

Environment & Energy

Lawyers Predict Fewer Long Court Battles With EPA Over Superfund

By Sylvia Carignan

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- \$1 billion Fox River cleanup offers lessons, attorneys say
 - River among handful of complex sediment cleanups
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Drawn-out legal battles between the EPA and companies responsible for millions of dollars in Superfund cleanup bills are becoming less common, attorneys said.

This week's announcement of the impending cleanup of Wisconsin's Fox River is a prime example, they said.

The 17-year cleanup of the Lower Fox River, which focuses on contaminated sediment, is one of a handful of such projects nationwide that have costs reaching \$1 billion or more.

After years of disputes in district and circuit courts, NCR Corp. signed a consent decree with the Environmental Protection Agency in 2017, committing to a complete cleanup of chemicals known as PCBs in the river, and dropping a potential legal appeal.

"It took 15 different court cases to get it done, but the site is now considered a model for collaboration between state and federal agencies and responsible parties," EPA Administrator Andrew Wheeler said at an Aug. 12 news conference about the cleanup of the Lower Fox River and Green Bay in Wisconsin.

Lawyers said the project offers valuable lessons in what not to do at similar sites.

Avoiding Court

"The court is not a perfect venue for resolving these kinds of disputes," said Bill Hatfield, director of the environmental law department at Gibbons PC in Newark, N.J.

Hatfield, who is working with parties involved in the Passaic River cleanup in New Jersey, said disputes among private parties will generally continue—but protracted legal fights with the EPA will be less frequent.

Generally, companies that may be responsible for pollution "can come up with their shares of liability without going to court about it," said Jerry George, partner at Davis Wright Tremaine LLP in San Francisco.

Taking an issue with EPA to court can increase the risk of an unfavorable result. Companies are finding that it's better for them to work directly with the agency instead of getting a judge involved, attorneys said.

At contaminated sites, it's now less common to see those companies—also known as potentially responsible parties or PRPs—sparring with the EPA over a cleanup plan and ending up in a court battle, said Allison Rumsey, partner at Arnold & Porter Kaye Scholer LLP in Washington.

"It's much more the case around the country that the PRP groups get together and work with EPA on what the remedy's going to be," she said.

Costly Cleanup

Cleanup of the Passaic River Superfund site in New Jersey, known as Diamond Alkali Co., is expected to cost about \$1.4 billion, and the Hudson River Superfund cleanup in New York is expected to cost about \$1.7 billion, according to the EPA's February estimates. Both sites have been on the EPA's National Priorities List for cleanups since 1984.

George has represented a party involved in the cleanup of Oregon's Portland Harbor, another major contaminated sediment site. The EPA has identified about 100 parties that may have been responsible for the harbor's pollution over decades of industrial use, making the task of dividing liability a complicated one.

The Fox River site also involved a complicated cleanup. PCBs, or polychlorinated biphenyls—which the EPA considers a probable human carcinogen—got into the river from nearby pulp and paper mills, either directly or through wastewater treatment systems. Those chemicals ended up in sediment and fish, with Wisconsin issuing fish consumption advisories for the area since 1976.

But in the Fox River cleanup, "you only have to negotiate with a handful of parties," George said. "In a place like Portland Harbor, you're going to have a hundred or more parties involved in some kind of negotiation, and the same is true at Passaic."

"If people actually tried to litigate liability at a place like Portland Harbor, you'd spend a hundred million dollars or more on litigation," he said.

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