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Not All Trash Disposal Creates CERCLA Liability

Ms. Carrie Greco

A recent case involving the disposal of hazardous substances at landfills held that if your waste does not contain the hazardous substances found at the site, you are not liable.¹ This case concerned the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).² CERCLA liability at a third party site can no longer be acceded upon a showing of a manifest that states the Army contracted with the landfill (or a waste hauler connected to the landfill.) Instead, the determination of whether wastes contain hazardous substances will require a closer examination of the type of waste sent and the substances in that waste.

In *Prisco v. A & D Carting Corp.*, the owner of a landfill brought suit against four transporters who were alleged to have transported hazardous substances to the site. The Second Circuit affirmed a District Court's dismissal of the landfill owner's CERCLA claims against these defendants, concluding that for the landfill owner to impose liability against a transporter, she must prove the items the transporter shipped to the site contained hazardous substances.³ Earlier, the District Court had held that the material transported by the four transporters (pipes, wire, carpets, and stained and painted wood) did not contain hazardous substances.⁴ Applying the standard for CERCLA liability, the District Court stated: "[i]n order to make out a prima facie case, a plaintiff must first have made a showing that a defendant transporter actually brought hazardous substances to the site."⁵

On appeal, the plaintiff did not address the District Court's finding that the pipes, wire, carpets, and wood shipped by three of the defendant transporters did not contain hazardous substances. Rather, the plaintiff appealed the District Court's holding that the painted and stained wood sent by the fourth transporter did not contain hazardous

¹ *Prisco v. A & D Carting Corp.*, No. 97-9405, 48 ERC 1097 (2d Cir. Feb 17, 1999),

² 42 U.S.C. § 9601, *et. seq.*

³ *Id.*

⁴ *Prisco v. State of New York*, No 91 Civ. 3990, (RLC), 1996 WL 596546 at 1, 1996 U.S. Dist. LEXIS 14944 (S.D.N.Y. Oct 16, 1996).

⁵ *Id.* at 9.

substances. To address the issue, the Second Circuit reviewed the evidence provided to the District Court. The plaintiff's expert testified before the District Court that the contaminants at the site could have been attributable to these sort of materials. DEC provided an affidavit to the District Court confirming that these types of materials can result in the leaching of various contaminants. After reviewing this evidence, the Second Circuit agreed with the District Court's conclusion, noting that the items shipped to the site, in fact, did not contain these contaminants. The Second Circuit concluded that:

CERCLA... is not so far-reaching that anyone who has ever transported waste material to a site becomes a potentially responsible party within the meaning of section 107(a)(4)... To impose liability on a defendant, a CERCLA plaintiff must prove more than that a defendant transported material to the site; he or she must show that the material contained a hazardous substance.⁶

The Second Circuit's holding gives the Army a new foothold in CERCLA landfill cases. In many cases, the plaintiffs cannot provide evidence that identifies the type of waste the Army may have sent to the landfill. Rather, the plaintiffs point to documents showing a contract with the Site owner, or other waste hauler who has a connection with the site, or the plaintiffs provide documents that only identify the type of waste in general terms such as "garbage" or "refuse." This flimsy evidence does not specifically identify the waste, or hazardous substances in that waste, that were taken from the Army to the site. An investigation is necessary to identify more carefully the types of waste and the types of hazardous substances that could have been sent to the site. Without the proof that the waste Army shipped to the site contained hazardous substances, the plaintiff cannot prevail.

So the next time you see a CERCLA claim regarding some regular trash disposal operations, take a second look. Those items disposed of may not contain hazardous materials and may not give rise to CERCLA liability. (Carrie Greco/LIT)

Supreme Court Adds to *Daubert* Analysis of Expert Testimony

Major Scott Romans

In *Kumho Tire Co., LTD., et al., v. Carmichael et al.*,⁷ the Supreme Court provided an application of its significant decision regarding expert testimony, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁸ *Daubert* held that, under Federal Rule of Evidence 702, the trial judge serves as a "gatekeeper," ensuring that expert testimony is not only relevant, but reliable. *Kumho Tire* provides further interpretation of that decision, and may have a significant impact on environmental litigation, which frequently involves expert testimony. Federal Rule of Evidence 702 allows for the admission of expert testimony when "scientific, technical, or other specialized knowledge will assist the trier of fact."⁹ Under the rule, in such situations

⁶ *Prisco v. A & D Carting Corp.*, No. 97-9405, 48 ERC 1097, 1105 (2d Cir. Feb 17, 1999).

⁷ No. 97-1709, 1999 U.S. Lexis 2189.

