

National Priorities List/Superfund: D.C. Court of Appeals Addresses Challenge to U.S. Environmental Protection Agency Listing Decision



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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Co-Author: Matthew Fiorillo

The United States Court of Appeals for the District of Columbia (“Court”) overturned a determination by the United States Environmental Protection Agency (“EPA”). See *Genuine Parts Co. v. EPA*, No. 16-1416, 2018 WL 2271086 (D.C. Cir. May 18, 2018).

The Court held that the agency erroneously listed a West Vermont Drinking Water Contamination Site (“Site”) to the National Priorities List (“NPL”) as contaminated by Genuine Parts Company (“Genuine”) and Aimco Michigan Meadows Holdings, LLC (“Aimco”) (together referred to as the “Companies”).

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 of a listed property or other responsible parties.

EPA makes NPL determinations pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), 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 Hazard Ranking System (“HRS”), which quantifies site-specific risk factors based on scientific methodology.

The HRS measures the risk posed by migration of hazardous substances through four possible pathways: air, soil, surface water, and ground water. At issue in the D.C. Circuit appeal was groundwater migration.

In analyzing groundwater migration pathways, EPA computes an individual pathway score for each aquifer located within a four-mile radius of a site’s source. However, if two or more aquifers are interconnected within 2 miles of the sources at the site, the agency must combine the aquifers having interconnections in scoring the site. It may not assume interconnection and if data are not adequate to establish aquifer interconnections, the HRS requires that the aquifers be evaluated separately.

EPA considers aquifers to be interconnected if their boundaries do not “impede the flow of ground water and hazardous substances between the aquifers.” Aquifers are not interconnected if they are separated by a “confining layer” of materials that serves as an aquifer boundary that water cannot easily move through. A “confining layer” serves as a boundary if it has a lower “hydraulic conductivity”—i.e., differences in permeability—than adjacent geologic materials by “at least two orders of magnitude.”

EPA concluded in assessing this site that there were two interconnected aquifers—namely, the Glacial Outwash Aquifer and Limestone Bedrock Aquifer—and gave only one ground water migration pathway score under the HRS instead of two. In determining the ground water migration pathway score for an interconnected aquifer, the agency analyzed the “targets” of the contamination based on: the size and location of the relevant populations, the location of the nearest wells, and “whether the target is subject to actual or potential contamination.” This analysis led EPA to the Companies.

Based on EPA’s own policies and reports, the Companies argued that EPA’s determination on Sept. 9, 2016, ignored the relevant factors and interconnection of the aquifers, skewing the Site’s HRS score. In reviewing the evidence presented by EPA, the Court examined whether EPA acted arbitrarily or capriciously, basing their conclusion on a factual premise that was “unsupported by substantial evidence.”

The Court first found that EPA ignored evidence at odds with its conclusion. The Companies presented evidence showing that the cross sections used by EPA to show that the aquifers were interconnected did not conclusively show that the aquifers sat on top of each other as EPA concluded. Indeed, the Court found that: “not only did the cross sections portray the dividing layer as visually distinct from the aquifers in question, but the diagrams also indicate that the layer consists of different materials from the aquifers.” Three cross sections appeared to indicate an aquifer consisting of sand and gravel sitting atop an independent layer of “nonaquifer material.” The differences in these materials—i.e., clay and till, not aquifer stone—were simply ignored by EPA’s conclusions.

Similarly, the Court found that EPA lacked substantial evidence of interconnection of the aquifers. EPA argued that the till indicated in two of the cross sections of the aquifers should include clay, sand, and loam, or silty sand, sandy clay, or gravelly clay, and, because this material is found in the upper aquifer cross section, it should be viewed as an “aquifer.” However, it offered no explanation for this conclusion in its brief or during the Court’s oral argument.

Instead, the cross section in question clearly labeled the “till” as “nonaquifer” material, plainly showing that it was not a part of the aquifer. Further, EPA argued that the well log data was better evidence of interconnection because it clearly showed the layering of the aquifers. The Court found this evidence beside the point, because it did not directly respond to the Companies’ arguments.

Independently, the Companies challenged the HRS scoring of the site arguing EPA enhanced “targets” values. While the Companies’ objections to the HRS were submitted after EPA’s 90-day statutory time limit, they fell within a narrow exception—namely, that the HRS conflicts with CERCLA.

EPA found the ground water flow and direction was “feasible” under the HRS, but CERCLA specifically requires that the HRS, “to the maximum extent feasible, . . . accurately assess[] the relative degree of risk to human health and the environment.” Ultimately, on the merits, this portion of Companies’ challenge failed.

The decision arguably demonstrates that courts will accept an objection to EPA’s determination if its evidence does not support its conclusions, or if it attempts to support its conclusion with less than substantial evidence. Finally, it highlights the courts willingness to apply exceptions to the 90-day statutory bar to challenges to EPA’s determinations.

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