IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NORTHERN STATES POWER COMPANY,

Plaintiff,

v.

THE CITY OF ASHLAND, WISCONSIN,
ASHLAND COUNTY, WISCONSIN,
SOO LINE RAILROAD COMPANY,
WISCONSIN CENTRAL, LTD., and
L.E. MYERS COMPANY,

Defendants.

OPINION AND ORDER

12-cv-602-bbc

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Plaintiff Northern States Power Company filed this civil action under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601-9675, and Wisconsin common law, to recover the costs of an environmental cleanup at an industrial site known as the Ashland Lakefund Superfund Site. Defendants Soo Line Railroad Company and Wisconsin Central, LTD., filed a motion to dismiss counts 1 and 5-8 of plaintiff's complaint, arguing that claim one of plaintiff's complaint fails to state a cost-recovery claim under 42 U.S.C. § 9607(a) because plaintiff's alleged costs are recoverable only in a contribution action under 42 U.S.C. § 9613(f) and plaintiff's state law causes of action in claims 5-8 are preempted by CERCLA. Dkt. #18.

Defendants City of Ashland, Wisconsin and L.E. Myers have also filed motions to

dismiss, in which they adopt the arguments raised by Soo Line and Wisconsin Central. Dkt. ##28, 47. (Technically, defendant L.E. Myers still has time to file a reply brief, but since it has merely adopted the railroads' arguments, I see no reason to delay a decision on its motion.) Defendant County of Ashland, Wisconsin has also filed a motion to join in the motion by the City of Ashland. Dkt. #45. Plaintiff did not oppose this procedure, so I will grant the county's motion to join the city's motion to dismiss.

After defendants filed their initial motions to dismiss, plaintiff filed an amended complaint. Dkt. #34. Defendants have renewed their motion to dismiss the amended complaint, dkt. ##37, 41, and plaintiff has conceded that the relevant allegations and legal claims remain unchanged so that the motions may be decided on the initial briefs. Dkt. ##42-43. Accordingly, defendants' motions to dismiss plaintiff's first amended complaint are ready for decision.

I will deny the motions to dismiss plaintiff's cost-recovery claim under § 9607(a). Although plaintiff may seek its costs pursuant to the 2003 Administrative Order on Consent and 2012 Consent Order only through a contribution action under § 9613(f), plaintiff may be able to recover costs spent before the 2003 order in a cost recovery action under § 9607(a). I will also deny the motions to dismiss plaintiff's state law claims because defendants have not shown that these claims conflict with the CERCLA remedial scheme.

In its amended complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

The Environmental Protection Agency placed the Ashland Lakefund Superfund Site (hereafter the Ashland site) on its National Priorities List in September 2002. The Ashland site consists of 40 acres of property along the shore of Chequamegon Bay of Lake Superior that the EPA has divided into four areas of concern: (1) Chequamegon Bay; (2) Kreher Park; (3) Upper Bluff and Filled Ravine; and (4) the Copper Falls Aquifer. Kreher Park consists of 13 acres of reclaimed lake bed used currently as a swimming beach, boat landing and recreational vehicle park. The Chequamegon Bay portion of the site consists of 16 acres offshore of Kreher Park and the Upper Bluff portion is southeast of Kreher Park.

The Ashland site was once highly industrialized and each of the defendants has contributed to its contamination. During the 1800s and early 1900s, defendant City of Ashland, Wisconsin, reclaimed the lake bed by dumping solid waste into the lake, discharged sanitary sewage and industrial wastewater into the lake and maintained an open sewer through the park.

From the 1870s through 1987, defendant Soo Line Railroad Company and its predecessors owned a railroad right-of-way through Kreher Park that they used to service a lumber facility, a manufactured gas plant and a commercial dock. Soo Line contributed to the contamination of the site by, among other things, dumping tars, oils and other materials along the tracks and shoreline. In 1987, defendant Wisconsin Central, Ltd. purchased the division of Soo Line that owned and operated the property and facilities in Kreher Park.

From 1885 until 1947, a portion of the Upper Bluff was the site of a manufactured

gas plant which was operated by defendant L.E. Myers Company for part of that time,. The construction and operation of the plant released wastes containing hazardous substances.

From 1901 to 1939, Kreher Park was the site of a large lumber mill. The mill released contaminants including petroleum, diesel, oils and creosote, a wood preservative. In 1939, defendant Ashland County purchased the lumber facility and its property. The county leased the property back to the lumber company for two years and authorized it to demolish the facility. During demolition, wood treatment structures were left on the site, allowing wood treatment residuals to enter the groundwater. The activities of the county and its lessees released contaminants and contributed to the mobilization of contaminants in Kreher Park to Chequamegon Bay.