⁸ 509 U.S. 579 (1993).

⁹ Fed. R. Evid. 702.

a witness “qualified as an expert by knowledge, skill, experience, training, or education may testify... in the form of an opinion or otherwise.”¹⁰ *Daubert* imposed the requirement on trial judges to ensure that expert testimony was not only relevant, but reliable as well. The opinion provided four factors for trial judges to consider in performing its “gatekeeper” function with regard to expert testimony: testing, peer review, error rates, and acceptability in the relevant scientific community.¹¹

In *Kumho Tire*, plaintiffs brought suit against a tire manufacturer and distributor to recover for one death and several injuries that occurred as a result of a tire blow-out.¹² Plaintiffs intended to offer the testimony of an expert who would testify that the blow-out was caused by defective design and manufacture of the tire.¹³ The District Court initially applied the four factors specifically cited by the Supreme Court in *Daubert* and decided that the expert testimony at issue in the case was inadmissible.¹⁴ On reconsideration, the District Court determined that the four factors from *Daubert* should be applied with flexibility, and that other factors may be relevant to determine admissibility of expert testimony in a particular case. Applying this more flexible interpretation, the District Court again ruled that the plaintiffs’ expert lacked reliability and refused to allow the testimony.¹⁵ On appeal, the Eleventh Circuit held that *Daubert* applied only to scientific testimony. Since the testimony at issue in *Kumho* was based on “skill or experience-based observation” as opposed to scientific principles, the District Court should not have applied *Daubert*.¹⁶ *Kumho Tire* appealed this decision to the Supreme Court.

The Supreme Court first stated that *Daubert* applied to all expert testimony, not just such testimony based on scientific principles. The Eleventh Circuit’s distinction between “scientific” knowledge and “technical or other specialized knowledge” was incorrect. Rule 702 specifically addresses “scientific, technical, or other specialized knowledge” that will assist the trier of fact. According to the Court, the rationale for the *Daubert* should not be limited to expert testimony considered to be “scientific.”¹⁷ Furthermore, the Court noted that it would be difficult to differentiate between “scientific” testimony and other types of expert opinion, such as engineering testimony, which is based on scientific foundations.¹⁸

The Court then turned to the issue of what factors a trial court should use in performing the “gatekeeper” function mandated by *Daubert*. The Court agreed with the proposition that trial courts may use the four specific factors stated in *Daubert* (testing, peer review, error rates, and acceptability in the relevant scientific community), but that trial courts may consider other relevant factors as well:

¹⁰ *Id.*

¹¹ *Id.* at 593-94.

¹² *Kumho Tire*, *supra* note 1, at *10.

¹³ *Id.*

¹⁴ *Id.* at **14-15.

¹⁵ *Id.* at **15-16.

¹⁶ *Id.* at *17.

¹⁷ *Id.* at *19.

¹⁸ *Id.*

We agree with the Solicitor General that “the factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert’s particular expertise, and the subject of his testimony.” Brief for United States as *Amicus Curiae* 19. The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.¹⁹

The Court concluded that the list of factors from *Daubert* was meant to be “helpful, not definitive.”²⁰ Applying an abuse-of-discretion standard, the Court then reviewed the trial court’s decision to exclude the expert testimony in this case, and concluded that the trial court’s decision was proper.²¹

This case is relevant to environmental litigation in its discussion of the expert testimony subject to a *Daubert* analysis, and the manner in which that analysis is conducted. Engineering and other types of expert opinion that are not purely “scientific” often play an important role in environmental cases. Furthermore, since the factors to determine admissibility are case-specific, the parties must think carefully about their case and the unique factors present in order to support their position on admission or exclusion of the expert testimony in question. (MAJ Romans/LIT)

Microbes Not Small Enough to Evade NEPA

Lieutenant Colonel David Howlett

A recent decision by the District Court for the District of Columbia ruled against the Interior Department’s reliance on a categorical exclusion from the National Environmental Policy Act of 1969 (NEPA).²² The opinion represents a cautionary tale for Army practitioners who invoke categorical exclusions for projects.

The case, *Edmonds Institute v. Babbitt*,²³ involves the Department of the Interior’s decision to enter into an agreement that allows a private biotechnology company to “bioprospect” for microbial organisms in geysers and other thermal features in Yellowstone National Park. The agreement, officially called a Cooperative Research and Development Agreement (CRADA), was the first of its kind to involve a national park. In return for payments and royalties, the contractor could search for genetic and biochemical information found in wild plants, animals, and microorganisms. The CRADA was announced at Yellowstone in a public ceremony that included Secretary of Interior Babbitt and Vice President Gore.

