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DEFENDING ENVIRONMENTAL CLASS ACTIONS

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The Successful Defense of Environmental Class Actions

John R. Allison[1] and Cooper S. Ashley[2]

Environmental class actions present a significant risk to the defendant. They are expensive lawsuits to defend, and a loss can have a significant adverse impact on the defendant's financial condition and reputation. We will outline and discuss the key steps to take in defending an environmental class action successfully, using our experience in Paulson, et al., v. 3M Company as an example.[3] Implicit in our discussion is the belief that the defendant must seize and maintain the initiative throughout the course of the litigation, starting when the possibility of litigation is first anticipated. Simply responding to whatever the plaintiff does will not lead to a successful outcome.

Develop a Strategic Goal

The first step in successfully defending an environmental class action is to develop a clear strategic goal that will guide the litigation of the case. To ensure the goal is realistic and well-informed, it will be important to understand as much as possible about the basic facts underlying the case, the existence of potentially troublesome witnesses and documents, and the likelihood of additional litigation. Because governmental regulatory activity can affect the outcome of the lawsuit, past regulatory activity should be taken into account and the possibility of future regulatory or legislative activity affecting the case should be assessed.

In the Paulson case filed in late 2004 in state district court in Minnesota, the defendant was faced with a putative class action seeking personal injury and property damages and injunctive relief for 69,000 property owners and other individuals allegedly exposed in the environment to perfluorochemicals ("PFCs") manufactured by the defendant. Generally speaking, the claims focused on two categories of conduct: landfilling of PFC-containing waste in the 1950, 1960s and 1970s; and failure to react more quickly when PFCs were detected in certain local water supplies in the early 2000s.

PFCs have received significant media coverage and have come to the attention of some members of the plaintiffs' bar, even though PFCs are not classified or regulated as hazardous substances under any of the federal environmental laws or Minnesota law. When Paulson was filed, the defendant was already named in two similar putative class actions in Alabama, which are still pending. For several procedural reasons, Paulson was on a faster track than the Alabama cases, and was likely to be the first case litigated. Taking all of this into account, the defendant's strategic goal for the Paulson case was simple: Defeat class certification, and then win the individual plaintiffs' case on liability.

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[3] This article and the case example involve a single defendant. Environmental class actions involving multiple defendants present additional issues of allocation and divergent strategic goals that are beyond the scope of this article.

In a different situation, the strategic goal may well be different. For example, a defendant that finds itself in a difficult venue, or discovers historical facts which make ultimate victory unlikely, may consider a successful defense one that produces a negotiated settlement for a tolerable amount. For such a defendant, the strategic goal might be: Defeat class certification, and then settle on an individual basis with the clients represented by plaintiffs' counsel.

Commit the Resources Necessary to Win

Environmental class action lawsuits are very expensive to defend. They are even more expensive to lose. It is important to educate the defendant about the resources that need to be committed to the defense of the litigation in order to have a realistic chance of success. Those resources include not only the financial costs of lawyers, experts and litigation support, but also the defendant's personnel costs associated with document collection, witness interviews and preparation for testimony. Well-prepared witnesses are critical to success, and the defendant needs to be willing to make testifying employees available for preparation sessions that can last several days.

Hire an Effective Team

It is essential for the defendant to hire an effective trial and litigation team for the venue where the case is filed. At a minimum, skilled trial counsel and appellate counsel should be retained and retention of local counsel should be considered. If the case involves a large number of documents or expert witnesses, additional counsel with experience in those areas may be added to the team. Depending on the situation, the members of the team may or may not be lawyers in the same firm. If the members of the team come from different firms, they need to be able to set their egos and turf issues aside and work together seamlessly as members of a team.

Understand the Defendant's Case

Environmental class actions often involve historical information, as well as practices or conduct that occurred when legal requirements, industry practices and public expectations were different. To fully understand the defendant's case, it may be necessary to interview a significant number of people, including retired employees of the defendant, and to collect and review a very large number of documents. While the Paulson case provides perhaps an extreme example, we interviewed well over 100 past and present employees of the defendant, and collected and reviewed over 13 million pages of documents, in connection with our preparation of the case.