In 1942, the County sold its property in Kreher Park to the City of Ashland to build a wastewater treatment plant. During construction, the City dispersed contaminants in the soil and pumped contaminated groundwater into the bay. During its operation of the plant, the City discharged raw sewage and wastewater into the bay and routed urban stormwater into the bay through outfalls on the Ashland site. The City also excavated a large area of creosote tar while building a road and disposed of the tar on the site.

In 1986, plaintiff Northern States Power Company, a Wisconsin public utility, acquired the property on the Upper Bluff that was formerly the site of the manufactured gas plant. Plaintiff used it as an equipment, repair and storage facility.

In 1989, the City of Ashland informed the Wisconsin Department of Natural Resources about potential contamination of Kreher Park. Subsequent investigations

determined that the site was contaminated by, among other things, polycyclic aromatic hydrocarbons and volatile organic compounds. In 1995, the DNR named plaintiff as a "potentially responsible party." In 1997, the DNR notified defendants City of Ashland and Wisconsin Central Railroad of their responsibility.

Since 1995, plaintiff has performed or funded a series of investigations to identify subsurface contamination and affected sediments and to identify the historic activities on the site and other potentially responsible parties. Plaintiff also performed two interim removal actions at the site: (a) installing a contaminant recovery system to pump and treat contaminants from the Copper Falls Aquifer and (b) excavating contaminated soil and installing a low permeability cap and a groundwater extraction well.

Subsequently, in November 2003, plaintiff entered into an "Administrative Order on Consent" with the EPA. In the order, plaintiff agreed to perform a Remedial Investigation and Feasibility Study of the entire Ashland site, including Kreher Park and Chequamegon Bay. The study's objectives were to determine the nature and extent of the contamination and any threat to human health and develop and evaluate alternatives for remedial action. Plaintiff completed the study in 2008 and the EPA issued a notice of completion for the Administrative Order on Consent in 2010. On September 30, 2010, the EPA issued a final record of decision on the remedial action to be implemented at the Ashland site.

Throughout the investigation of the site, plaintiff has cooperated closely with the EPA and DNR, including taking the lead role in investigations, preparing technical work plans, remediation plans and design reports, implementing interim actions and providing project

management and technical support. Other than government agencies, plaintiff is the only party that has done any work or provided any funding to address the contamination.

In 2012, plaintiff and the EPA entered into a consent decree, which this court approved on October 19, 2012. Plaintiff agreed to perform a "remedial design and remedial action" with respect to the onland portions of the Ashland site. Plaintiff has incurred and will continue to incur substantial costs related to its cleanup activities at the site in fulfillment of the 2012 consent decree.

OPINION

A. Cost Recovery or Contribution

The Comprehensive Environmental Response, Compensation and Liability Act includes three distinct private causes of action for the costs of environmental cleanups: a "cost recovery" cause of action under 42 U.S.C. § 9607(a) and two contribution causes of action under 42 U.S.C. § 9613(f). As the Court of Appeals for the Seventh Circuit has explained,

> [E]ach CERCLA right of action carries with it its own statutory trigger, and each is a distinct remedy available to persons in different procedural circumstances. Where a person has been subjected to a civil action under 42 U.S.C. §§ 9606 or 9607(a), he may attempt to recover his expenditures through a contribution suit under 42 U.S.C. § 9613(f)(1). Where a person has resolved his liability to the United States, or to a state, for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement, he may attempt to recover his expenditures in a contribution suit pursuant to 42 U.S.C. § 9613(f)(3)(B). If neither of those triggers has occurred, a plaintiff does not have a claim for contribution under CERCLA. That does not mean he has no remedy, however. Any time a person has incurred "necessary costs of response ... consistent with

> the national contingency plan[,]" CERCLA provides for a § 9607(a)(4)(B) cost recovery action.

Bernstein v. Bankert, 702 F.3d 964, 973-76 (2012) (internal citations omitted). If a party has a contribution remedy under either subdivision of § 9613(f), then it cannot bring a cost-recovery action under § 9607(a) for those same costs. Id. at 979; United States v. Atlantic Research Corp., 551 U.S. 128, 139 (2007) (potentially responsible party that pays to satisfy court judgment, "though eligible to seek contribution under [§ 9613(f)(1)], . . . cannot simultaneously seek to recover the *same expenses* under [§ 9607(a)].") (emphasis added). Although the causes of action are mutually exclusive in that sense, it does not follow that a party cannot bring claims under both provisions to recover distinct costs.

