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## *City of Spokane v. Monsanto Co.*

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In *City of Spokane v. Monsanto Co.*, No. 15-201, 2017 WL 2945729 (E.D. Wash. July 10, 2017), the Eastern District of Washington issued a ruling regarding the nature of response costs that a party must incur to give rise to a cost recovery claim under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The decision also addressed the viability of non-CERCLA claims, such as the Clean Water Act ("CWA") and common law theories.

The case involved polychlorinated biphenyl ("PCB") contamination in the Spokane River. The City of Spokane sued Monsanto based on its production of PCBs under several state tort theories, asserting that Monsanto is responsible for the contamination and resulting damages. Monsanto counterclaimed against the City, alleging that the City's use of PCBs and discharges of those PCBs via the City's wastewater discharges give rise to liability under CERCLA, the CWA, and state tort-law theories (negligence, unjust enrichment, contribution, and equitable indemnity). The City moved to dismiss Monsanto's counterclaims, which the court granted.

### CERCLA Claim

The court initially dismissed Monsanto's CERCLA cost recovery counterclaim, but granted Monsanto's motion to file amended counterclaims explicitly stating the alleged costs that Monsanto incurred. Monsanto's amended CERCLA cost recovery counterclaim alleged that Monsanto incurred costs associated with investigatory and analytical activities related to identifying the sources of PCBs in the Spokane River and

potential remediation options. Monsanto also claimed that the City's PCB discharges created "contingent liability" to Monsanto, which may arise from lawsuits or regulatory actions.

The court held that Monsanto failed to allege that it had incurred recoverable costs for "response" actions under CERCLA. Citing to the Supreme Court's decision in *Atlantic Research*, the court explained that a CERCLA cost recovery action requires that the plaintiff actually pay for the cleanup of a facility—i.e., the response—and that CERCLA does not "provide a means for a party that fears it may face liability for some potential future cleanup costs to preemptively bring an action against another party it believes may be liable for those costs." The court found that Monsanto's alleged costs—those associated with investigating, assessing, identifying, tracing, and quantifying the presence of PCBs in the Spokane River—did constitute "response" costs as defined by the statute. Since there were "no allegations that any containment or cleanup have been undertaken by Monsanto," and Monsanto provided "no indication that it has undertaken these investigative activities for any purpose other than evaluating its liability and defending against legal claims," the court dismissed the claim.

The court also rejected Monsanto's CERCLA declaratory judgment claim, holding that such a claim must be predicated on a viable underlying CERCLA action, which Monsanto did not establish.

### CWA and Common Law Claims

The court also dismissed Monsanto's CWA and common law claims for overlapping reasons. With respect to the CWA claim, the court held that Monsanto failed to establish two of the three elements of Article III standing—causation and redressability. The court noted that, because Monsanto will only be required to respond to the contamination in the Spokane River if it is found liable in a court judgment or settlement, this contingent liability is not fairly traceable to the City's conduct. Moreover, the remedies provided for under the CWA's citizen suit provision—civil penalties paid to the United States—would not redress its purported injury of contingent liability.

The court dismissed Monsanto's state law negligence claim for failure to demonstrate the prima facie element of duty, holding that the City owed no duty "to protect individuals from . . . contribution costs associated with remediation of contamination." While the City does have a duty to protect the public from the harms associated with contamination of the Spokane River, according to the court, Monsanto's claim failed to allege any specific "economic, recreational, or aesthetic interest" in the land or water

allegedly contaminated due to the City's alleged negligence. The court also held that Monsanto failed to demonstrate the element of causation, for the same reason that the court found lack of standing on the CWA claim.

The court rejected Monsanto's unjust enrichment claim as "absurd." Monsanto claimed that any judgment awarded to the City not specifically related to Monsanto's PCB contamination would be "inequitable and unjust." The court noted that Washington's contributory negligence rule ensures that plaintiffs' comparative fault be reduced from judgments, thereby eliminating the possibility of unjust enrichment if the City were to be awarded judgment. For the same reason, the court dismissed Monsanto's contribution claim, while also noting that "there is no basis for a defendant to bring a claim for contribution against the single plaintiff that may secure a judgment against it." Finally, the court dismissed Monsanto's equitable indemnity claim, explaining that equitable indemnity is only available between parties that are found liable to a third party for the same tort.

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