251(a) (the Court “shall have” jurisdiction over controversies between states), Justice Thomas and Justice Alito would have granted New Mexico’s petition.
concerns of San Juan and La Plata Counties, as well as other downstream communities in New Mexico, Utah, and the Navajo Nation.

EPA studies performed following the release concluded that water quality returned to pre-event conditions within two weeks after the Gold King Mine plume passed. Additionally, there were no reported fish kills in the affected rivers, and post-release surveys by several organizations found that other aquatic life does not appear to have suffered harmful short-term effects from the Gold King Mine plume. EPA and Colorado continue to monitor the potential impacts from the Gold King Mine spill.

Colorado’s victory at the U.S. Supreme Court protects Congress’s carefully constructed statutory scheme for the effective management and remediation of water pollution across the country. It also protects Colorado’s sovereign ability to regulate mining activities within state boundaries.

Brent Owen is an associate in the Environment, Safety and Health Practice at Squire Patton Boggs (US) LLC and emphasizes environmental litigation in his work.
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