Understanding the case includes an analysis of its strengths and weaknesses. The defendant may have a reasonably good story to tell, but may also have disgruntled former employees and internal documents and emails that could be problematic for any number of reasons. Weaknesses such as these need to be identified and addressed as effectively as possible, usually head-on.

Understand the Venue

Understanding the venue involves knowing as much as possible about the judge, the jury pool, the appellate courts and local attitudes and customs. External issues affecting the court, such as a budget crisis that results in a hiring freeze for law clerks, or unfilled judicial positions

exacerbating the judge's workload, should be taken into account. Anticipated media coverage of the case, or past publicity about the environmental condition that led to the filing of a lawsuit, need to be considered. Factors such as these may guide decisions about which pretrial matters to bring to the court's attention and which ones to let go, and should inform the development of trial themes suitable for the venue where the case is pending. Three examples from the Paulson case illustrate what this can mean in practice.

In Paulson, we learned that the judge assigned to the case had a very heavy workload and, given the reputation of plaintiffs' counsel and the nature of the case, we anticipated a fair amount of motion practice relating to discovery issues. We brought a motion, which the court granted, for the appointment of a special discovery master so the judge would be spared hearing and deciding anticipated discovery motions and the parties could obtain speedy rulings on discovery issues. As it turned out, the special discovery master handled literally dozens of discovery disputes, leaving the judge free to concentrate on critical issues such as class certification, summary judgment and *limine* motions and, ultimately, the trial.

The second example arose in the context of ever increasing media publicity about the case and the underlying environmental situation. Plaintiffs' counsel conducted two public meetings and mailed two successive letters to roughly 25,000 local citizens, purportedly informing them about the case. The meetings and the letters were argumentative and misleading, and the defendant was concerned that the plaintiffs' lawyers were essentially creating the very property stigma damages for which they were seeking recovery and were potentially tainting the jury pool. To call this practice to the court's attention and hopefully obtain some relief, we filed a motion with the judge seeking permission to mail a letter to the same 25,000 people, inviting them to visit an informational website the defendant created. It became apparent later in the case that the plaintiffs' last-minute stipulation to the relief we sought did not prevent the judge from reading our rather pointed motion papers, which described the misleading nature of the plaintiffs' public meetings and mass mailings in considerable detail. When we made references to "lawyer-driven" litigation, the judge understood that in this case, those words had real meaning.

The third example involved the trial team. Plaintiffs were represented by counsel from Minnesota, Alabama, Ohio and West Virginia. The defendant's litigation team included counsel from Minnesota, Alabama, Georgia and Washington, D. C. At the trial of this Minnesota case, plaintiffs had counsel from Alabama, Ohio and Minnesota seated at counsel table. Plaintiffs' Alabama trial counsel made the mistake of trying to ingratiate themselves to the jury by adopting a folksy self-deprecating manner that fell flat and by attempting to draw analogies to local situations they did not fully understand. For the defendant, all of the lawyers in the courtroom were from Minnesota, and understood local customs and attitudes extremely well. Post-trial juror interviews confirmed that defendant's counsel won the credibility battle.

Develop Persuasive Trial Themes

To be successful in an environmental case, the defendant needs to have a good story to tell and the story needs to be told well. For the story to be told as effectively as possible, themes should be developed that resonate with the judge and the jury. Research should be conducted to test and refine those themes. Corporate and other institutional defendants can be somewhat insular, and what may seem like a good argument internally may not be persuasive outside the organization. Also, people today expect corporations and their representatives to be authentic, to take

responsibility for their actions and decisions and to be transparent. Those expectations are different than expectations were in the past, and historical ways of handling an environmental issue or explaining an organization's response may not be persuasive today.

Once persuasive trial themes have been developed and tested, they should guide the litigation of the case, including the way motions are presented and argued and the way the plaintiffs' expert and other witnesses are cross-examined in depositions or at trial.

Seek Effective Case Management Orders

Oftentimes in environmental class action cases, plaintiffs' counsel will attempt to introduce as many factual and legal theories as possible, hoping that at least one claim or factual scenario convinces the judge to allow the case to go to the jury. Issues of the defendant's conduct and the resulting environmental exposure may be presented as common issues overshadowing individual issues of causation and damages to justify certification of a class. Case management orders can be effective and necessary tools for keeping the order of expert witness disclosures consistent with the burden of proof, and for holding the plaintiffs to their burden of satisfying all the elements of Rule 23 or its state law equivalent. They can also help ensure that the class certification issue is decided before the substantive claims are litigated on the merits.