Plaintiff alleges causes of action for cost recovery and contribution. Defendants argue that plaintiff cannot bring a cost recovery claim under § 9607(a)(4)(B) because all of its alleged remedial costs were incurred pursuant to settlements and thus are recoverable only through contribution claims under § 9613(f). Plaintiff contends that it may bring a cost recovery action for its costs under the 2003 order and the costs it incurred from 1995 until the 2003 Administrative Order on Consent.

A party may bring a contribution claim under § 9613(f)(3)(B) when it has "resolved its liability . . . for some or all of a response action . . . in an administrative or judicially approved settlement." In Bernstein, 702 F.3d at 975-76, the court of appeals clarified the circumstances in which a settlement "resolves" a party's liability within the meaning of CERCLA. Merely entering an administrative settlement is not sufficient. A party's liability is "resolved" only after it satisfies its obligations under the settlement and the President

certifies that the remedial action is complete. Id. (citing 42 U.S.C. § 9622(f)(1), (3)). Until that time, a party must recover its costs under § 9607. In Bernstein, the plaintiffs had entered into two separate Administrative Orders on Consent with the EPA. When the plaintiffs filed their lawsuit, the EPA had certified that the plaintiffs' work was complete under the first settlement, but their work under the second settlement was ongoing. The court held that the plaintiffs could sue only for *contribution* under § 9613(f)(3)(B) for cost incurred under the first settlement but could bring a suit for *recovery of costs* under § 9607(a) for costs incurred in their ongoing efforts under the second settlement.

In this case, plaintiff alleges that it satisfied its obligations under the 2003 Administrative Order on Consent in 2008 and the "EPA issued its notice of completion for the AOC in 2010." (Am. Cpt., dkt. 34, ¶ 6). The certification of completion triggered plaintiff's right to contribution, so plaintiff can recover costs associated with its 2003 settlement only under § 9613(f)(3)(B). However, plaintiff has also alleged that it incurred investigatory and cleanup costs after 1995 but before entering into the 2003 Administrative Order. These costs are not clearly response costs for which it has "resolved" its liability through an administrative or judicially approved settlement, which would be sufficient to state a cost-recovery claim. Atlantic Research, 551 U.S. at 139 (2007) (contribution cause of action permits reimbursement of costs incurred to "satisfy a settlement agreement or a court judgment," as opposed to costs incurred in cleanup "without any established liability to a third party"); City of Waukegan, Illinois v. National Gypsum Co., No. 07-C-5008, 2009 WL 4043295 (N.D. Ill. Nov. 20, 2009) (allegation that plaintiff incurred costs outside

obligations in consent order sufficient to state claim under § 9607(a)).

However, defendants argue that plaintiff can pursue these pre-2003 costs in a contribution action because they relate to the same environmental cleanup. Defendants rely for this argument primarily on Appleton Papers Inc. v. George A. Whiting Paper Co., 572 F. Supp. 2d 1034 (E.D. Wis. 2008). In Appleton Papers, the district court concluded that the right to sue under § 9613(f) is triggered by a suit or a settlement, but the right to contribution is not limited to costs "expressly mandated by a previous action." Id. at 1044. Under the common law of contribution, a plaintiff must prove it shares a common liability with the defendant, but its recovery is not limited to amounts set by a prior determination of liability. Id. (citing Atlantic Research, 551 U.S. at 138-39 (explaining contribution in CERCLA should be understood in its "traditional sense")). Therefore, the court concluded, a plaintiff may seek contribution under CERCLA for "[a]ny payments made to discharge a common liability in excess of the plaintiff's own fair share." Id.

Although I agree that nothing in CERCLA § 9613(f)(1) and 9613(f)(3)(B) limits a plaintiff's recovery to liabilities "expressly mandated" by a settlement or lawsuit, I am not persuaded to adopt the broader rule urged by defendants. If a CERCLA contribution claim is not limited in some way by the scope of the triggering settlement or lawsuit, it is difficult to imagine what purpose these triggers serve. It is possible that in Appleton Papers the court meant that a party may seek contribution for any payments related to the "common liability" that is the subject of a lawsuit or an approved settlement, even if no settlement or order required the plaintiff to incur those specific costs. At this point, defendants have

offered the court insufficient guidance to support a definitive interpretation of a right to contribution under CERCLA in light of the text and its purposes. Even if I were to follow the interpretation of Appleton Papers, defendants have not engaged in the necessary analysis of the 2003 and 2012 orders to show that plaintiff's alleged costs fall under a "common liability." Defendants argue that plaintiff pleaded itself out of court by including its costs before 2003 in its claim for contribution under § 9613, but only those espousing a rigidly formalistic pleading standard would fault plaintiff for claiming these damages in the alternative.