¹⁹ *Id.* at *23.

²⁰ *Id.*

²¹ *Id.* at **27-37.

²² 42 U.S.C. § 4321, *et. seq.*

²³ *Edmonds Institute v. Babbitt*, No. 98-561(RCL), 1999 U.S. Dist. LEXIS 4168 (D.D.C., March 24, 1999) at *26-27.

Plaintiffs, representing both environmental and technology interests, filed suit against the project, alleging that Interior had not complied with NEPA.²⁴ Interior moved to dismiss most claims based on standing and failure to state a claim on which relief could be granted. Both sides moved for summary judgment on the NEPA claim.

The court found that because the collection of microbial specimens is an actual invasion of plaintiffs' recognized aesthetic and recreational interests, plaintiffs had established injury in fact for standing purposes. The court also denied Interior's other motions to dismiss.²⁵

The opinion then turns to the NEPA claim. Interior prepared neither an EA nor an EIS before entering into the Yellowstone CRADA. Instead, it argued that it was entitled to summary judgment because (1) the activities performed under the CRADA fell under a categorical exclusion for "day-to-day resource management and research activities"²⁶ and (2) approval of the CRADA was not a "major federal action" subject to NEPA.

First, the opinion notes that Interior, while relying on a categorical exclusion before the court, could point to no evidence that it had considered application of the exclusion before entering into the CRADA. The court found this "practically determinative" -- a post hoc invocation of a categorical exclusion during litigation cannot justify a failure to prepare an EA or EIS.²⁷ On this basis alone, the court found the failure to prepare an EIS or EA to be arbitrary and capricious.

The court noted that did not intend to establish a requirement that an agency prepare a full-blown statement of reasons for invoking a categorical exclusion. "Such a requirement would detract from the legitimate governmental interest in avoiding unnecessary paperwork for actions that legitimately fall under a categorical exclusion and do not require an EA or EIS."²⁸

The court then noted that even if there were some evidence of a contemporaneous adoption of a categorical exclusion for the Yellowstone CRADA, it would probably not survive the arbitrary and capricious review. The court explained its doubt with reference to Interior's NEPA regulation:

First, commercial exploitation of natural resources does not strike the Court as logically equivalent to "day-to-day resource management and research

²⁴ Plaintiffs also alleged violations of the *Technology Transfer Act of 1986*, 15 U.S.C. § 3701 *et seq.*, the *National Park Service Organic Act of 1916*, 16 U.S.C. § 1 *et seq.*, the *Yellowstone National Park Organic Act*, 16 U.S.C. § 21, *et seq.*, and the so-called public trust doctrine, as well as the *Administrative Procedure Act*, 5 U.S.C. §§ 702; 706. This note deals solely with the NEPA violation.

²⁵ *Edmonds Institute v. Babbitt*, No. 98-561(RCL), 1999 U.S. Dist. LEXIS 4168 (D.D.C., March 24, 1999) at *26-27.

²⁶ See, Department of the Interior Department Manual, 516 DM 7, App. 7, § 7.4(E)(2).

²⁷ *Edmonds Institute v. Babbitt*, 1999 U.S. Dist. LEXIS 4168 at *47, quoting *Anacostia Watershed Soc'y v. Babbitt*, 871 F. Supp. 475, 481 (D.D.C. 1994) and *Fund for Animals v. Espy*, 814 F. Supp. 142, 149-51 (D.D.C. 1993).

²⁸ *Edmonds Institute v. Babbitt*, 1999 U.S. Dist. LEXIS 4168 at *47.

activities." Second, and frankly more weighty in terms of arbitrary-and-capricious review, the DOI's own Department Manual identifies several exceptions applicable to all categorical exclusions. These exceptions include actions that may have adverse effects on such unique geographic characteristics as ecologically significant or critical areas, including those listed on the Department's National Register of Natural Landmarks, have highly controversial environmental effects, have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks, establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects, be directly related to other actions with individually insignificant but cumulatively significant environmental effects. Even had the defendants complied with the initial determination procedures mandated by the NEPA, the CEQ regulations, and their very own department manual, the Court finds that they could not reasonably have found none of the exceptions listed above to apply. The defendants themselves proclaim the ecological significance of Yellowstone's thermal features, and Old Faithful at least must be on the Department's National Register of Natural Landmarks. Likewise, there can be no debate that the Yellowstone-Diversa CRADA is a precedent-setting agreement within the National Park System and the DOI in general. The first agreement of its kind, the CRADA was announced in the presence of the Vice-President, the Secretary of the Interior, the Director of the Park Service, and the Superintendent of Yellowstone. As many as eighteen other entities have already discussed similar agreements with the defendants. Finally, the very Solicitor of the DOI has called for a reevaluation of all research permits on lands controlled by the Department and recommended insertion of a provision prohibiting commercial development of the fruits of such research without a CRADA. Any argument that [the exceptions] do not apply here cannot possibly pass muster even under the deferential arbitrary-and-capricious standard of review.²⁹

