IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHWESTERN DIVISION

ASARCO, LLC,	)	
	)	
Plaintiff,	)	
v.	)	No. 11-00138-CV-SW-BP
	)	
NL INDUSTRIES, INC., *et al.*,	)	
	)	
Defendants.	)	

ORDER

This is an action under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9626. This matter comes before the Court on multiple pending motions, which the Court resolves in two ways. First, the Court grants the following Motions to Stay for the reasons discussed in the sections below:

- Defendant NL Industries, Inc.'s ("NL") Motion to Stay, (Doc. 128);
- Defendant Sunoco, Inc.'s ("Sunoco") Motion to Stay, (Doc. 131);
- Defendant Doe Run Resources Corporation's ("Doe Run") Motion to Stay, (Doc. 141); and
- Defendants E.I. du Pont de Nemours & Company's ("DuPont") and United States Steel Corporation's ("U.S. Steel") Motion to Stay, (Doc. 213.)

Second, because the Court stays this case, the Court denies the following motion as moot:

- DuPont's and U.S. Steel's Motion for Reconsideration of Orders, (Doc. 215.)

I. Background

This CERCLA contribution action, pursuant to 42 U.S.C. § 9613(f)(1), concerns the Tri-States Mining District ("Tri-States"). Tri-States produced lead and zinc for over 100 years, and covers 2,500 square miles in southwest Missouri, southeast Kansas, and northeast Oklahoma.

(Doc. 1, ¶ 21.) Large-scale mining and milling in this district began in the late 1800s and continued through the 1940s. (Doc. 1, ¶ 22.) Due to these activities, the United States Environmental Protection Agency ("EPA") has concluded that the soil, ground water, and surface water at the sites are contaminated with metals. (Doc. 1, ¶¶ 22, 23.) Additionally, acid mine drainage and hazards relating to piles of waste rock pervade the area. (*Id.*) Asarco claims that Defendants, like itself, conducted mining operations within Tri-States and are responsible for some of this environmental damage. (Doc. 1, ¶¶ 6, 10, 12-14.) The specific sites at issue within this district are: the Tar Creek Superfund Site in Oklahoma; the Cherokee County Superfund Site in Kansas; the Oronogo-Duenweg Lead Mining Belt Superfund Site in Missouri, and the Newton County Mine Tailings Site in Missouri. (Doc. 1, ¶ 21.)

On August 9, 2005, Asarco filed a voluntary petition of bankruptcy under chapter 11 of the United States Bankruptcy Code in the Southern District of Texas. (Doc. 1, ¶ 24.) Asarco's filing prompted the United States and the states of Missouri, Oklahoma, and Kansas ("the government") to file proofs of claim against Asarco for response costs and natural resource damages ("NRD") resulting from Asarco's mining operations within Tri-States. (Doc. 160, p. 18.) The government's claims originally totaled approximately $4.8 billion in damages. (Doc. 160, p. 18.) Asarco later reached a settlement agreement with these governmental entities, which the bankruptcy court approved on February 4, 2008. (Doc. 1, ¶ 26.) Ultimately, Asarco settled its liability for Tri-States for approximately $158 million. (Doc. 160, p. 18.)

On February 4, 2011, Asarco filed the instant suit, stemming from its Tri-States settlement. Asarco originally filed this suit against eleven (11) companies and Does 1-50. Five named Defendants remain in the case: NL, DuPont, U.S. Steel, Sunoco, and Doe Run. In addition, Asarco's claims against the unknown Does 1-50 remain. In this action, Asarco seeks

contribution from Defendants because Asarco contends it paid more than its share of response costs and NRD when it settled its liability for Tri-States. (Doc. 1, ¶ 45.) Specifically, Asarco asserts that it is entitled to contribution from:

- NL, due to its activities at the Tar Creek, Cherokee County, and Oronogo-Duenweg Lead Mining Superfund Sites;
- DuPont and Sunoco, due to their activities at the Cherokee County and the Orongo-Duenweg Lead Mining Belt Superfund Sites; and
- Doe Run and U.S. Steel, due to their activities at the Oronogo-Duenweg Lead Mining Superfund Site.

