

National Priority List/Superfund: Federal Appellate Court Addresses Challenge to U.S. Environmental Protection Agency Listing Decision



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The United States Court of Appeals for the District of Columbia (“Court”) addressed in a November 13th decision a challenge to a United States Environmental Protection Agency (“EPA”) decision regarding a Comprehensive Environmental Response, Compensation, and Liability Act (“Superfund”) National Priority List (“NPL”) listing decision. See *Troy Chemical Corporation v. Environmental Protection Agency* 2020 WL 7021492.

Troy Chemical Corporation (“Troy”) filed a petition with the Court challenging a final EPA rule listing an area encompassing part of its manufacturing facility on the Superfund NPL.

Sites listed on the NPL are eligible for government funded remedial action through the Superfund program. Placement of a site on the NPL can have significant financial consequences for the owner or operator of a listed property or other responsible parties.

EPA makes NPL determinations pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, which maintains the NPL. Sites on the NPL are high priorities for remedial action due to their “relative risk or danger to public health or welfare or to the environment.” EPA determines which sites to add to the NPL based on the Hazardous Ranking System (“HRS”), which quantifies site-specific risk factors based on scientific methodology.

The HRS evaluates relative threats to public health and the environment posed by uncontrolled releases or threatened releases of such substances. It uses information obtained from the initial, limited investigations conducted at a site. EPA uses the HRS to assign each site a score ranking from 0-100 based on the likelihood that contaminants have been or will be released from the site, physical and toxicological characteristics of the contaminants present at the site, and the human population or sensitive environment or potentially exposed to release from the site.

A site is included on the NPL if it scores above the minimum threshold of 28.5 on the HRS.

The HRS measures the risk posed by migration of hazardous substances through four possible pathways:

- Air
- Soil
- Surface water
- Groundwater

As to each of these four pathways, EPA calculates a score by measuring what it describes as factor categories:

1. Waste characteristics
2. Likelihood of release
3. Targets (i.e., an individual, a human population, resources and sensitive environments)

The factor categories are measured by scoring a variety of subfactors. As the Court notes, two of the subfactors used to measure the target category are relevant in Troy's appeal:

- Wetland-rating subfactor
- Food chain individual subfactor

The referenced Troy facility is stated to have been operated by the company in Newark, New Jersey from the mid-1950s to the 1987. It is stated to have generated mercury-bearing wastewater that for a period of time was placed directly into a creek.

The New Jersey Governor in 2011 nominated the Troy facility and an adjacent segment of the creek for listing on the NPL. EPA is stated to have determined that a portion of the creek and its banks was contaminated by mercury and that the creek connected to a fishery within 15 miles of the facility. As a result, it assigned the HRS food chain individual subfactor a score of 20.

EPA also found a wetland extending for 0.15 miles along the mercury-contaminated segment of the creek. The EPA expert is stated to have determined that the wetland and zone of contamination overlapped by 0.15 miles. The federal agency, therefore, assigned the HRS wetland-rating subfactor a score of 25.

The food chain individual and wetland-rating subfactors (along with others) produced a surface water migration pathway score of 100. This score was stated to be sufficient to bring the total site score to 50. The site therefore exceeded the HRS minimum threshold of 28.5 and was proposed to be listed on the NPL. EPA subsequently finalized a rule listing the site on the NPL. See 79 Fed. Reg. 56,515.

Troy petitioned for review of the listing. The challenge to the listing was based on four arguments:

1. EPA failed to substantiate a finding that the wetland within the zone of contamination was 0.15 miles long.

Sizeable gaps were alleged to be between EPA's soil borings and that the creek through which it had run had been subject to industrialization and filling. EPA's determination that the wetland was continuous for 0.15 miles was therefore challenged.

The Court concluded that Troy did not "clear the high bar to overturn EPA's wetland delineation under substantial evidence review." The EPA wetland expert's observations and analysis and other technical determinations constituted substantial evidence of the agency's wetland delineation.

The Court also held that Troy failed to show that EPA's wetland delineation was undermined by contradicting evidence. It discounted a letter that Troy cited from the New Jersey Department of Environmental Protection and noted that even if the letter was legally valid, it is not necessary that all EPA evidence point in one direction.

2. Failure to comply with notice-and-comment requirements.

Troy argued that EPA did not provide in its notice of listing information regarding the locations of soil borings used to delineate the wetland. Also cited as missing were photographs to demonstrate the vegetation and other physical characteristics of a wetland. EPA did provide the information in the final listing.

The Court notes that the failure to disclose for public comment is subject to the rule of prejudicial error. It cannot set aside a rule unless the party challenging it can point to inaccuracies in the data on which the agency relied. Troy was deemed to have failed to show such prejudice.

3. Interpretation of the HRS food chain individual subfactor is inconsistent with CERCLA.

Troy argued that EPA's interpretation of the HRS food chain individual subfactor is inconsistent with CERCLA. Nevertheless, the Court held that the company did not dispute that EPA complied with the relevant sections of the HRS. The Court concludes that Troy is actually challenging the HRS. Consequently, Troy was deemed to have forfeited the opportunity to challenge the HRS itself by failing to adequately raise it in its opening brief.

4. The food chain individual subfactor score is unsubstantiated.

Troy argued that the food chain individual subfactor was unsubstantiated. This was based on the argument that EPA did not adequately respond to Troy's comments which responded there was no potential for mercury to migrate from the creek (and therefore enter the human food chain). Its comments had argued that mercury released into the creek would rapidly settle into its sediments. Also cited was the alleged lack of flow and removal from the adjacent channel by the United States Army Corps of Engineers through dredging.

EPA's response to these arguments were deemed adequate because it explained:

... during storm events contaminated sediments will migrate from Pierson's Creek into the Port Newark Channel," and that "the mercury contaminated sediments in Pierson's Creek are uncontained and can continue to migrate into Port Newark Channel and continue to pose a threat to the downstream fishery" regardless of dredging by the Army Corps of Engineers.

The Court also referenced a prior holding that HRS scoring determinations are not arbitrary and capricious if EPA has offered a reasoned explanation for the assumptions and methodology it relied upon in creating the relevant components of the HRS model.

The Court rejects the challenge to the NPL listing.

A copy of the decision can be downloaded [here](#).