Confidentiality issues should also be addressed. Given the large number of documents involved in the Paulson case, we were successful in persuading the court to enter a blanket protective order, allowing the parties to designate all documents being produced as confidential and establishing a process for the parties to later challenge the confidentiality designation for specific documents or groups of documents. That order made it unnecessary for the defendant to incur the expense of reviewing every document for confidentiality prior to production, and also expedited the production of documents. Issues of confidentiality were particularly important in Paulson because we had good reason to believe that plaintiffs' counsel intended to feed selected documents to the news media and to an environmental group for posting on its website.

Fully Meet Discovery Obligations

The defendant must conscientiously meet all of its discovery obligations in order to have a fair chance for a successful result. Plaintiffs' environmental class action counsel are often adept at playing the discovery "gotcha" game, hoping to catch the defendant in a misstep that provides a diversion from the merits of the case. This is particularly true in the current realm of electronic discovery, where it is easy for responsive documents stored in various electronic archives to be missed initially, only to be located later and untimely produced. A document preservation notice should be sent to the defendant's employees who may have relevant information as soon as litigation is reasonably anticipated. Plaintiffs' counsel will likely make a big deal out of a late preservation notice, particularly if documents have been lost or destroyed in the meantime. Objections to discovery should be reasonable and well-founded, and a motion for a protective order is often the best way to deal with burdensome or harassing discovery. Judges generally dislike spending time on discovery disputes, and having a special discovery master appointed to handle such matters will keep them away from the judge and will also provide the parties with faster rulings.

If plaintiffs' counsel are actively engaged in the discovery "gotcha" game, it is important to respond quickly and aggressively to create an accurate record of events. In the Paulson case, plaintiffs' counsel literally bombarded us with countless letters setting forth complaints about one discovery issue or another. At times we received more than one such letter a day, and we often received several letters a week. We promptly responded to each one of those letters point-by-point despite the annoyance and cost of having to do so. The result was a discovery record that stood up well under the pressures of motion practice.

It is also important to keep the pressure on plaintiffs' counsel to meet their discovery obligations. In Paulson, we picked our battles carefully, but when it made sense to do so, we aggressively pointed out the plaintiffs' own discovery shortcomings. For example, these plaintiffs were less than forthcoming in their responses to discovery on the issue of their personal injury claims, and it took several letters, meet and confer sessions as well as motion practice to finally extract information supporting our position that none of the plaintiffs and none of the potential class members had received a medical diagnosis related to their exposure to PFCs. We also caught plaintiffs' counsel electronically removing the confidentiality designation from documents we had produced, and then making those documents public. Our motion for sanctions was granted, and plaintiffs' counsel paid the defendant a substantial monetary sanction and incurred the cost of retaining a computer forensic expert to conduct an investigation on their entire data base of defendant's documents and submit a report to the special discovery master.

Develop a Strategy for Motion Practice

The defendant should have a strategy in place for motion practice before motions are filed. It is important to carefully choose the motions that are brought and the timing and order in which they are filed in order to have the best chance of educating the court and narrowing the case.

In Paulson, before filing an answer, we filed a Rule 12 motion to dismiss directed to some, but not all, of the plaintiffs' causes of action. We did not want to lose credibility with the court by seeking relief that is rarely granted, so we focused only on those claims where we really thought we had a good shot at dismissal on the pleadings. The court granted our motion to dismiss plaintiffs' medical monitoring and public nuisance claims. The dismissal of the medical monitoring claim seriously undermined the plaintiffs' later argument for certification of a class.

As we anticipated, there were a number of motions brought by both sides on various pretrial discovery issues. As noted above, those motions were heard by a special discovery master appointed by the court for that purpose at our request. Given the contentious nature of several of the discovery motions, we were well served by the fact that the judge hearing the substantive motions in the case and presiding over the trial did not need to address the discovery issues that arose in the case.