(Doc. 1, ¶¶ 31-33.)

All of the remaining Defendants move to stay this case pending the EPA's further administration and findings regarding Tri-States. Asarco opposes these motions.

II. CERCLA

CERCLA was enacted "to address threats to human health and the environment from the release or threatened release of hazardous substances." Manual for Complex Litigation (Fourth) § 34.1 (2004); 40 C.F.R. § 300.430(a)(i). The EPA functions as the lead federal agency with responsibility for site cleanup pursuant to Exec. Order No. 12580, 52 Fed. Reg. 2923 (Jan. 23, 1987). Once a site has been identified as hazardous, the EPA undertakes a Remedial Investigation/Feasibility Study ("RI/FS") to develop various options for cleanup and to determine the scope of remedial action. Manual, § 34.1. The EPA "conducts a detailed investigation at the site, seeking information regarding all site operations, and the extent of contamination at the site." *Id.* (*See* 42 U.S.C. §§ 9604(e), 9604(e)(5) (establishing information-gathering authority for the EPA)). After completing its investigation, the EPA prepares a record of decision ("ROD") describing the remedial action it selected and the action's anticipated costs.

Id. (*See* 40 C.F.R. § 300.430(c)(5)(I), (f)(4), (f)(5)). The ROD is not issued until after a public comment period on the proposed plan. *Id.* at n.2344.

Once the EPA has incurred response costs or determined that an imminent release of hazardous contaminants would initiate a governmental response, the EPA can bring a CERCLA action against potentially responsible parties ("PRPs"). *Id.* at §§ 34.1-34.11. Private PRPs may incur response costs themselves, including by reimbursing the government for response costs pursuant to a settlement agreement. *Id.* at § 34.11. These parties can seek to recover an equitable portion of such costs from other PRPs through a contribution action pursuant to 42 U.S.C. § 9613(f)(1), as Asarco seeks to accomplish here. CERCLA requires a settling party to sue within three years of a settlement. *See* 42 U.S.C. § 9613(g)(3) (suit must be brought within three years of the date of judgment giving rise to the payment obligation or entry of a judicially approved settlement with respect to costs or damages).

III. Analysis

Defendants argue that two distinct legal concepts authorize the Court to stay this case: 1) the doctrine of primary jurisdiction; and 2) the Court's inherent power to manage its docket. Defendants contend that a stay will not create any hardship for Asarco, but the case's progression will prejudice Defendants. Asarco responds that a stay would cause it harm, Defendants face no risk of inconsistent determinations, and the Court possesses the expertise to address the issues presented. Asarco also argues that there is no pressing need for the Court to employ its inherent power to stay. The Court addresses these legal concepts and arguments below.

A. The Doctrine of Primary Jurisdiction

The doctrine of primary jurisdiction concerns proper relationships between the courts and the administrative agencies charged with particular regulatory duties. *United States v. W. Pac.*

R.R. Co., 352 U.S. 59, 63 (1956); *United States v. Rice*, 605 F.3d 473, 475 (8th Cir. 2010). The doctrine applies where a claim is originally cognizable in the courts, but enforcement of that claim requires resolution of issues governed by a regulatory scheme and placed within the special competence of an administrative body. *W. Pac. R.R. Co.*, 352 U.S. at 64. The judicial process is therefore suspended pending referral of such issues to the administrative body for its views and action. *Id.* (citing *Gen. Am. Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940)). Thus, primary jurisdiction "promotes uniformity, consistency, and the optimal use of the agency's expertise and experience." *Rice*, 605 F. 3d at 475 (citing *United States v. Henderson*, 416 F.3d 686, 691 (8th Cir. 2005)).