The court ordered suspension of the CRADA pending preparation of NEPA documentation. The court did not feel that it had enough information to know whether an EIS was required or whether an EA might be appropriate.

Like the Department of Interior, the Army has published a list of categorical exclusions to NEPA and has also established screening criteria, that is, exceptions to the applicability of those exclusions.³⁰ Adoption of most of the categorical exclusions requires preparation of a Record of Environmental Consideration or "REC."³¹ Decision-makers must also determine the proposed action does not involve any extraordinary circumstances or special resources.³² These "screening criteria" are very similar to the ones adopted by the Department of the Interior in its regulation.

²⁹ *Id.* at *48-50. Quotation marks and citations omitted.

³⁰ Army Regulation 200-2, *Environmental Effects of Army Actions*, 23 December 1988.

³¹ *Id.* at ¶ 4-2d.

³² *Id.* at ¶ 4-2b and appendix A, ¶ A-31.

For Army practitioners, the *Yellowstone Microbe* case under discussion reinforces two points. First, use of a categorical exclusion requires that the REC be prepared before the decision is reached. Although the REC does not have to be lengthy, it must reflect basic information about the exclusion being adopted and the reasons for doing so.³³ If the proposed action is at all controversial, the REC should specifically address the screening criteria and state why they do not apply. This might be required if the action will occur at an installation with environmental problems or fragile resources. This will show that the decision-maker considered these issues and will make it more likely that he or she will be given deference by a reviewing court.³⁴ Finally, if you plan to say later that the proposed action is not controversial or significant, avoid having the Vice President of the United States present when you announce the action to the public. (LTC Howlett/LIT)

American Indian and Alaska Native Policy

Lieutenant Colonel Jill Grant

On 20 October 1998, Secretary of Defense William Cohen signed the Department of Defense's (DoD) *American Indian and Alaska Native Policy*. The policy was promulgated to carry out President Clinton's mandate, as expressed in his 1998 Executive Order 13084,³⁵ that federal agencies provide Indian tribes a "meaningful and timely opportunity" to comment on agency policies with significant or unique effects on tribal interests.

The policy establishes a framework for working with federally recognized American Indian and Alaska Native governments³⁶ to ensure these governments receive timely notice and meaningful opportunity to be heard before DoD takes action that may significantly affect protected tribal resources,³⁷ tribal legal rights,³⁸ or tribal lands³⁹ as required by the Executive Order.

³³ See, *Id.*, figure 3-1.

³⁴ The Army environmental community refers to the resulting document as a "Mayfield REC," named after an Army lawyer who initiated use of expanded RECs for a post that was subject to frequent environmental litigation.

³⁵ Executive Order 13084, *Consultation and Coordination with Indian Tribal Governments*," dated May 14, 1998.

³⁶ The policy refers to these federally-recognized American Indian and Native Alaskan governments as "tribes."

³⁷ The policy defines protected tribal resources as: "Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained be, or reserved by of for, Indian tribes through treaties, statutes, judicial decisions, or executive order, including tribal trust resources."

³⁸ Tribal rights are defined as: "Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies."

³⁹ Indian lands are defined as: "Any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual, or 2) held by an Indian tribe or individual subject to restrictions by the United States against alienation."

In order for the policy to apply, two criteria must be met. First, the policy applies only to those American Indian and Native Alaskan governments that are "federally-recognized." These are tribal entities recognized by the Department of the Interior' Bureau of Indian Affairs, as listed in the Federal Register pursuant to section 104 of the *Federally Recognized Indian Tribe List Act*. Second, the policy applies only where the action DoD contemplates "may significantly affect protected tribal resources, tribal legal rights, or tribal lands. "

Once these criteria have been met, DoD must follow the four principles outlined in the policy. First, DoD must meet its trust responsibilities to the tribes. These responsibilities are derived from the federal trust doctrine, treaties, statutes, executive orders, and other legally binding agreements between the Federal government and the tribes. Next, the policy requires DoD to build "stable and enduring" government-to-government relationships with these federally recognized tribes, treating them as another foreign sovereign. These relationships are to be maintained through the following: (1) communication at both the leadership and staff levels; (2) establishment of liaisons throughout DoD to respond to tribal inquiries; and (3) providing information about opportunities for tribes within DoD. Perhaps most important, DoD must determine the effect its proposed "significantly affecting" actions may have on protected tribal resources, tribal rights, and Indian lands before decisions are made.