After we successfully defeated class certification, we engaged in merits discovery and ultimately filed summary judgment motions attacking the remaining claims. We simultaneously filed Frye motions challenging the opinions of most of plaintiffs' experts, to highlight the weaknesses in plaintiffs' proof. However, we only brought motions we felt had a reasonable chance of success. For example, several causes of action were asserted as a basis for personal injury damages, and we felt these claims, if sent to the jury, would stretch Minnesota law beyond its historical boundaries. We decided to challenge the personal injury claims head-on by moving for

summary judgment on those claims. The court granted that motion. As a result of that ruling, as well as rulings on other summary judgment motions directed to other causes of action asserted by plaintiffs, the only claims remaining for trial were property damage claims by three homeowners based on theories of negligence and trespass.

Retain Outstanding Experts

It is important to retain the best available expert witnesses who will be prepared to testify about each of the scientific or technical issues that may be relevant at trial. In the Paulson case, in which plaintiffs' allegations were extremely broad and pled in the alternative, we had more than thirty experts on board, including employees of the defendant who qualified as experts, as well as outside experts retained for the litigation. Because rulings on several pretrial motions narrowed the issues for trial, not all testified. However, we were ready to address any scientific or technical issue that might arise in the case.

Prepare Thoroughly

Thorough preparation is essential to a successful result. Counsel for the defendant needs to fully understand the defendant's documents and the context for those documents, as well as the scientific, technical and medical literature that may be relevant to the issues in the case. In preparing to depose or cross-examine plaintiffs' experts, counsel should be familiar with the expert's published articles and previous testimony that may have a bearing on the expert's opinions, and with authoritative works in the expert's field. Having such familiarity will give counsel the best chance of effectively undermining or limiting the expert's opinions and obtaining testimony that supports the defendant's themes. The defendant's witnesses need to be very well prepared so they are not caught by surprise during their testimony and so they can handle questioning by plaintiffs' counsel without becoming argumentative or defensive.

Address Contextual Issues

An environmental class action is seldom litigated in a vacuum. If the case is the subject of extensive media coverage, the defendant needs to take proactive steps to try to ensure that the coverage is at least reasonably balanced.

Regulatory agencies and legislative bodies may also take action that can affect the outcome of the case, at least indirectly. It is entirely possible that plaintiffs' counsel themselves will try to make that happen. In Paulson, plaintiffs' counsel were actively lobbying the state environmental regulatory agency and the state legislature, seeking rule making and legislation that would have classified PFCs as hazardous substances under Minnesota law and most certainly impacted the scope of the trial and perhaps the ultimate outcome. It was critical for the defendant to respond to those initiatives. Ultimately, no outcome determinative regulatory or legislative changes occurred.

Oppose Class Certification Aggressively

Plaintiffs gain considerable leverage if the case is certified as a class action. Unless the defendant wants a class certified to facilitate a settlement, and is not concerned about the precedent that might be set for other situations, class certification should be opposed vigorously.

The proposed class definition can often be challenged, particularly in environmental exposure cases. Pretrial discovery should initially focus on issues related to class certification, recognizing that a bright line cannot ordinarily be drawn between class certification discovery and merits discovery. The principal goal of discovery related to class certification should be to develop a record showing as many individualized issues among members of the putative class as possible and that, if certified, the case is far from over and the court will have its hands full with individual damage trials and administrative responsibilities.

We faced an interesting, though not atypical, situation in the Paulson case. Plaintiffs made several attempts to define a class based on environmental exposure to PFCs above background levels, but were unable to present evidence supporting their various definitions. That failure of proof provided one of the bases for the court's decision to deny certification of a class. Plaintiffs also sought a case management order that would focus initial discovery on "common issues of the defendant's conduct." We were successful in persuading the court to reject plaintiffs' tortured interpretation of Rule 23 and to hold plaintiffs to their burden of proving they met each of the required elements, including whether the named plaintiffs had claims that were representative of the proposed class. Plaintiffs tried to circumvent the fact that none of the named plaintiffs or putative class members were sick or injured as a result of their exposure to PFCs, by asserting they all suffered from "subcellular injury" and "altered gene expression." Their dilemma was underscored by the position they took in opposing medical records discovery, arguing that such discovery was unnecessary because those conditions would not show up in medical records and, in any event, anyone with their environmental exposures would have those conditions. We dealt with plaintiffs' position by engaging in aggressive discovery and motion practice challenging the legal sufficiency of generalized "subcellular injury" and "altered gene expression" as a basis for personal injury damages under Minnesota law and by engaging outstanding national experts to expose the lack of a medical basis for plaintiffs' personal injury claims.