Although no fixed formula exists for applying the doctrine of primary jurisdiction, "[i]n every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *W. Pac. R.R. Co.*, 352 U.S. at 64. The Eighth Circuit has articulated that the doctrine applies in "cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion." *Alpharma, Inc. v. Pennfield Oil Co.*, 411 F.3d 934, 938 (8th Cir. 2008) (citations omitted).

B. The Court's Inherent Power to Manage Its Docket

The United States Supreme Court has held that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936); *Lunde v. Helms*, 898 F.2d 1343, 1345 (8th Cir. 1990). In so managing its docket, the court must weigh competing interests while maintaining an even balance. *Landis*, 299 U.S. at 255. Thus, a district court has discretion to determine whether a

stay is necessary to avoid piecemeal, duplicative litigation and potentially conflicting results. *See Kerotest Mfg. Co. v. C-O-TWO Fire Equip. Co.*, 342 U.S. 180, 183-84 (1952). Traditionally, the party moving for a stay has the burden of showing specific hardship, inequity, or a pressing need that will result in the absence of a stay, if there is even a fair possibility that the stay will damage another party. *Landis*, 299 U.S. at 166; *Jones v. Clinton*, 72 F.3d 1354, 1364 (8th Cir. 1996). "Considerations such as these, however, are counsels of moderation rather than limitations upon power." *Landis*, 299 U.S. at 166.

C. A Stay Is Appropriate in this Case under Either Source of the Court's Authority

For the following reasons, both the doctrine of primary jurisdiction and this Court's inherent power to manage its docket warrant a stay in this case.

In this action, Asarco seeks contribution from Defendants for the settlement it entered into with the government. However, the parties have disputed throughout this litigation whether Asarco's settlement was based on joint-and-several liability or only its individual liability. This dispute is critical here because the "right to contribution under § 113(f)(1) is contingent upon an inequitable distribution of common liability among liable parties." *Morrison Enter., LLC v. Dravo Corp.*, 638 F.3d 594, 603 (8th Cir. 2011) (quoting *United States v. Atl. Research Corp.*, 551 U.S. 128, 139 (2007)). The term "contribution" has its traditional meaning of a "tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault." *Id.* "Nothing in § 113(f) suggests that Congress used the term 'contribution' in anything other than this traditional sense." *Atl. Research Corp.*, 551 U.S. at 190. Thus, to resolve Asarco's contribution claim, the Court must determine whether Asarco's settlement was based on joint-and-several or individual liability.

Yet, this determination is complicated by the nature of this action. It is uncontested that Asarco was required under CERCLA's statute of limitations to bring this type of claim in federal court within three years of its settlement. Thus, Asarco asserts that because it properly filed suit pursuant to CERCLA's statutory mandates, this is a regular contribution action to which the Court will then apply a standard approach. However, Asarco's Tri-States settlement does not result from the conventional CERCLA process for contribution actions. Instead, it differs in two crucial respects: 1) the EPA has not yet finished its investigation of Tri-States and has not determined common liability for the area;[1] and 2) Asarco's early settlement with the government was compelled by Asarco's bankruptcy.

Despite the anomalous nature of Asarco's claim, Asarco nevertheless asserts this Court need not make substantive determinations regarding the precise scope of remediation or NRD at the sites. Instead, Asarco argues that this Court need only decide the relative liabilities of Asarco and Defendants regarding the amounts already paid by Asarco to the government. However, Asarco's contribution claim turns upon whether Asarco overpaid for total response costs and NRD at the sites, and whether the respective Defendants will therefore ultimately underpay for these costs and damages if they do not pay Asarco now. Although the amount of Asarco's payments is known, the amount of total liabilities, a prerequisite to a contribution right, is not.[2]