Moreover, defendants have not explained why, at this early stage of the litigation, it is necessary to locate defendants' claim in a specific remedial provision. They have not argued that placing plaintiff's claims in one provision or the other will narrow this litigation. Defendants' only argument about the difference between the provisions has been rejected by the court of appeals since defendants filed their brief. Defendants argue that plaintiff is trying to shift full liability onto defendants by suing them under § 9607(a), which provides for joint and several liability, while hiding behind § 9613(f)(2), which prohibits parties who have settled from being sued in a counterclaim for contribution. However, the court of appeals has explained that CERCLA plaintiffs cannot exploit the "contribution bar" in this fashion because liability under § 9607(a) may be apportioned according to fault. Id. at 979. Because it appears from the pleadings that plaintiff incurred costs that are not encompassed by their settlements, defendants motion to dismiss plaintiff's claim one will be denied.

B. Preemption

In addition to its CERCLA claims, plaintiff has asserted Wisconsin common law claims against Soo Line for negligence (claim four), creation and maintenance of a public nuisance (claims five and six) and contribution (claim eight) and against Wisconsin Central for negligence (claim seven) and contribution (claim eight). (Because the state law claims are pleaded only against Soo Line and Wisconsin Central, from this point forward I will use the term defendants to refer only to Soo Line and Wisconsin Central.) Defendants argue that these state law claims are preempted by CERCLA.

CERCLA contains several provisions relevant to defendants' preemption argument. Section 9614 provides in part:

> (a) Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.
>
> (b) Any person who receives compensation for removal costs or damages or claims pursuant to this Act shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this Act.

42 U.S.C. § 9614. In addition, § 9652(d) provides

> Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants. The provisions of this chapter shall not be considered, interpreted, or construed in any way as reflecting a determination, in part or whole, of policy regarding the inapplicability of strict liability, or strict liability doctrines, to activities relating to hazardous substances, pollutants, or contaminants or other such activities.

42 U.S.C. § 9652(d).

As these provision make clear, CERCLA allows states to impose additional liability with respect to the release of hazardous substances or contaminants but expressly prohibits double recovery for "the same removal costs or damages or claims" under both CERCLA and other state laws. People ex rel. Ryan v. Northbrook Sports Club, No. 99-C-4038, 1999 WL 1102740 at *3 (N.D. Ill. Nov. 24, 1999). Because CERCLA does not preempt state law expressly or occupy the field of hazardous waste cleanup, it preempts state law only when there is an actual conflict. Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 138 (2d Cir. 2010); PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, 617-18 (7th Cir. 1998). Accordingly, CERCLA preempts a state law cause of action only when "compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." United States v. Locke, 529 U.S. 89, 109 (2000).

Defendants argue that plaintiff's state law claims are preempted because plaintiff alleges identical conduct and damages under its state law and CERCLA claims. They argue that plaintiff's claims are precluded to the extent they seek recovery of costs otherwise recoverable under CERCLA and allowing plaintiff to recover any costs *not otherwise recoverable* under CERCLA would interfere with its scheme for apportioning liability. (Defendants also argue in their reply brief that allowing additional liability under state law, even in the alternative, would undermine the incentive of potentially responsible parties to settle because an EPA settlement could not bar state law suits. Dkt. #25, at 6. Defendants waived this

argument by not raising in its opening brief. Nelson v. La Crosse County Dist. Attorney, 301 F.3d 820, 836 (7th Cir. 2002).)

Defendants' apportionment argument is unpersuasive, for several reasons. First, it relies on the incorrect preemption test. If any state law claim related to environmental contamination was preempted whenever a party raised a CERCLA claim, then CERCLA has preempted the field of hazardous waste cleanup, contrary to the governing case law. Moreover, defendants' position is contrary to the plain language of §§ 9614(a) and 9652(d), which expressly authorizes state law claims that impose additional liability. Last, defendants' argument relies on PMC, 151 F.3d at 617, and Appleton Papers Inc. v. George A. Whiting Paper Co., No. 08-C-16, 2012 WL 4748611 (E.D. Wis. Oct. 4, 2012), but these cases are distinguishable by their facts and their procedural posture.