Conclusion

The Paulson case was filed in October 2004. Class certification was denied in June 2007. After a seven-week jury trial, a unanimous defense verdict was obtained in June 2009. From the very beginning, the defendant and outside counsel discussed, refined, modified and executed a strategy that took into account all of the topics discussed in this article. It was expensive. It was difficult. But this was a case that needed to be litigated through trial and won.

Defending Environmental Class Actions

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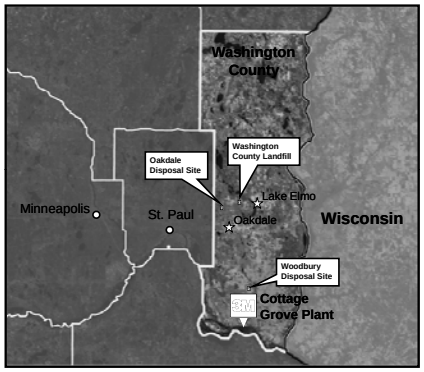
Maslon Edelman Borman & Brand

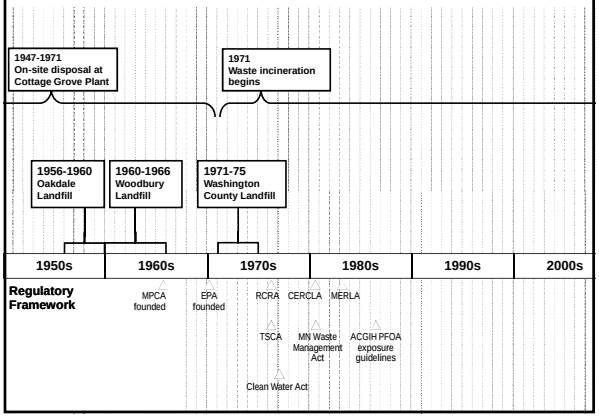
John Allison
3M

EMERGING RESPONSIBILITIES OF IN-HOUSE COUNSEL
TRIAL.COM LITIGATION MANAGEMENT SUPERCOURSE

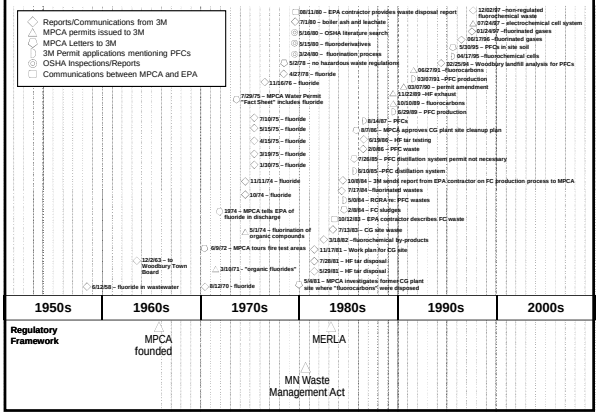
Site of Landfills and 3M Plant



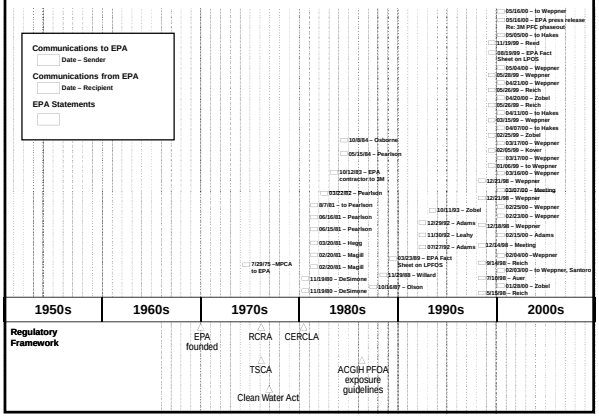
3M's Waste Disposal



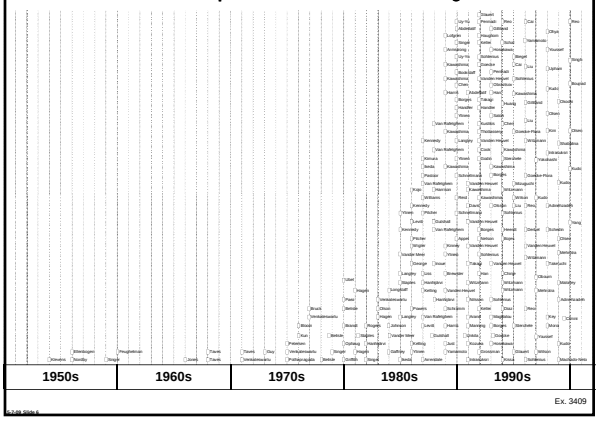
