



How a City Fumbled a \$59 Million Contaminated Groundwater Claim – Do You Know the Requirements for NCP Compliance?

By Bill Wagner, Taft Stettinius & Hollister LLP

Cities and towns unknowingly sabotage their CERCLA cost recovery claims all too often by failing to understand and comply with the National Contingency Plan (NCP). The U.S. Court of Appeals for the Ninth Circuit confirmed this recently for the City of Colton, California (Colton) in the case entitled *City of Colton v. American Promotional Events, Inc.-West*. Colton's fumble cost the city its claim for past response costs of \$4 million and its claim to establish liability for future response costs estimated between \$55 and \$75 million.

Colton's predicament arose from contamination to the city's drinking water supply. Colton detected perchlorate in three of its drinking water supply wells at concentrations of 4 to 10 parts per billion (ppb). At the time, the California Department of Health Services (CDHS) had an "advisory action level" for perchlorate of 4 ppb. Because "advisory" meant non-enforceable, the

CDHS advised Colton that it could continue to use the supply wells. Instead, in a closed-session meeting with the City Council and City Attorney, Colton adopted a policy prohibiting the use of water above 4 ppb of perchlorate. Colton then took the impacted wells out of service and instituted a wellhead treatment program. It later sued 20 defendants under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) claiming the defendants' industrial activities caused the groundwater contamination. Colton sought to recover its past cost responding to the contamination and a declaration from the court that defendants were liable for Colton's future response costs.

The Ninth Circuit Court of Appeals affirmed the federal district court's order granting summary judgment against Colton on both claims. (By rule, a court is required to grant a motion for summary judgment when there is no

genuine issue as to any material fact and the party filing the motion is entitled to judgment as a matter of law.)

The Ninth Circuit first found that Colton's claim for past response costs failed because Colton failed to prove that its actions were 'necessary' under the NCP. Response costs are considered 'necessary' when an actual and real threat to human health or the environment exists, which Colton could not establish.

The Ninth Circuit then joined the U.S. Court of Appeals for the Second, Third, and Eighth Circuits in finding that a CERCLA plaintiff's failure to establish liability for past costs scuttles its ability to obtain a declaratory judgment as to liability for future costs. (The First and Tenth Circuits, however, have suggested that declaratory relief may be available even in the absence of recoverable past costs.) In the end, the Ninth Circuit held "declaratory relief is available only if

liability for past costs has been established” under CERCLA.

So why must plaintiff comply with the NCP? Section 107(a) of CERCLA requires it. Section 107 provides that a private party may recover expenses associated with cleaning up contaminated sites only if it establishes, among other elements, that the release or threatened release of hazardous substances has caused plaintiff to incur response costs that were “necessary” and “consistent with the national contingency plan.”

How must a plaintiff comply with the NCP? The NCP is designed to make the party seeking response costs to choose a cost-effective course of action to protect public health and the environment. The NCP requirements, codified at 40 C.F.R. Part 300, include, in part, providing the public information about the contamination and for meaningful community input, an appropriate evaluation of the health and environmental threat, documentation to support all actions taken and that form the basis for the cost recovery, remedial investigations and feasibility studies to consider different treatment technologies, identification of all applicable or relevant and appropriate requirements, and cost analysis. So for Colton, even if it could have shown that action was necessary, it would still have had to demonstrate to the court that it substantially complied with the NCP requirements before it could recover its response costs.

We have litigated similar issues for both municipalities and defendants. A recent case that garnered much attention involved the City of Martinsville, Indiana. There, we represented a landowner whose tenant operated an industrial dry cleaning operation that released perchloroethylene (also known as ‘Perc’ or ‘PCE’) into the environment. The PCE eventually contaminated the city’s drinking water wellfield. In 2004, the city filed a lawsuit asserting CERCLA cost recovery claims against both our client and the tenant. The city also began exploring a remedy that would involve relocating the city’s drinking water wellfield at a cost of millions of dollars. We raised NCP compliance as a defense to the city’s CERCLA claims because the city

failed (up to that point) to engage in any meaningful study of alternative remedies, feasibility studies, or cost analysis. The city eventually followed the NCP requirements and switched its focus to a remedy of implementing a granular activated carbon filter system to treat the water and remove the PCE. The carbon filter system was much less expensive than the cost of moving the well field. Had the city focused on NCP compliance to start,

the carbon filter system may have been installed, and the case might have settled, years sooner.

It is very important to seek sound advice early in these types of disputes because, while compliance may be complex, failing to comply with the NCP will be fatal.

For more information on CERCLA cost recovery claims, please contact Bill Wagner or any member of Taft’s environmental practice group. ■

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