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[1]Asarco asserts that "federal courts' resolution of contribution issues prior to final site cleanup is far from novel," and cites cases in support of that general proposition. (Sugg. in Opp., Doc. 158, p. 14.) However, a review of these cases reveals that they are distinguishable from the instant suit. For instance, in *Action Mfg., Co., Inc. v. Simon Wrecking Co., Inc.*, 287 F. App'x 171 (3d Cir. 2008), the district court determined contribution amounts after the EPA had already conducted its site investigation and issued its ROD. As such, the court was enabled to estimate future allocable costs for the site based on the remedies in the ROD. Also, in *NL Industries, Inc. v. Halliburton Company*, No. 1:10-cv-00089-RJA-HBS, Doc. 47 (W.D.N.Y 2010), the district court dismissed without prejudice NL's contribution claim as premature because there was no prior assignment of liability.

[2]In its briefing, Asarco has not put forth the methodology it recommends the Court utilize to resolve this contribution claim. However, in oral argument on March 8, 2013, Asarco suggested the Court could base the Defendants' contribution amounts on $717 million, the government's reduced claim in Asarco's bankruptcy proceedings. The Court finds this number would be unreliable for the Tri-States proportionate liability determinations for a number of reasons. For instance, the reduced claim was made approximately eight years ago. Perhaps most important, however, is that Asarco represented to the Court during oral argument that this amount was

Therefore, in order to assess Asarco's contribution claim, the Court must first: 1) predict the final remedy the EPA would select for the area; 2) calculate the potential costs of such cleanup; 3) assess the liability of each party in relation to those costs; and 4) determine how the predicted remedial action may affect any natural resources, resulting in an estimation of total NRD. Further, the Court would have to determine the amount of the parties' payments that represents past costs, as well as the amount that will represent future costs, since the EPA's response is still underway. *See* 42 U.S.C. § 9613(g)(2) ("the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages.").

The Court finds that this approach raises at least four concerns: 1) the EPA—not the Court—is the agency with the competence, expertise, and experience to make these determinations; 2) Congress intended that the EPA—not the Court—make these findings; 3) any Court-ordered concurrent investigation into these matters would be duplicative and wasteful; and 4) an Order in favor of Asarco would expose Defendants to the risk of inconsistent obligations. The Court addresses each of these concerns more fully below.

First, the assessment of NRD is clearly within the special competence and experience of NRD trustee agencies. 42 U.S.C. § 9607(f)(2)(A)-(B). In NRD litigation, CERCLA requires courts to presume that damages calculated in compliance with the Department of the Interior's regulations are accurate. 42 U.S.C. § 9607(f)(2)(C). Further, the United States District Court for the Northern District of Oklahoma has previously ruled that that it is impossible to determine the amount of NRD at the Tar Creek Superfund Site until after a remedial action has been selected. (Doc. 129-7, p. 17; Doc. 129-8, p. 19). That court found that "[a]n NRD claim . . . is a residual

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likely inflated by the government. This representation, coupled with the parties' vigorous disputes on the issue, leads the Court to conclude that employing Asarco's suggested amount would likely produce erroneous results.

claim and the full measure of damage can not be determined until a remedial action is completed." *Quapaw Tribe v. Blue Tee*, No. 03-846, 2008 U.S. Dist. LEXIS 51476, at *61 (N.D. Okla. July 7, 2008). The Court finds this reasoning persuasive and follows it here.

Second, Congress intended that the remaining determinations required to resolve this matter be left to the EPA. This agency holds the statutory authority to investigate environmental matters, and it has already begun devoting resources to such investigation. *See* Exec. Order No. 12580, 52 Fed. Reg. 2923 (Jan. 23, 1987); 42 U.S.C. §§ 9604(e), 9604(e)(5). Congress's intention is further evidenced by the fact that if the EPA had already selected a remedy, CERCLA would deny this Court jurisdiction to consider challenges to the EPA's choice. 42 U.S.C. § 9613(h). In contribution cases, CERCLA requires courts to uphold the EPA's remedial action decisions unless it can be "demonstrated, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law." 42 U.S.C. § 9613(j). CERCLA thus clearly assumes that the EPA's determinations are to inform later court rulings.

