1998 WL 2016507
Only the Westlaw citation is currently available.
United States District Court, W.D. Michigan.

KALAMAZOO RIVER STUDY GROUP, Plaintiff,
v.
ROCKWELL INTERNATIONAL, et al.,
Defendants.

No. 1:95–CV–838.
|
June 30, 1998.

Attorneys and Law Firms

Alan C. Bennett, Law, Weathers & Richardson, Bridgewater Pl., Grand Rapids, MI, Kent, Jerome T. Wolf, James Lee Moeller, Sonnenschein Nath & Rosenthal, Kansas City, MO, for Kalamazoo River Study Group, pltf.

Joseph C. Basta, Dykema Gossett, PLLC, Detroit, MI, Wayne, for Rockwell International Corporation, deft.

Kathryn J. Humphrey, Joseph C. Basta, (See above), Dykema Gossett, PLLC, Detroit, MI, Wayne, for Eaton Corporation, deft.

Joseph C. Basta, Dykema Gossett, PLLC, Detroit, MI, Wayne, for Rockwell International Corporation, counter-claimant.

Alan C. Bennett, Law, Weathers & Richardson, Bridgewater Pl., Grand Rapids, MI, Kent, Jerome T. Wolf, James Lee Moeller, Sonnenschein Nath & Rosenthal, Kansas City, MO, for Kalamazoo River Study Group, counterdeft.

Joseph C. Basta, Dykema Gossett, PLLC, Detroit, MI, Wayne, for Rockwell International Corporation, counter-claimant.

Alan C. Bennett, Law, Weathers & Richardson, for Kalamazoo River Study Group, counterdeft.

OPINION

BELL, J.

***1** This matter comes before the Court on cross-motions for summary judgment on the issue of liability filed by Plaintiff Kalamazoo River Study Group ("KRSG") and Defendants Rockwell International and Eaton Corporation.

I.

Plaintiff KRSG filed this action under sections 107(a) and 113(f) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9607(a) & 9613(f), seeking relief from eight corporations for the study and remediation of polychlorinated biphenyl ("PCB") contamination at the Allied Paper, Inc./Portage Creek/Kalamazoo River Superfund Site (the "Site").

In a previous opinion issued in this case this Court determined that CERCLA does not permit a § 107 claim by one potentially responsible party ("PRP") against other PRPs for joint and several liability.[1] In another opinion addressing cross-motions for summary judgment filed by Plaintiff and Defendants Menasha Corporation, Pharmacia and Upjohn Company, and Rock–Tenn Company, Mill Division, Inc.,[2] this Court outlined the background of this case and set forth the legal standards that would be applied in evaluating Plaintiff KRSG's claims. In that opinion, which is incorporated herein by reference, this Court articulated the standard it would apply for testing the liability of the defendants in this action as the "threshold of significance" standard: is the evidence of defendant's release of PCBs of sufficient significance to justify holding defendant liable for response costs?

II.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. "In assessing the record to determine whether there is any genuine issue of material

fact, the court must resolve all ambiguities and draw all factual inferences in favor of the non-moving party." *Wathen v. General Elec. Co.*, 115 F.3d 400, 403 (6th Cir.1997) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). The mere existence of a scintilla of evidence in support of Plaintiff's position is not sufficient to create a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The nonmoving party must do more than show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The mere possibility of a factual dispute is not enough. *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir.1996). The non-moving party must present evidence on which the trier of fact could reasonably find in its favor. *Id.*

III.

Plaintiff KRSG has moved for summary judgment on the issue of Defendant Rockwell's liability. In support of this motion KRSG relies on evidence that Rockwell has a history of releasing oily wastes into the Kalamazoo River, and evidence that PCBs have been found in all of the oil handling areas.

***2** Defendant Rockwell opposes KRSG's motion and moves for summary judgment in its own favor. Rockwell contends that the evidence is insufficient to support a finding of liability as a matter of law. Defendant Rockwell does not deny the presence of PCBs on its site. Neither does it deny the release of oily wastes into the Kalamazoo River. Rockwell contends, however, that there is no evidence that it has released any PCBs into the River, much less that it released sufficient quantities of PCBs to meet the threshold of significance.

The underlying evidence is not contested. Since 1914 Defendant Rockwell International has owned property and a manufacturing plant at 1 Glass Street, Allegan. The property is on the Kalamazoo River downstream from the National Priorities List ("NPL") Site, but within the 95–mile stretch of the Kalamazoo River that KRSG has agreed to study pursuant to the Administrative Order by Consent ("AOC").

From 1953 through 1988 Rockwell manufactured automotive parts at the Allegan plant, including universal joints and driveline parts for heavy trucks and construction equipment. The manufacturing process (forging, machining and heat treating metal parts) involved the use of straight cutting oils, water soluble oils, quench oils, cooling oils, and hydraulic oils. Rockwell's manufacturing process generated thousands of gallons of oil-containing wastes.

Prior to 1945, Rockwell discharged its process wastewater with little or no treatment directly into the Kalamazoo River. In 1945, in response to concerns raised by the Michigan Department of Conservation, Rockwell built the Oil Floatation House, also referred to as the "Hog House", to separate oils from the plant's process wastewater before it was discharged into storm drains and into the Kalamazoo River.

In 1960 Rockwell began discharging industrial wastewater into a new, unlined collection pond known as the Soluble Oil Separation ("SOS") Pond. The SOS Pond was 15 feet from the Kalamazoo River. In 1965 the Michigan Water Resources Commission ("MWRC") survey concluded that Rockwell's oil was reaching the river as a result of leaching from the SOS Pond and as a result of discharges from the Oil Floatation House. By 1970 Rockwell acknowledged that ponds constructed of dirt dikes were unsatisfactory due to saturation of the dike walls and sub-soil seepage. In 1974 the SOS Pond was filled in.

Due to continued complaints from the MWRC, in 1971 Rockwell constructed a wastewater treatment plant ("WWTP") consisting of six underground storage tanks and three treatment ponds located next to the River. In 1973 oils appeared to be seeping into the river through the banks of the new treatment ponds. Oil booms were installed across the width of ponds # 1 and # 2. In the mid–1970's Rockwell installed two oil booms in the river to control continued seepage problems.

The EPA's testing of the area in 1984 revealed the presence of lead, arsenic, cyanide, and solvents in the ground water near the oil recovery wells and lead in the water being discharged into the river. In 1987 the EPA added the Rockwell facility to the National Priorities List as a Superfund Site. Rockwell signed an AOC in 1988, and agreed to conduct a Remedial Investigation/Feasibility Study ("RI/FS") at the site.

***3** Rockwell's wastewater effluent was tested by the Michigan Department of Natural Resources in 1976 and 1986, and both tests were negative for PCBs. However, in 1990 and 1992, in the course of conducting its RI/FS, Rockwell's environmental consultants, Environmental Strategies Corporation ("ESC") detected PCBs in ground water, light non-aqueous phase liquid ("LNAPL"), soil and sediment, taken from the areas of the Oil Floatation

House, the SOS Pond, and the WWTP Ponds Nos. 1, 2, and 3. The samples showed PCB concentrations as high as 1600 parts per billion ("ppb"), 900 ppb, 620 ppb, and 440 ppb.[3]

In October 1996, Rockwell's consultant took a soil sample from the river bank at the end of the former discharge line from the Oil Floatation House which confirmed the presence of PCBs at 35 ppm (35,000 ppb). This sampling result, found within a foot or two of the River's edge, was described by the EPA as a high level of PCB contamination. The pattern of PCBs found at this location was not consistent with the PCBs upstream or downstream. Rockwell's consultant, Robert C. Barrick, concluded that the River was not a source of the PCBs at this location; instead, these PCBs were most likely associated with the outfall pipe from the Oil Floatation House.

Defendant Rockwell notes that PCBs were only found in 13 out of 111 soil samples. Plaintiff, however, has come forward with evidence that PCB contamination was found in all of Rockwell's oil handling areas.

Although there is ample evidence of PCBs on Rockwell's property, no one with personal knowledge has been able to pinpoint the origin of the PCBs. Some of the possible sources of the PCBs include dielectric fluids in Rockwell's electrical equipment, fill dirt from a nearby landfill, or PCBs in the oils used by Rockwell.

The release of PCBs associated with electrical equipment or fill dirt are arguably incidental, and no effort has been made to trace the PCBs from such sources to the Kalamazoo River. The focus in this case has accordingly been directed to the issue of whether Rockwell used PCBs in its process oils.

There is no direct evidence that Rockwell used any oils containing PCBs as additives. There is no evidence that Rockwell purchased PCB-containing oils, and none of the Rockwell employees had any recollection of using PCB-containing oils. Rockwell asserts that it did not conduct any operations at the facility which historically have been associated with PCBs, and had no incentive to use oils with PCBs. Rockwell conducted no forging, die casting or other extremely high temperature operations that might have benefitted from the fire-resistant qualities of PCB-containing oil. Moreover, oils with PCBs were more expensive, had an unpleasant odor, and were irritating to the workers' skin. According to Rockwell, if there were PCBs in the process oils, they are only attributable to unintentional trace contamination.

Rockwell has also presented evidence developed through gas chromatography that the "fingerprint" of PCBs detected on the Rockwell property does not match the "fingerprint" of the PCBs found in the Kalamazoo River. The dominant Aroclor mixture found on Rockwell's property is Aroclor 1254, while the dominant Aroclor mixture found in the River, both upstream and downstream of the Rockwell facility, is Aroclor 1242.

***4** Despite the lack of direct evidence that Rockwell used PCB-containing process oils, PCBs have been found in the subsurface waste oils (LNAPL) floating on the groundwater in the vicinity of Rockwell's oil treatment areas. Rockwell's consultants have described the LNAPL as a mixture of Rockwell's cutting oils and hydraulic oils.

Viewing the facts in the light most favorable to Plaintiff KRSG, there is evidence in the record to support Plaintiff's contention that the steady release of PCBs to the River can be inferred from the fact that for the past 10 years environmental samples taken by Rockwell and its consultants have confirmed PCB contamination in those areas where Rockwell's oily wastewaters were handled, treated and discharged to the river.

Viewing the facts in the light most favorable to Defendant Rockwell, the Court finds some merit to Rockwell's contention that there is insufficient evidence of its use of PCB-containing oils to support a reasonable inference that it discharged PCBs in its oily wastes to the Kalamazoo River, at least not in any measurable quantity or with any regularity.

Upon review of all the evidence presented on these cross-motions for summary judgment, the Court concludes that whether the PCBs found at Rockwell's Allegan facility indicate only incidental PCB contamination from discrete sources, or whether they indicate that Rockwell made regular use of PCB-containing oils in its process oils that were released with its wastewater into the Kalamazoo River, is a question of fact that merits further development at trial. This is not an issue that is appropriate for resolution on summary judgment. Accordingly, the cross-motions for summary judgment as to liability filed by Plaintiff KRSG and by Defendant Rockwell will be denied.

IV.

Also before this Court is a motion for summary judgment on the issue of liability filed by Defendant Eaton

Corporation. Eaton contends that there is no evidence to support Plaintiff's contention that Eaton is responsible for PCB contamination of the Kalamazoo River.

Plaintiff KRSG opposes Eaton's motion and moves for summary judgment in its own favor. Plaintiff contends that there is no question that Eaton used process oils containing PCBs at each of its facilities and that wastewaters containing those oils for a considerable period of time were discharged directly into storm and sanitary sewers that further discharged directly to the Kalamazoo River.

Eaton manufactures parts for the automotive industry. Three Eaton facilities are at issue in this motion: the Marshall, Battle Creek, and Kalamazoo facilities. None of these three facilities is located next to the River.

A.

The Eaton Torque Control Products Division plant is located in Marshall, Michigan, approximately 30 miles upstream of the most upstream part of the Site. It is located approximately one-quarter mile from the Kalamazoo River. The Marshall facility machines, grinds, heat-treats and assembles components for the transportation industry. It is still in operation.

***5** There is evidence that in 1980 PCBs were detected in a single sample of the effluent from the Marshall facility at a level of 0.82 ppb. Despite additional sampling, no further PCBs were detected. In 1981 Eaton inventoried all incoming products at the Marshall plant for PCBs. No PCBs were found. The MDNR agreed that no further PCB monitoring was necessary because the Marshall plant did not use PCBs.

Other than the one 1980 sample, no PCBs were found in wastewater tested in 1973, 1980, 1981 and 1983. The quench oils, hydraulic oils and waste oils at the Marshall plant were tested by the MDNR in 1985, and no detectable levels of PCBs were found.

Sampling of riverbed sediments and settleable solids for almost 20 miles downstream of the Marshall plant have not revealed any detectable levels of PCBs.

B.

Eaton's former Valve Division plant was located at 463 North 20th Street, Battle Creek, approximately one-half mile from the Kalamazoo River, and approximately 15 miles upstream of the Site. Eaton manufactured internal combustion engine valves and gears at the Battle Creek plant from the 1940s until 1983 when operations were ceased.

The outfall from the Battle Creek plant to the Kalamazoo River was shared with Clark Equipment Company and three municipal storm sewers. In February 1972 a wastewater sample from the joint outfall revealed PCBs of 1400 ppb. A September 1972 study of the wastewater at Eaton's facility found PCBs at 0.24 ppb and 0.12 ppb. The samples were taken from a storm sewer that drained areas outside of the Eaton facility as well as areas within the Eaton facility.

In 1981 VERSAR, an environmental consultant, inspected the Battle Creek plant to determine compliance with PCB disposal and marking regulations. VERSAR found some PCBs leaking from transformers. VERSAR also found PCBs in the swarf (grinding sludge) at a level of 7 ppm. VERSAR sampled cutting, quench and hydraulic oil in the plant, however, and found no detectable levels of PCBs in any of those oils.

In 1983, after the plant was shut down, the wood block floor was tested for PCBs. PCBs were found to be present in all wood block sampled. Approximately 20 percent of the samples had PCB levels of greater than 50 ppm, the level at which the EPA requires special disposal.

The MDNR tested sediments downstream of the former Battle Creek plant in 1988. Of the eleven sampling stations, all but one were non-detect for PCBs, and the remaining one was at the detection limit of 1 ppm. That single detection occurred more than a mile downstream of the Battle Creek plant.

A Monsanto document found in the MDNR files indicates Monsanto sales of Pydraul, a PCB-containing hydraulic oil, to a number of customers, including Eaton's Battle Creek plant. The document indicates that Monsanto sold Eaton 1940 pounds of Pydraul in 1970, 645 pounds in 1971, and 1080 pounds in 1972.

C.

The Eaton Corporation Transmission division plant is located at 222 Mosel Avenue, Kalamazoo, Michigan. Eaton manufactured truck transmissions at the Kalamazoo facility from the mid–1950's until January 1984, when the plant was shut down. The plant was located approximately one-half mile from the Kalamazoo River.

***6** The wastewater from the Kalamazoo plant was tested by the MDNR in 1973 and 1976. No PCBs were detected. There is no evidence in the record of any sample of water, soil or wastewater effluent which has detected PCBs at the Kalamazoo plant.

Wastewater from the Kalamazoo plant was discharged via the Zantman Drain to the Kalamazoo River.[4] The Zantman Drain is an open culvert draining upstream farmlands and is accessible to several industrial properties near Eaton. There is no testing or sampling indicating detectable levels of PCBs anywhere along the Zantman Drain between the Eaton facility and the River.

When the Kalamazoo plant was sold in 1985, an environmental due diligence investigation was performed by an environmental consultant, GZA, retained by the purchaser. The only PCBs located at the Kalamazoo plant were those found in the wood block flooring. Eaton's expert, Dr. Lennard Wharton, has indicated that the PCBs in the flooring were localized in four areas of the floor where PCB-containing electrical power distribution equipment had been located. There were no significant concentrations in the vicinity of the quench baths or the machine tool areas where cutting fluids would have been used.

V.

Plaintiff boldly asserts that the evidence conclusively demonstrates that the process oils used by Eaton contained PCBs, and that those PCB-containing process oils were discharged to the Kalamazoo River in "huge quantities" until the late 1960s or early 1970s.

Defendant Eaton does not deny that there were PCBs in the electrical equipment at each of the three plants. There is no evidence, however, of PCB leaks from the electrical equipment at the Marshall plant and there is no evidence that any PCB leaks from the electrical equipment at the Battle Creek and Kalamazoo plants made their way into wastewater or outside soil and from there to the Kalamazoo River.

Plaintiff KRSG does not attempt to show that leaks from electrical equipment resulted in PCB contamination of the River. Plaintiff focuses instead on its claim that there were PCBs in Eaton's process oils (quench, hydraulic and cutting oils). Defendant Eaton does not deny that process oils likely escaped in wastewater and may have been discharged to the River. Therefore, the central issue raised by these cross-motions for summary judgment is whether, viewing the evidence in the light most favorable to Plaintiff, and drawing all reasonable inferences in Plaintiff's favor, a trier of fact could reasonably conclude that Eaton's process oils contained PCBs.

There is no testimony from anyone with personal knowledge that Eaton ever used PCB-containing oils in its processes. There is no evidence of any test results showing the presence of PCBs in the fluids used in the Eaton plants. There is no testimony that Eaton engaged in activities that required PCB additives. PCBs are most commonly found in the oils used in die casting operations. Eaton did not have a die casting operation. The evidence is uncontroverted that Eaton had no incentive for using PCBs in its process oils because the PCBs would have added unnecessary costs, without any corresponding benefit. In fact, there was a disincentive for using PCBs because they were poorer in performance than other cutting oils, had unpleasant odors, and were irritating to the skin.

***7** Despite the lack of direct evidence of PCBs in Eaton's process oils, Plaintiff's expert, Dr. Kenneth Crumrine, has opined that "PCBs were present in at least one or more of the cutting oils, hydraulic oils and quench oils" used by Eaton. Dr. Crumrine's opinion is built largely on the statements of Eaton's environmental engineers, the statements of a former MDNR engineer, EPA studies regarding the types of oils used in the industry, and the PCB contamination of Eaton's wood block floors.

Plaintiff argues that Eaton has "admitted" that its process oils contained PCBs because its director of environmental engineering testified that some process oils "in fact" contained PCBs. Plaintiff overstates the evidence.

Stuart Lightfoot, Eaton's director of environmental engineering, testified that he suspected that the sources of the PCB contamination at the Battle Creek facility were leaking capacitors and transformers, and possibly a heat treat oil quench operation. "Possibly heat treat quench oil, if there was any used. We had no knowledge there was any PCBs in the quench oils but, I mean, it could be." Lightfoot dep. p. 153.

Ken Manchen, one of Eaton's environmental engineers,

speculated that the PCB contamination at the Battle Creek facility was attributable to PCB-containing hydraulic oils used during the war years. Manchen did not have any independent knowledge that PCB-containing hydraulic oils had been used. As Manchen testified, in forming his opinion he relied on a theory voiced by Lightfoot. Manchen dep. pp. 73–74.

With respect to the Kalamazoo facility, Mr. Lightfoot testified that he thought the cause of the PCB contamination on the floors was a dripping spigot on an internal wet transformer, and a heat treat oil quench operation. *Id.* at 173 –75. Because the Kalamazoo facility heat treat department did not have automatic fire extinguishers on it, Lightfoot presumed the facility had built-in fire extinguishers in the PCB oils. *Id.* at 175. That was his best "guesstimate". *Id.* at 179. Lightfoot interjected, however, that there were other fire retardant methods in quench oil besides PCB, and no investigation had been done to determine which methods were used. *Id.* at 197.

Thomas Newell, a former MDNR engineer, noted that PCBs were commonly contained in the oils used in the automobile parts manufacturing industry. He testified that based upon his experience many of the oils used in the industry are recycled, and recycled oils may tended to contain trace PCB contaminants, even into the 1980s. Newell, however, did not have any specific knowledge about the oils used at any of Eaton's facilities. Moreover, his opinion that the PCBs in the Marshall plant's effluent likely came from PCB-containing process oils was based upon his inaccurate assumption that Eaton had a die casting operation. Newell's general knowledge about the automobile parts manufacturing industry is not probative of what occurred at Eaton.

***8** In his affidavit Dr. Crumrine indicates that his opinion "is also based on the type of oils used at the facilities as documented by the Environmental Protection Agency, whose studies determined that such oils contain PCBs."

Plaintiff's expert did not base his opinion on an EPA report documenting the oils used at Eaton's facilities. Neither did he base his opinion on any personal knowledge about the oils used by Eaton or on a report about what was standard in the automobile parts manufacturing industry. He apparently relied on the May 1972 Interdepartmental Task Force on PCBs report on Polychlorinated Biphenyls and the Environment. That report notes that PCBs are found in hydraulic fluids, but cautions that "[n]o definite knowledge is available that PCBs are present in commercial hydraulic fluids. Since composition specifications of these fluids are usually not available to the public, PCB content should be established by chemical composition." *Id.* at 53. The report also notes that some of the "more interesting and non-conventional uses" of PCBs are as a metal quencher, or as an aid to fusion cutting of stacked metallic plates. *Id.* at 65–66.

There is no general report indicating that PCBs were necessarily or even probably used in the process oils at facilities like Eaton's. Without further corroborating evidence, the general report that PCBs could sometimes be found in cutting, quenching and hydraulic oils, is of little probative value on the issue of what process oils were used by Eaton. At most it supports the possibility that PCBs could have been found in Eaton's process oils. It does not support a probability that Eaton's process oils contained PCBs. In the absence of some corroborating evidence or a high degree of statistical certainty, a general study such as the EPA report cannot be used to draw conclusions in specific cases. *See Textron Inc. v. Barber–Colman Co.*, 903 F.Supp. 1546, 1557 (W.D.N.C.1995).

Plaintiff contends that the distribution pattern of PCBs in the wood block floors from the Battle Creek and Kalamazoo facilities demonstrates that there were PCBs in the process oils used at these facilities.

Dr. Wharton has charted the location and levels of the PCBs found in the wood block floor at the Kalamazoo plant. He observed that the only places where PCBs were found at concentrations of 50 ppm or more were where there was known placement of PCB containing electrical power distribution equipment. If there had been PCBs in the quench, cutting or hydraulic oils, high concentrations of PCBs would have been found in the areas where those operations were carried out. Instead, he found only insignificant PCB concentrations in those areas.

Plaintiff's expert, Dr. Mark Brown, concedes that there appears to be a correlation at least with the highest PCB levels and the location of transformers. Brown dep. 1/8/98 pp. 192–93. Dr. Brown testified that the distribution of PCBs in the wood block flooring "suggests that there are as likely alternate hypotheses to the hypotheses that distribution simply reflects people tracking around and operations tracking around PCBs that lead from transformers and capacitors." *Id.* at 192. However, he was unable to conclude that the PCBs in the floor more likely came from process oils than from transformers or capacitors. In his opinion they were "equally plausible hypotheses." *Id.*

***9** The wood floor from the Battle Creek plant showed more widespread contamination than the floor from the Kalamazoo plant. Dr. Crumrine testified that in his experience with PCB releases from electrical equipment

such as capacitors and transformers, he had never seen floor patterns of contamination like that found at the Battle Creek plant. In Dr. Crumrine's opinion, such pervasive contamination of an area cannot be attributed to leaks from electrical equipment, and therefore must be associated with PCB-containing process oils.

Dr. Crumrine's conclusion that PCBs were used in the process oils at the Battle Creek plant is also based on some additional factors that were not present at the other two Eaton plants. At the Battle Creek plant there is evidence of the purchase of Pydraul, a PCB-containing hydraulic oil, in 1970, 1971 and 1972, and a contemporaneous detection of PCBs in the wastewater. There is also evidence of PCBs in the grinding sludge in 1981.

Upon consideration of all the evidence, the Court concludes that Plaintiff has not come forward with sufficient probative evidence to show that the Marshall plant released PCBs to the Kalamazoo River. The only evidence Plaintiff has come forward with for the Marshall plant is a single test result of effluent that could not be repeated. A single detection of PCBs in Marshall's wastewater is not a sufficient basis on which to premise liability, particularly where, as here, the single positive test result is not supported by any evidence of PCBs in the sediment downstream of the Marshall plant. "[O]ne test is not a sufficient basis for extrapolation absent additional evidence which establishes that those results are a reliable indicator of typical discharges." *Textron, Inc. v. Barber–Colman Co.*, 903 F.Supp. 1546, 1555 (W.D.N.C.1995). "It is unsound scientific practice to select one concentration measured at a single location and point in time and apply it to describe continuous releases of contamination of any 11–year period." *Renaud v. Martin Marietta Corp.,* 749 F.Supp. 1545, 1553 (D.Colo.1990), *aff'd,* 972 f.2d 304 (10th Cir.1992).

The Court also concludes that Plaintiff has not come forward with sufficient probative evidence to show that the Kalamazoo plant released PCBs to the Kalamazoo River. There is no more than a scintilla of evidence that there were PCBs in the process oils at the Kalamazoo facility. The evidence is limited to the speculation of Eaton employees regarding the possibility that PCBs were added to the quench oils, and the opinion of Dr. Brown that PCBs in process oils was an "equally plausible" explanation for the PCBs in the wood floor. Plaintiff carries the burden of proving liability in this case. Plaintiff has not presented sufficient evidence with respect to the Kalamazoo facility from which the trier of fact could reasonably find in its favor.

Eaton's motion for summary judgment with respect to the Marshall and Kalamazoo facilities will be granted.

***10** The Battle Creek facility presents the Court with a more difficult question. Plaintiff's evidence of the use of PCBs in the process oils at the Battle Creek facility is undoubtedly slim. The evidence is mostly speculative and conjectural. Nevertheless, viewing the evidence in the light most favorable to Plaintiff, and drawing all inferences in Plaintiff's favor, the Court is constrained to conclude that Plaintiff has come forward with sufficient evidence to create an issue of material fact for trial. However, it would appear to this Court at this juncture that this evidence, without more, is not likely to be sufficient at trial where the Court will be in a position to weigh the evidence to determine whether Plaintiff has shown, by a preponderance of the evidence, that Eaton has released PCBs to the Kalamazoo River and that its release was of sufficient significance to justify holding Eaton liable for response costs. Eaton's motion for summary judgment with respect to the Battle Creek facility will be denied. KRSG's cross-motion for summary judgment will also be denied.

VI.

For the reasons stated above, Rockwell and KRSG's cross-motions for summary judgment will be denied. Eaton's motion for summary judgment will be granted as to the Marshall and Kalamazoo facilities, and will be denied as to the Battle Creek facility. KRSG's cross-motion regarding Eaton will be denied.

An order consistent with this opinion will be entered.

ORDER

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Plaintiff Kalamazoo River Study Group's motions for summary judgment as to Defendants Rockwell International and Eaton Corporation (Docket # 's 650 & 662) are DENIED.

IT IS FURTHER ORDERED that Defendant Rockwell International's motion for summary judgment (Docket # 654) is DENIED.

IT IS FURTHER ORDERED that Defendant Eaton Corporation's motion for summary judgment (Docket # 656) is GRANTED IN PART and DENIED IN PART. Eaton's motion for summary judgment is granted with respect to the Marshall and Kalamazoo facilities and is denied with respect to the Battle Creek facility.

All Citations

Not Reported in F.Supp., 1998 WL 2016507

Footnotes

[1] Opinion dated January 16, 1998, Docket # 642.

[2] Opinion dated March 6, 1998, Docket # 689.

[3] In order to give some meaning to the levels discussed in this opinion, the Court makes note of the testimony of Plaintiff's expert, Dr. Brown, that certain background levels of PCBs (roughly 10 ppb for sediments and 1 ppb for soil) can be expected due to the atmospheric deposition process.

[4] Until the early 1960's the Zantman Drain discharged directly into the Kalamazoo River through the Richardson Drain. No oils were removed from Eaton's discharge to the Zantman Drain until the late 1960s, when an oil skimmer was installed. From the mid–1960s to early 1970s the Zantman Drain terminated in a marshy area. In the early 1970s the Zantman Drain's connection to the Kalamazoo River was reestablished.