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National Priorities List/Superfund: District of Columbia Circuit Court of Appeals 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 July 18th decision a challenge to a Comprehensive Environmental Response, Compensation, and Liability Act (“Superfund”) National Priority List (“NPL”) determination by the United States Environmental Protection Agency (“EPA”). See *Daikin Applied Americas Inc. and Super Radiator Coils LP. v. Environmental Protection Agency*, No. 20-1479.

The decision involved a site containing groundwater contamination southwest of Minneapolis, Minnesota.

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

EPA makes NPL determinations pursuant to the Superfund statutory authority, 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. 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 the migration of hazardous substances through four possible pathways:

- Air
- Soil
- Surface Water
- Groundwater

At issue in the D.C. Circuit appeal was the groundwater pathway.

The Court indicates that EPA performed an HRS analysis of a site of groundwater contamination in Minnesota. The federal agency determined that the HRS score exceeded the required threshold for NPL listing. The analysis is stated to have indicated that releases were observed of the same contaminants

across a series of overlapping underground aquifers. The deepest was stated to be a drinking water aquifer used by residents in two cities.

Two parts of the HRS analysis were relevant to the challenge of the NPL ranking:

- Because several possible sources of contamination existed EPA scored the site as a “groundwater plume with no identified source” (this enabled EPA to treat the plume [as opposed to a particular facility] as the source)
- EPA concluded that adequate evidence of aquifer interconnections existed (allowing it to evaluate the aquifers as one unit)

As a result of this analysis, EPA listed the site on the NPL. See 85 Fed. Reg. 54,931 (Sept. 3, 2020).

Daikin Applied Americas Inc. and Super Radiator Coils LP (collectively, “Petitioners”) are described as former owners of a metal fabricating facility considered a possible source of contaminants. They challenged the listing as arbitrary and capricious and unsupported by substantial evidence.

The Petitioners’ arguments included:

- EPA arbitrarily ignored other possible sources of contamination in determining the site
- EPA ignored evidence disproving and failed to provide adequate evidence of aquifer interconnectivity

The Court rejected these arguments holding that:

- EPA was not required to attribute the contamination to a specific source
- The site was properly defined as a groundwater plume with no identified source noting comingled nature of the releases likely resulted from one or more sources.
- To define a site under the HRS procedures EPA is not required to evaluate all known releases.
- Petitioners’ comments on other plausible sources of contamination involving multi-aquifer wells were not ignored.
- EPA adequately supported aquifer interconnectivity
- Five wells were not improperly listed as “release wells.”
- Well data was not arbitrarily selected.
- It was correctly noted that at this state of the listing groundwater modeling, 3D or other, to predict migration pathways is not required as part of an HRS evaluation.

The Court denies the Petition for Review.

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