Third, any investigation required by this Court through discovery and litigation would be collateral to the EPA's ongoing investigation. Duplicating these efforts would waste the parties' and this Court's resources. Although Asarco complains that the EPA has not been diligent in its investigation of these sites, Asarco has presented no evidence in support. Instead, it must be emphasized that this process was not initiated in the normal fashion by the EPA, but rather by Asarco in filing for bankruptcy.

Fourth and finally, the Court finds that deciding this case now could lead to inconsistent judgments. Asarco asserts that once Defendants pay it contribution, the government is then entitled to collect from Defendants the remaining amount of total damages after deducting what Asarco already paid. *See* 42 U.S.C. § 9613(f)(3)(A). Asarco argues that because Defendants'

contribution is excluded from this remaining amount, the government cannot gain a double recovery for the same remediation costs and NRD. However, this argument assumes the EPA will ultimately determine Asarco's settlement was for more than its fair share of the total liability. Yet, it is entirely possible that the EPA could decide the opposite, given the large amount the government initially claimed in Asarco's bankruptcy proceedings ($4.8 billion), and the fraction of that amount reached in Asarco's settlement ($158 million). If, under that hypothetical, this Court concluded Asarco was entitled to contribution, Defendants would be ordered to pay amounts that the EPA effectively determined they were not obligated to pay. It is undisputed that any contribution Asarco receives now is later unrecoverable due to the contribution protection Asarco received in its bankruptcy. It is further undisputed that the EPA is not bound by any decision of this Court concerning remedial costs. A stay would thus avoid the substantial hardship of inconsistent judgments for Defendants.

For the foregoing reasons, this Court finds that a stay in this case is necessary under both the doctrine of primary jurisdiction and its inherent power to manage its docket. Consistent with the doctrine of primary jurisdiction, the Court finds that enforcement of this claim requires the resolution of issues which, under CERCLA, have been placed within the special competence and expertise of the EPA. Staying this case would also best promote consistency and uniformity within CERCLA's area of regulation. In addition, the Court finds that Defendants face a specific hardship or "pressing need" warranting the exercise of its inherent power to manage the docket. Therefore, the Motions to Stay will be granted.

D. The Scope of the Stay

Defendants move to stay until the EPA makes a final determination of the Tri-States remedy, NRD are determined, and the United States' claims have concluded. However, the

Court finds that the better course is to reconsider this stay upon a showing of good cause. The parties shall not move to lift this stay until either: 1) the EPA has completed its investigation, selected a final remedy for the Tri-States area, and NRD are determined; or 2) all of the parties in this case have resolved their total liabilities with the government and/or with each other. *See Lunde v. Helms*, 898 F.2d 1343, 1345 (8th Cir. 1990); *Emerson Elec. Co. v. Black & Decker Mfg. Co.*, 606 F.2d 234, 237 n.6 (8th Cir. 1979).

IV. Conclusion

Accordingly, it is hereby **ORDERED** that the following motions are **GRANTED**:

- Defendant NL Industries, Inc.'s Motion to Stay, (Doc. 128);
- Defendant Sunoco, Inc.'s Motion to Stay, (Doc. 131);
- Defendant Doe Run Resources Corporation's Motion to Stay, (Doc. 141); and
- Defendants E.I. du Pont de Nemours & Company's and United States Steel Corporation's Motion to Stay, (Doc. 213.)

Finally, the following motion and objection are respectively **DENIED** and **OVERRULED as moot**:

- DuPont's and U.S. Steel's Motion for Reconsideration of Orders, (Doc. 215); and
- Asarco's Objection to NL's Notice of Supplemental Authority, (Doc. 222.)

IT IS SO ORDERED.

/s/ Beth Phillips
BETH PHILLIPS, JUDGE
UNITED STATES DISTRICT COURT

DATE: March 18, 2013