In PMC, the court of appeals found that CERCLA preempted an Illinois statutory claim for contribution because the state law claim would nullify specific prerequisites for a CERCLA contribution claim. The district court had dismissed the plaintiff's CERCLA contribution claim because the plaintiff failed to submit its proposed cleanup method for public comment, which is required for consistency " with the national contingency plan" and recoverable in a CERCLA contribution claim. Id. (citing 42 U.S.C. § 9607(a)(4)(B); 40 C.F.R. § 300.700(c)(6)). Nevertheless, the district court allowed the plaintiff to recover the same cleanup costs under Illinois's general contribution statute. The court of appeals reversed, holding that the state law claim was preempted. It recognized that the "savings clause" of CERCLA means that the Act is not the exclusive remedy for harms caused by

hazardous substances or contaminants and the Act does not "wipe out" the common law of nuisance. However, allowing the plaintiff to recover for *the same costs* under the Illinois statute that it was specifically denied under CERCLA would "nullify" the requirement that contribution costs be consistent with the national contingency plan. Id. at 618.

In Appleton Papers, 2012 WL 4748611 at *1-4, the district court found that CERCLA preempted the defendants' counterclaims for negligence, strict liability, nuisance and contribution. In a previous opinion, the court had ruled that the defendants were not entitled to contribution from the plaintiff under CERCLA because the plaintiff was not responsible for the environmental damage. Id. at *1. Because the court had found that defendants' alleged costs arose "because of CERCLA" and the CERCLA framework dictated that plaintiff should be apportioned none of those costs, it reasoned that allowing recovery under state law counterclaims would undermine the CERCLA framework for apportioning environmental cleanup costs. Id. at *2-3. See also Niagara Mohawk, 596 F.3d at 138 (state law contribution claim preempted because "§ 113 was intended to provide the only contribution avenue for parties *with response costs incurred under* CERCLA") (emphasis added).

Neither PMC nor Appleton Papers supports dismissal of plaintiff's state law claims at this time. Unlike the defendants in PMC, the defendants in this case do not contend that the state law claims would allow plaintiff to circumvent a specific requirement of CERCLA's statutory scheme. Instead, they argue that *any* state law claims for the cleanup costs of environmental contamination must be preempted because state law may impose a different apportionment than CERCLA. Although defendants' position is similar to the district

court's conclusion in Appleton Papers, the procedural posture of this case is significantly different. I have not determined whether plaintiff's costs are encompassed by CERCLA. Plaintiff *contends* that it can recover its costs under CERCLA and under state law, but it is entitled to plead in the alternative. Fed. R. Civ. P. 8(d)(2). I may find that plaintiff's claims are not encompassed by CERCLA and thus there is no conflict. Moreover, CERCLA provides expressly that states may impose additional liabilities for environmental contamination, as long as they do not *conflict* with its statutory scheme. Defendants' hypothetical conflict is not sufficient to show that the state law claims are preempted.

At later stages of this litigation, I may conclude that (1) plaintiff is entitled to recover all of its costs under CERCLA, so its state law claims are precluded as duplicative under § 9614(b); (2) some or all of plaintiff's cost claims were incurred pursuant to CERCLA but the statute does not permit it to recover those costs, so recovery under state law would conflict with CERCLA and plaintiff's state law claims would be preempted under PCM; or (3) some of plaintiff's costs are outside the CERCLA framework, so a state law claim for those costs would fall within the CERCLA savings clauses, §§ 9614(a), 9652, and not be preempted. Because it is not possible to make this determination on the pleadings, I will deny defendants' motions to dismiss the state law claims as preempted. New York v. West Side Corp., 790 F. Supp. 2d 13, 28 (E.D.N.Y. 2011) (premature to determine CERCLA preemption under Fed. R. Civ. P. 12(b)(6)).

ORDER

IT IS ORDERED that

1. Defendant Ashland County, Wisconsin's "motion to join 41 motion for judgment on the pleadings regarding first amended complaint," dkt. #45, is GRANTED.

2. The motion to dismiss plaintiff's first amended complaint, dkt. #37, filed by defendants Soo Line Railroad Company and Wisconsin Central, LTD.'s is DENIED.

3. The "motion for judgment on the pleadings regarding first amended complaint," dkt. #41, filed by defendant the City of Ashland, Wisconsin is DENIED.

4. Defendant L.E. Myers Company's motion to dismiss, dkt. #47, is DENIED.

Entered this 1st day of April, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge