

CERCLA LITIGATION

Planning to Litigate the CERCLA Case

John Dunbar



CERCLA

Liability for releases of
hazardous substances

Who can be liable as a responsible party?

- Current and past owners and operators
- Generators
- Transporters
- Others, such as lenders, parent corporations and/or controlling shareholders, successor/ predecessor corporations, individuals who participate in decisions concerning handling and disposal

42 U.S.C. § 9607(a)

What can PRPs be liable for?

- **Response & Removal Costs**

- Any PRP “associated with a ‘facility’ from which there is a release, or a threatened release which causes ... response costs, of a hazardous substance, shall be liable for . . . [any] necessary costs of response ... consistent with the national contingency plan.” 42 U.S.C. § 9607(a)(4)(B).

- **Natural Resource Damages**

- Damages “for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.” 42 U.S.C. § 9607(a)(4)(C).

- **Health Assessment Costs**

- Costs “of” any health assessment or health effects study carried out under section 9604(i)....” 42 U.S.C. § 9607(a)(4)(C).

Claims

- Cost recovery
- Contribution – allocation

Defenses

- Acts of God, war, third parties
- Passive Migration
- Bona Fide Purchaser
- Hold Property in Trust
- Hold through exercise of security interest
- Statutes of Limitation

Defenses - Statute of Limitations

- **Cost Recovery**

- Section 107 cost recovery actions must be commenced:
 - within 6 years of initiation of physical on-site remediation actions, or
 - within 3 years from completion of a removal action

- **Contribution**

- Section 113 contribution claims must be commenced within 3 years of:
 - the date of judgment ... under this chapter for recovery of such costs or damages, or
 - (B) the date of an administrative order for a de minimis settlements or a cost recovery settlements, or entry of a judicially approved settlement with respect to such costs or damages.

Divisibility leading to apportionment

- A defense to joint and several liability
- Can defendant demonstrate a reasonable means of apportioning harms it caused?

Burlington Northern & Santa Fe Ry. Co. v. U.S., 556 U.S. 599 (2009)

Equitable Factors in an Allocation

- Contribution to release distinguishable
- Amount
- Toxicity
- Involvement
- Degree of care
- Cooperation with government officials
- Culpability
- Knowledge
- Others

Road Map

- Insurance
- Budgeting and Staffing
- Claims and Defenses – Initial Case Evaluation
- Investigation
- Experts
- Litigation Plan
 - Discovery
 - Motions
- Settlement
- Evidence Map - Trial Plan

Insurance

- **Finding the policies**
 - Company records, old accounting/banking records, brokers, lawyers, former employees
 - Lost policy requests to the insurer – ORS 465.479
 - Duty to investigate thoroughly and promptly
 - Process to determine terms and amount of coverage
 - Cooperation by both sides

Exhaustion of policy

Are costs defense or indemnity?

Defense - Remedial investigations, risk assessments

Indemnity - Feasibility studies, removal actions

ORS 465.480(7)



Know your client's rights under OECAA

- **Oregon Environmental Cleanup Assistance Act**
 - Independent counsel – represent only the insured
 - Regular and customary rates for counsel and consultants
 - Duty to pay promptly
 - Rebuttable presumptions: investigation costs are *defense*, remedial costs are *indemnity*
 - Claims for unfair settlement practices (treble damages, attorneys' fees)

ORS 465.475 to 465.485



Protect the client

- Tender Promptly
- Written common interest agreement with insurers who defend
- Coverage counsel
- Joint defense or common interest agreement with other PRPs

Consider other claims, venue

- Oil Pollution Act - 33 U.S.C. §2701 *et seq*; ORS 466
- State Superfund Law Claims - ORS 465
 - No dispute that state law authorizes claims against state agencies
 - *Aviall* does not apply to state law contribution claims
 - No right to prejudgment interest
 - Six year statute of limitation
- Common law claims
 - Trespass, nuisance, negligence, breach of contract
 - Jury rights
 - Do common law claims belong in state court?

Documenting Claims

- Establish record keeping requirements with client, consultants, contractors, subcontractors
- Preservation notices, reminders
- Document expenditures with detailed billings, backup
- Document connection between expenditures and response activities
- Segregate recoverable and nonrecoverable expenses

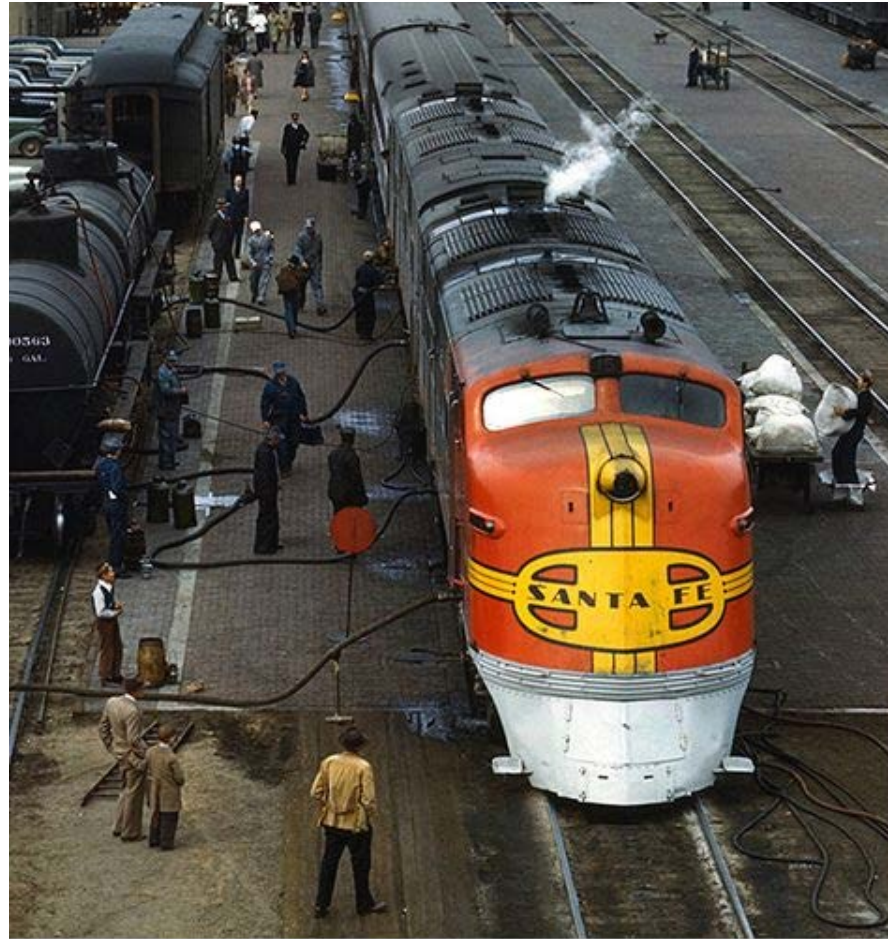
What's recoverable – two types of recovery

- From Insurers
 - Defense Costs
 - Indemnity Costs
- From PRPs
 - Costs of response necessary – threat to health/environment
 - Consistent with NCP - 42 USC §9607(a)(4)(B)

Investigation

- **Client Documents**
 - Preservation Obligations
 - Spoliation
- **Third Parties**
 - Public Records Requests
- **Witness interviews**
 - Former employees
- **Photographs**
 - Did releases occur, where, how, when?
 - Ground-level and aerial photos

Ground-level photos



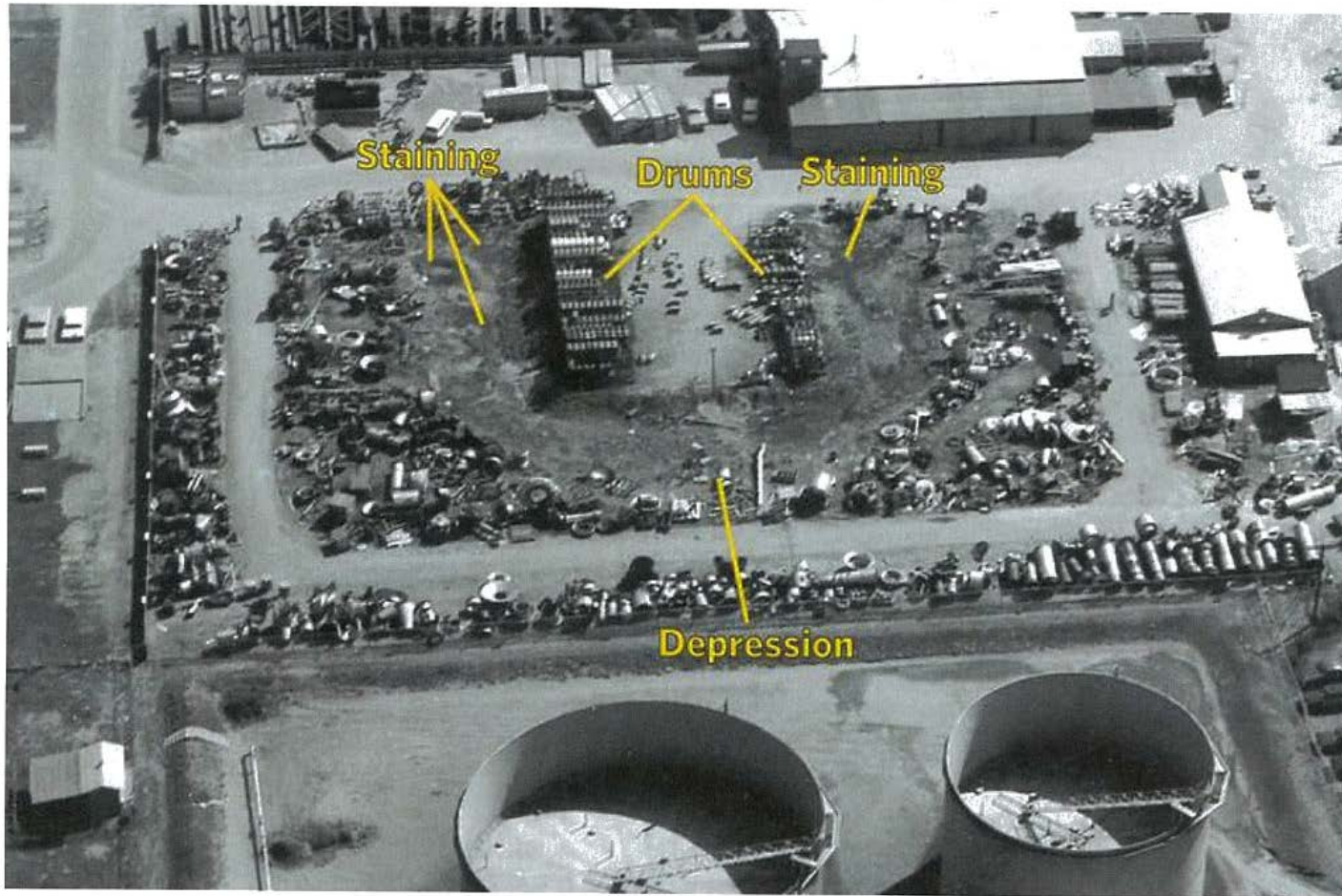
LVK
LARKINS | VACURA | KAYSER

If only...