The policy then requires DoD to consult and negotiate with federally-recognized tribes about these "significantly affecting" actions, providing tribes "an opportunity to participate in the decision making process that will ensure these tribal interests are given due consideration." Finally, it requires DoD to recognize and respect tribal natural resources and properties of traditional or customary religious or cultural importance by acting consistent with the principle of conserving protected tribal resources and protecting Indian treaty rights; enhancing tribal capabilities to protect and manage tribal trust resources that may be significantly affected by DoD's actions; and, where practical, accommodating tribal member access to tribal sites on the installation.

The DoD policy is intended only to memorialize existing rights. It is not intended to create or change any legally enforceable rights, benefits, or trust responsibilities; nor is it intended to change tribal sovereignty, treaty rights or other rights of any Indian tribes or the exercise of those rights. Nevertheless, it is important to note that the policy makes clear that, even where there is a strong military interest, tribal rights must be respected and accommodated. As stated by Secretary Cohen, "[i]f tensions arise between these principles and the principles that guide the military mission, components will develop, as necessary, appropriate means to ensure tribal interests are given 'due consideration' and such tensions resolved." (LTC Grant/CPL)

EPA's Year 2000 (Y2K) Enforcement Policy

Major Robert J. Cotell

Recently, the Environmental Protection Agency (EPA) has done extensive research and analysis into possible problems and environmental damage that may result from the potential Year 2000 (Y2K) Computer problem. If not handled properly, many adverse effects could occur through accidental contamination of the drinking water or release of pollutants into the air.

As a result of these concerns, EPA's Office of Environmental Compliance and Assurance (OECA) has announced an enforcement policy for violations that occur due to Y2K problems. The policy is designed to encourage regulated facilities to conduct Y2K testing well in advance of 1 January 2000. Under the policy, facilities are encouraged to conduct Y2K tests under existing regulatory and permit procedures. Such procedures might include those found in Resource, Conservation and Recovery Act (RCRA)⁴⁰ regulations providing for trial burn testing of hazardous waste⁴¹ and land treatment demonstrations.⁴²

In the absence of applicable existing procedures (or timely use of existing procedures) the OECA policy states that EPA may exercise its discretion to waive 100% of civil penalties that may apply to violations that occur as a result of testing. Likewise, the policy allows that EPA will recommend against criminal prosecution for violations resulting from testing.

In order to qualify for the waiver or the non-prosecution recommendation, a facility must meet several criteria:

- a) Test protocols must have been designed in advance of the testing period;
- b) the Y2K testing must have been the cause of any potential violations where penalty waiver is sought;
- c) The testing was needed to assess Y2K compliance status or test the effectiveness of Y2K modifications; was conducted before the Year 2000; and conducted for the shortest possible period of time, not to exceed 24 hours in duration;
- d) Violations must not have created a potentially imminent and substantial endangerment;
- e) All violations ceased at the end of the test or were corrected within 24 hours thereafter;
- f) The facility expeditiously remediated any releases or other adverse consequences as specified by EPA.

In addition, the policy requires that a facility meet all violation reporting requirements. In the absence of reporting requirements the facility must notify EPA of testing violations expeditiously (ordinarily no later than 30 days, and in all cases, no later than 1 February 2000). All re-testing must also comply with the policy. Finally, a facility must provide all information requested by EPA to determine the waiver or non-prosecution recommendation.

In addition to testing violations that occur prior to 1 January 2000, EPA will also recognize a facility's good faith in connection with violations occurring after the date. Facilities that test in accordance with the policy will be treated more favorably than those that make no effort.

In light of this, installations are encouraged to begin immediate Y2K testing in accordance with the OECA policy. Installations should contact EPA regional representatives to establish protocols and receive guidance. Installations that have more contact and interaction with EPA will likely receive more protection. EPA's Y2k enforcement policy is at **Error! Bookmark not defined..** (MAJ Cotell/CPL)

⁴⁰ 42 U.S.C. § 6901, *et. seq.*

⁴¹ 40 C.F.R. § 266.102.

⁴² 40 C.F.R. § 270.63.