3M Communications with State & Local Agencies



3M Communications with EPA

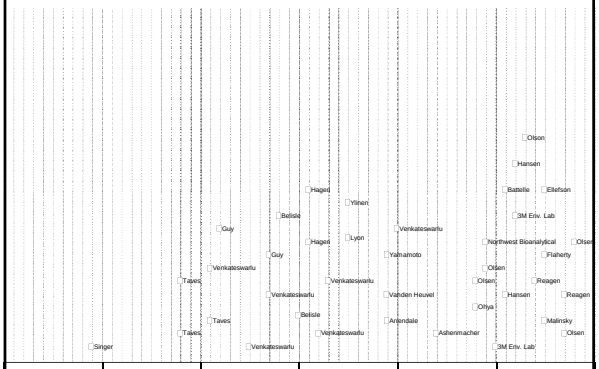


PFC Publications in the Open Scientific Literature through 2000



Ex. 3409

Analytical Publications in the Open Scientific Literature



Ex. 3400

3M PFC Publications

Toxicology

51

Publications

Ex. 3405

Worker Studies

19

Publications

Ex. 3408

Environmental

26

Publications

Ex. 3406

General Population Studies

18

Publications

Ex. 3404

Analytical Chemistry

16

Publications

from Ex. 3400

Since the 1980s, who knew about 3M's PFCs?

Researchers

er Universities

nt Workers

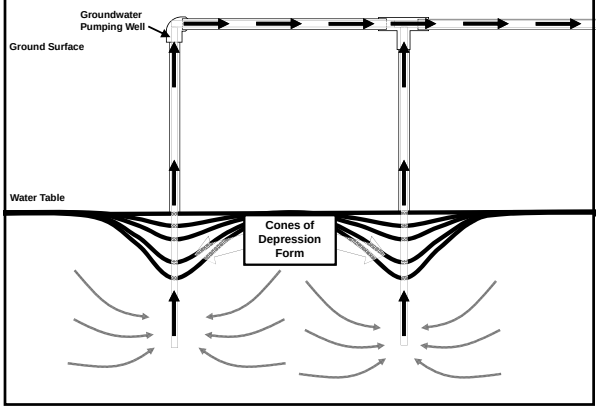
& MDH Laboratory

MPCA

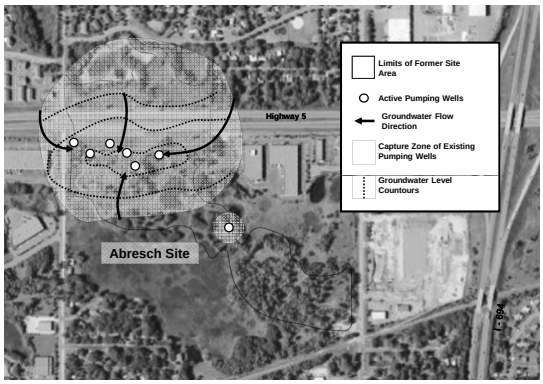
Local and Intl. Union

Readers of Scientific Journals

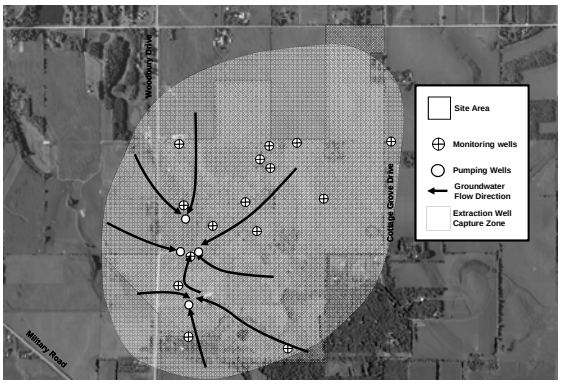
How Extraction Wells Control Groundwater Flow



Oakdale Disposal Site



Woodbury Disposal Site



How much is one part per million (1ppm)?

Example: 1 minute out of 1 million minutes

1 minute

1 million minutes equals:

1 year,
10 months,
and 25 days.

Example: 1 minute out of 1 million minutes

1 minute

1 million minutes ago it was June 12th, 2007.

May 24, 2007
Jordin Sparks
Winner of American Idol 2007

June 29, 2007
Apple's iPhone becomes available

July 21, 2007
Harry Potter and the Deathly Hallows

April | May

2009

How much is one part per billion (1ppb)?

Example: 1 minute out of 1 billion minutes

1 minute

1 billion minutes equals:

1,902 years,
7 months,
and 2 days.

Example: 1 minute out of 1 billion minutes

1 minute

1 billion minutes ago it was the year 106 AD

82 AD
Coliseum completed in Rome

121 AD
Death of Cai Lun, credited with the invention of modern paper

April

May

2009

Juror Expectations

- **A**uthentic
  Be real
- **R**esponsible
  Take responsibility
- **T**ransparent
  Be open, honest and respectful

3M Response to detection of PFCs in 2005

3M builds system to treat Oakdale municipal water supply

Oakdale Treatment System

- **July 29, 2005 - 3M agrees to build granular activated carbon (GAC) system**
- **Oct. 2006 – Treatment system startup**

Excerpts from Testimony

Q: Can you tell the jury the historical context of how landfills were used by companies like 3M in the years leading up to the 1960s?

A: Based on the technology, there was some feeling – that the ground would help remediate, would help neutralize – that there would be a filtering action of the material. That's 1960.

* * *

If you look at it today, 49 years later, you would look at it differently because we know a lot more now. We'd say, "Look, this is probably not – not a good thing to do."

MASLON

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Products Liability
Punitive Damages

Cooper Ashley is a partner in Maslon's Litigation Practice Group. Since 2003, he has served on the firm's Governance Committee and is currently the Chair. Cooper's practice is focused primarily on products liability matters on behalf of both plaintiffs and defendants and complex class action and tort cases, including environmental toxic tort and fire/explosion cases. He has first chaired numerous jury and bench trials in state and federal courts, argued appeals before the Eighth Circuit Court of Appeals (en banc), the Minnesota Supreme Court and the Minnesota Court of Appeals, and conducted all manner of related fact and expert discovery and motion practice. Cooper has appeared on behalf of clients in multiple state and federal jurisdictions, including courts in Minnesota, Wisconsin, Michigan, Montana, Texas, Nevada, Florida and North Dakota.

Experience

- *Paulson, et al. v. 3M*, C2-04-6309 (State of Minnesota, Washington County District Court)
  Defeated motion seeking class certification of a 67,000 member putative class claiming chemical exposure via drinking water contamination (2007) and obtained a defense verdict on the merits after a seven-week jury trial (2009).
- *G&K Services, Inc. v. Syswa, Inc., et al.* (D. Minn. 2006)
  Obtained multi-million dollar jury verdict in favor of plaintiff uniform supplier against defective industrial detergent supplier.
- *Brooks v. Howmedica, 273 F.3d 785* (8th Cir. 2002)
  Obtained summary judgment for defendant medical device manufacturer in precedent-setting 8th Circuit federal preemption case.
- *In re St. Cloud Gas Explosion Cases, State of Minnesota, Stearns County District Court,* C3-99-2293, *et al.* (1999)
  Defended and successfully mediated multiple death, burn, injury and property damage claims against cable company arising from natural gas explosion.
- *In re 3rd and Maria Gas Explosion Cases,* State of Minnesota, Ramsey County District Court, C9-95-6556 (1993-1997)
  Defended and successfully mediated multiple death, burn, injury and property damage claims against local utility arising from natural gas explosion.