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Agencies' Slow Remediation Process Frustrates Courts

If site cleanup takes too long, courts will permit citizen suits

By James Stewart

Remediation of contaminated sites can be a lengthy and complicated process. Two recent federal circuit court decisions show that if remediation takes too long, the courts will intervene.

According to the Government Accounting Office, the average time for a site on the National Priority List to go from being named on the list to the completion of the capital construction for the remediation is 10.6 years. GAO, Superfund Times to Complete the Assessment and Cleanup of Hazardous Waste Sites, GAO/RCED-97-20, March 1997 at 10. Completion of actual remediation is years longer.

These time estimates are averages for sites, or more accurately, for operable units at sites. *Id.* An operable unit is either a separate physical area or separate environmental media, such as soil or ground water, to be cleaned up. *Id.* at 9, n.8. More complex sites take even longer to address. Complex sites are often large and hold great quantities of waste, can have many operable units, present more complicated technical

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issues, raise greater community concerns and can present more protracted negotiations with responsible parties. *Id.* at 12-13. Some times the issues that a particular site presents require broader policy development by the environmental agencies, which policies require evaluation, public input and time to develop.

Both the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA) restrict citizen suits while environmental agencies are addressing contaminated sites. CERCLA delays suits challenging removal or remedial actions until after they are completed, and delays a suit challenging a removal until after any subsequent removal action at the same site is completed. CERCLA §113(h); 42 U.S.C. § 9613(h). RCRA delays a suit if the Environmental Protection Agency (EPA) or a state environmental agency is addressing the site under CERCLA through a suit, performing a removal or incurred costs to perform an RI/FS, or under RCRA by filing a suit for injunction relief. RCRA § 7002(b); 42 U.S.C. §6972(b).

In two recent federal appellate cases, one under CERCLA and the

other under RCRA, courts evaluated citizen suits regarding environmental conditions at complex sites where environmental agencies were in the process of determining the appropriate remedy. The circuit courts allowed both suits to proceed and, in the RCRA case, upheld a court-selected remedy.

The Seventh Circuit

In *Frey v. EPA*, 403 F.3d 828 (7th Cir. 2005), the Seventh Circuit allowed a citizen's suit under CERCLA even though the agency was considering the appropriate remedial action to address PCB contamination. The court indicated its impatience with the snail's pace at which the EPA was addressing remediation of the contamination.

The *Frey* situation presented many of the factors that contribute to a lengthy cleanup process. For example, the site was complex. It was, in fact, several sites near Bloomington, Ind., where PCB waste had been dumped. *Id.* at 830. The size and complexity of the site caused the EPA to address it in operable units. Even separate operable units did not make the remediation go smoothly.

The EPA filed suit in January 1983, seeking a cleanup. A 1985 consent decree required that PCB-contaminated soils, down to the bedrock, be excavated and incinerated. *Id.* A citizen suit to challenge the incineration remedy was dismissed, *Shalk v. Reilly*, 900 F.2d 1091 (7th Cir. 1990), but the state legislature enacted a statute to block construction of the incinerator. The EPA then evaluated other remedies. *Id.*

This re-examination of remedies continued for years, and in 1997 the district court issued an order requiring the sites to be remediated by 1999. In response to the order, the parties agreed on soil excavation of hot spots and to investigate water treatment and sediment removal. *Id.* The hot spot excavation was incorporated into a 1999 amendment of the Record of Decision (ROD) for the source control remedy. EPA also indicated that future RODs would deal with water treatment and sediment removal. *Id.* at 831.

Frey filed suit challenging the hot spot soil excavation, and the suit was dismissed as premature under the CERCLA timing of review provisions at § 113 of CERCLA in the district court and remanded by the Seventh Circuit for further fact-finding. *Frey v. EPA*, 270 F.3d 1129 (7th Cir. 2001) (*Frey I*). The most recent decision was the Seventh Circuit's review of the additional fact-finding of the district court that additional remedial action at the sites was planned and, therefore, the suit could not proceed until remedial actions were complete.

The record before the district court included testimony from the EPA project manager that in addition to the hot spot soil removal, additional water and sediment investigations were in progress at three of the sites. These investigations included whether to expand a water treatment plant and add additional treatment equipment, and whether sediments needed to be removed from nearby creeks. At one of the sites, a ground water investigation was ongoing. There was also evidence that negotiations between the EPA and the responsible party over the scope of liability and responsibility for ground water and sediments extended the studies at the sites. *Frey*, 403 F.3d at 831.

The Seventh Circuit reversed the district court and allowed the citizen suit to go forward. It was influenced by the absence of a timetable or other objective criteria to assess when the study phase might end. *Id.* at 834. While the court acknowledged that the EPA's ROD contemplated operable units to address ground water and sediments, it held that the EPA must operate

with some level of transparency and cannot preclude review by simply pointing to ongoing studies. *Id.* at 834-35. The court deemed the EPA's process as "a desultory testing and investigation process of indefinite duration." *Id.* at 835.

The Third Circuit

The Third Circuit evaluated a complex site in a RCRA citizen suit in *Interfaith Community Organization v. Honeywell International, Inc.* (ICO), 399 F.3d 248 (3d Cir. 2005). The site at issue in the *ICO* case met the GAO definition of a complex site. The site was large, 34 acres, and held 1.5 million tons of chromium ore processing waste. This waste had significant quantities of hexavalent chromium and a high pH. The pH interfered with the ability to reduce the hexavalent chromium to less toxic trivalent chromium. Hexavalent chromium is soluble, mobile and a carcinogen. *Id.* at 252.

In 1982, the New Jersey Department of Environmental Protection began activities to address conditions at the site. Its efforts led to the installation of an interim cap on the site. *Id.* at 252-53. In 1993, NJDEP entered into an administrative consent order (ACO) with Honeywell to address the remediation of the site and other chromium contamination sites in that area. The ACO established that the site would be addressed under the normal NJDEP procedures of delineation, analysis of potential remedies, remedy selection and then remedy implementation. *Id.* at 253. In 1995, a community organization filed suit under RCRA seeking an injunction to compel cleanup of the site. *Id.*

The district court found the site to present an imminent and substantial endangerment to human health and the environment and issued an injunction requiring the excavation and off-site disposal of all chromium ore processing residue and the remediation of the impacted sediment. *Id.* at 253, 266. The Third Circuit upheld the injunction, despite the existence of the ACO between Honeywell and the NJDEP, and the NJDEP's authority to select the

appropriate remedy.

The Third Circuit held that the injunction did not impermissibly interfere with NJDEP enforcement activities. The court affirmed the findings of the district court that a complete delineation of the contamination had not occurred and that NJDEP lacked a timetable for a permanent remediation of the site. In fact, the court characterized the evidence as "showing a substantial breakdown in the agency process that has resulted in twenty years of permanent clean-up inaction." *Id.* at 265.

Advent of Citizen Suits

In the 25 years since the passage of CERCLA, site remediation has evolved. In the beginning of the program, there were disputes over the scope of liability. Then came disputes over the scope of investigation and remediation. In these early days, private parties were impatient with agency procedural requirements and frustrated that remediation could not be done more quickly.

Weary from fighting a consistently losing battle, private parties resigned themselves to the slow, inevitable pace of regulatory agency approaches to remediation of contaminated sites. They took some solace in knowing that while cooperating with the regulatory agencies, they were protected under CERCLA § 113(h) and RCRA § 7002(b) in many circumstances from citizen suits interfering with the remediation process, because such suits could only be filed after the removal or remedial actions were completed.

Frey and *ICO* show that there is danger in becoming too complacent with a regulatory process that becomes drawn out and extensively delayed. These courts showed little sympathy for the complexity of the problems and other practical considerations that might explain a 20-year process with still no complete remediation plan or schedule.

There may come a time where a lengthy administrative process for site remediation may leave one vulnerable to a citizen suit. Private parties involved in these situations have little ability to

control or alter the situation. The pace and content of the decision-making process are mostly within the control of the agency. Yet, if your site is approach-

ing 20 years old, a remediation plan is not yet selected, there is no timetable for remediation and you have an active citizens' group, a citizen suit may be in

your future. *Frey* and *ICO* illustrate that if remediation is too long delayed, courts will permit citizen suits to compel the remediation. ■