

Environmental Law & Litigation

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Emhart Industries: A Rare Moment in CERCLA Jurisprudence

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The decision of the United States District Court for the District of Rhode Island in *Emhart Industries, Inc. v. New England Container Company, Inc.* is notable as one of the few CERCLA decisions that does not uphold completely USEPA's remedy decision and does not limit its review strictly to the administrative record. It is also one of the few CERCLA decisions that find a party had a good-faith basis for refusing to comply with a Unilateral Administrative Order (UAO) under CERCLA.

Below we discuss the court's unusual holdings on five issues: (1) allowing expert testimony to explain the "highly technical" environmental issues; (2) reviewing key assumptions underlying the remedy decision even though no arguments were presented in the administrative record to challenge them; (3) rejecting USEPA's conclusion, as unsupported by facts and analysis in the record, that the groundwater be considered a source of potable water; (4) rejecting as arbitrary USEPA's fish consumption calculations performed in the Human Health Risk Assessment; and (5) finding a good-faith basis for failure to comply with the UAO.

Background

The site includes three miles of the Woonasquatucket River and surrounding areas where dioxin was discovered in fish in 1996. EPA conducted several removal and remedial actions in which Emhart participated. Emhart filed this case in 2006 to recover its costs. EPA is currently pursuing a "comprehensive" remedial action to address current and future health risks. Emhart challenged multiple aspects of the proposed remedy during public comment periods.

In 2014, EPA issued a UAO ordering Emhart to perform the estimated \$104.6 million remedy outlined in a 2012 Record of Decision. Emhart refused to comply, despite a finding of its liability for releasing dioxin at the site. Instead, it sought judicial review of EPA's remedy selection under Section 113 of CERCLA.

Expert testimony

Normally, challenges to CERCLA remedies are decided on the administrative record, without any witness testimony. In *Emhart Industries*, however, the court held that it would allow

expert testimony. The record was not incomplete, but the court admitted expert testimony as supplemental evidence to help it understand the record's "highly technical" aspects. While the court considered this only a minor exception to the administrative law principle that agency decisions are evaluated based on the administrative record, all CERCLA remedy decisions involve highly technical issues. It will be interesting to see whether other courts reviewing CERCLA remedy decisions will allow expert testimony to supplement the administrative record.

Reviewing key assumptions underlying the remedy

The court declined to bar some arguments that Emhart failed to first raise with EPA during public comment. The issue waiver doctrine normally holds such arguments waived. But a crucial exception provides that EPA will not be excused from its burden to justify key assumptions in its remedy selection, even if no objection arose during public comment. This holding could potentially apply to all CERCLA remedy challenges. While it is prudent to raise all arguments regarding a remedy in the administrative record during the public comment period, this holding gives those challenging a remedy decision a chance to raise arguments not in the record if the issue can be characterized as a key assumption underlying the remedy decision. Here, the court held that the key assumptions regarding fish consumption made in the Human Health Risk Assessment could be challenged even though Emhart had not submitted those comments in the administrative record.

Rejecting the potable groundwater determination

The National Contingency Plan ("NCP") requires a finding that groundwater restoration is practicable and the remedy will effectively accomplish it. But EPA's analyses of the contamination's vertical extent and how much of it resulted from off-site sources were insufficient to support a finding that the groundwater restoration was practicable. Additionally, overwhelming evidence suggested that the groundwater was far too contaminated to become potable.

The court invalidated the remedy decision that EPA had made in reliance on these erroneous assumptions. While the court recognized EPA's broad discretion to characterize the site and

adjust the remedy, it also observed that the NCP requires the Agency to show that groundwater restoration is “practicable” and the remedies will be “effective” in restoring it. EPA had not “collected sufficient information or conducted sufficient analysis” to make that showing.

Fish consumption

The court found that EPA also made missteps in its Baseline Human Health Risk Assessment by artificially increasing the risk calculation for fish consumption at one of the site’s dammed ponds. The Agency had excluded largemouth bass, despite knowing that such fish are likely present there. Including largemouth bass would have significantly reduced the findings of risk. Additionally, it relied on a study to assume that people consume 14 grams of fish from the site daily, even though the same study had cautioned against ascribing this full weight to a single water body. The court held both of these assumptions to be unjustified.

The court held that EPA must correct the administrative record and its foundational errors before proceeding with the comprehensive site remedy. While EPA has discretion on how to move forward, the court posited that the Agency might reopen the remedial investigation and feasibility study process and amend the Proposed Remedial Action Plan. However, in any event, the NCP would require EPA to provide for an additional notice and comment period if its corrections lead to a “significant change” to the remedy, such as a significant increase in necessary time or costs, disruption to local residents, or other possible effects.

Good faith defense to the UAO

The court’s holdings provided the “sufficient basis” Emhart needed to support its refusal to follow the UAO. It noted that EPA’s missteps “do not automatically provide [PRPs] sufficient cause to disregard a UAO”—rather, a showing of good faith is required. But here, Emhart made that showing by its sustained challenges to the remedial design through various public comment periods, objecting to the same critical aspects of the remedial design that the court ultimately found arbitrary. In the meantime, Emhart had actually participated in past site cleanup. Its persistence and good judgment were rewarded.

Conclusion

The *Emhart Industries* decision demonstrates that judicial deference to EPA is not a universal rule and that courts may prevent the Agency from resting on unsupported assumptions. The case allows for rare supplementation of the administrative record and for opportunity to raise issues not raised in that record. These holdings are unusual and underscore the importance of submitting complete criticisms during the public comment period. The way the *Emhart Industries* court addressed the issues gives insight into what type of comments might be most effective in changing the remedy or successfully challenging a remedy decision on judicial review.

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