LVK
LARKINS | VACURA | KAYSER

Stereoscopic Photo Analysis



Aerial Photos of the same site



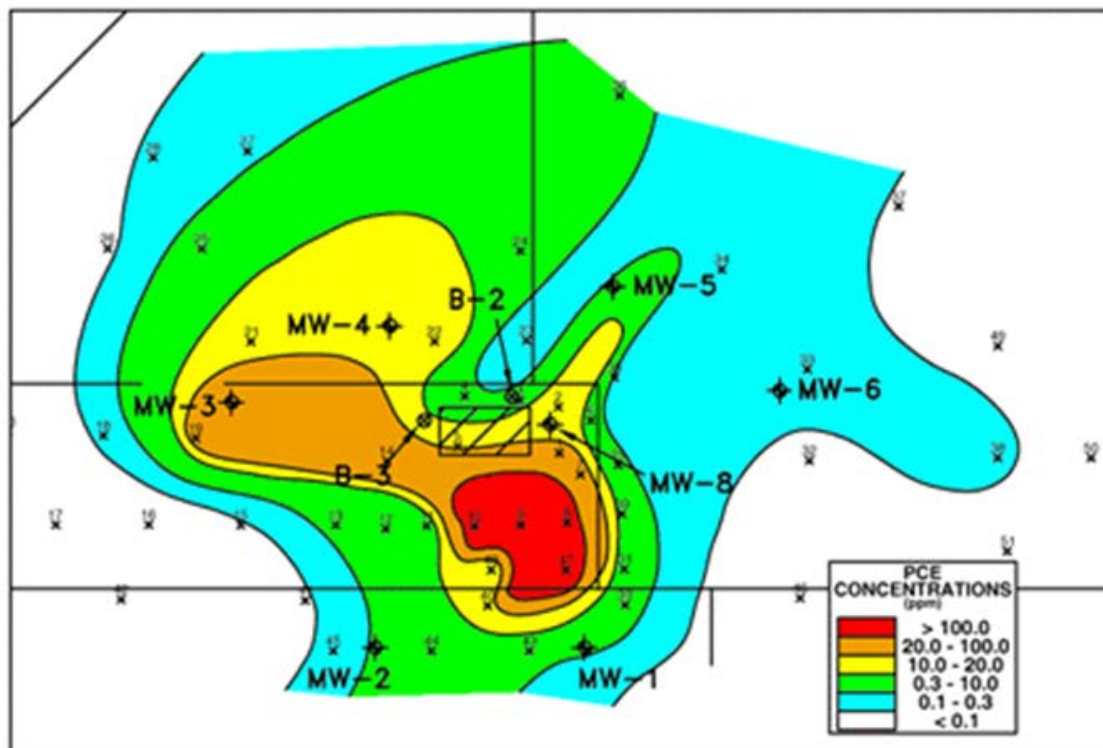
• 1952

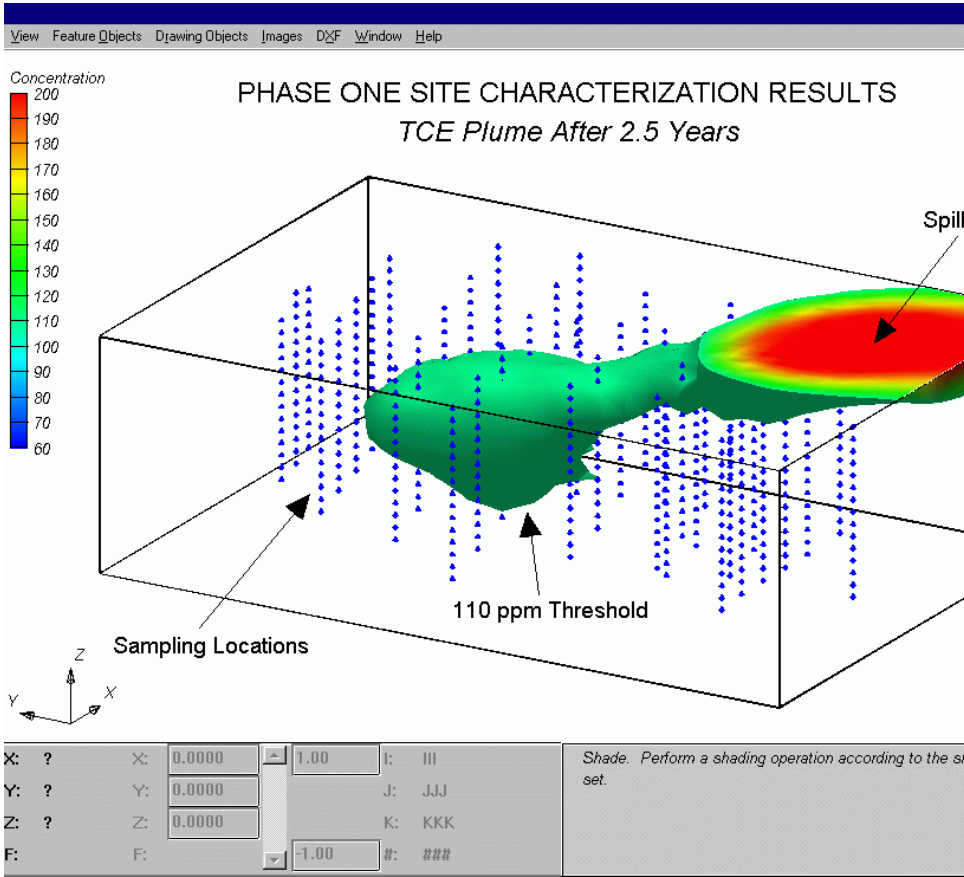


1997

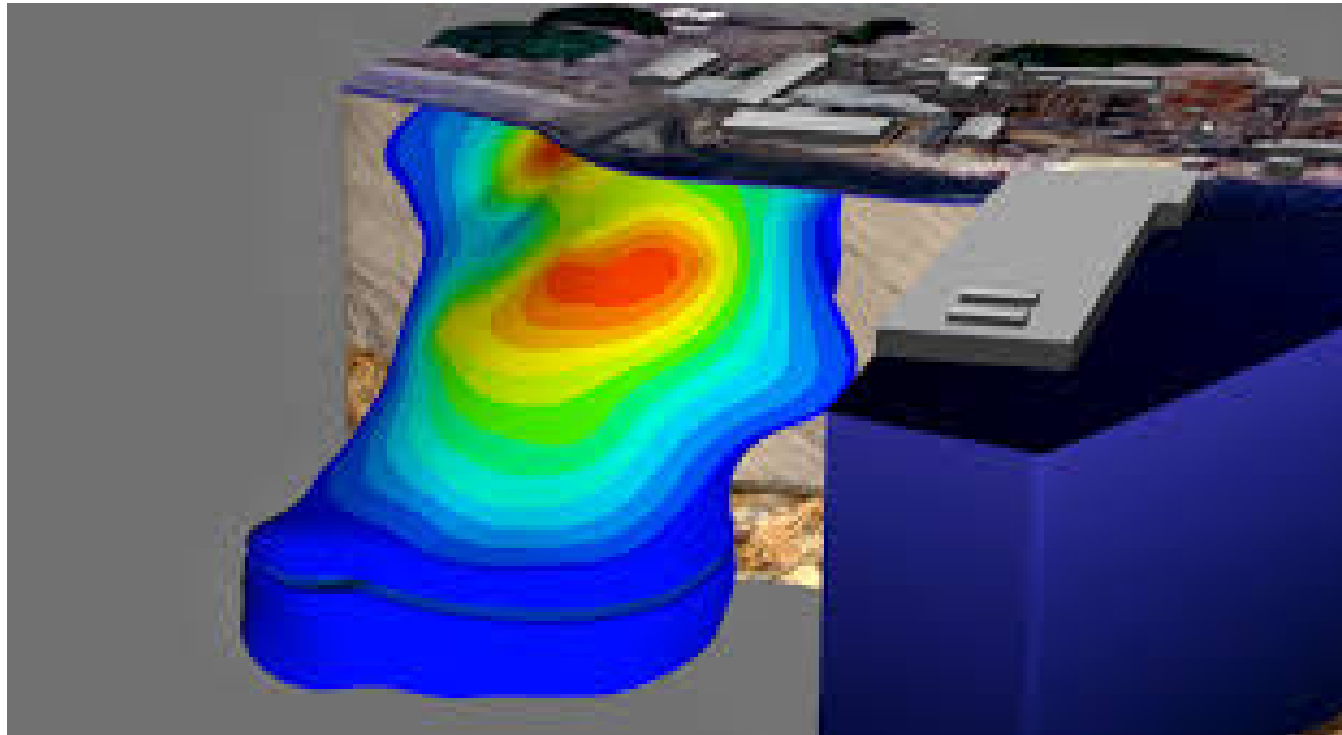
Experts

- Identify the issue
- Select the expert, contract
- Expert reports and discovery
 - FRCP 26 amendments – Draft reports and some attorney communications are protected, but not all
 - Consider agreeing to take depositions in state court, or not to in federal court
- Translate the Opinion into Graphic Evidence





Combining media



Discovery Planning

- **Requests for Production**
 - Use, amounts, timing, care taken
- **Requests for Inspection**
 - Testing, examination of the facility itself
- **Requests for Admission**
 - Advantage: Efficient, fees may be awarded if denial improper
 - What: Historical facts, documents authentic
- **Interrogatories**
- **Depositions with written questions**
 - What to ask: are documents authentic

Discovery planning

- **Depositions**

- Fact witnesses
- Organizational depositions - FRCP 30(b)(6), ORCP 39C(6)
- Perpetuation – FRCP 27; ORCP 37, 39

- **Expert reports and discovery**

- Reports - be careful of the mixed “percipient fact” and expert witness
- Consider agreement to take depositions in state court, or not to in federal court

Other Litigation Considerations

- **Third Party Claims**
- **Bifurcation**
 - Liability, then Remedy *or*
 - Remedy, then Liability
- **Special Master**

Develop the Evidence Map

Claim 1			
Elements	Evidence	Witness	Notes
1.			
2.			
3.			

Developing Trial Themes

Theme 1			
	Evidence	Witness	Notes

Questions?



LVK
LARKINS | VACURA | KAYSER

LVK
LARKINS | VACURA | KAYSER

LVK
LARKINS | VACURA | KAYSER

LVK
LARKINS | VACURA | KAYSER

LVK
LARKINS | VACURA | KAYSER

LVK
LARKINS | VACURA | KAYSER

LVK
LARKINS | VACURA | KAYSER

LVK
LARKINS | VACURA | KAYSER