

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24<sup>th</sup> day of January, two thousand fourteen.

PRESENT: DENNIS JACOBS,  
DENNY CHIN,  
CHRISTOPHER F. DRONEY,  
Circuit Judges.

-----X  
State of New York,  
Plaintiff,

-v.-

Solvent Chemical Company, Inc.,  
Defendant-Third-Party  
Plaintiff-Appellee,

-v.-

13-132(L)  
13-148

Olin Corporation,  
Third-Party Defendant-  
Appellant,

E.I. du Pont de Nemours and Company,  
Third-Party Defendant-  
Appellant.

1  
2 **FOR APPELLANTS:**

MICHAEL T. WETMORE (JoAnn T. Sandifer, Joel B. Samson, on the brief), Husch Blackwell LLP, St. Louis, Missouri.

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7 DANIEL M. DARRAGH, Cohen & Grigsby, P.C., Pittsburgh, Pennsylvania.

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11 **FOR APPELLEE:**

DENNIS P. HARKAWIK, (Charles D. Grieco, on the brief), Jaeckle Fleischmann & Mugel, LLP, Buffalo, New York.

15  
16 Appeal from a judgment of the United States District Court for the Western District of New York (Curtin, J.).

18  
19 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**  
20 **AND DECREED** that the judgment of the district court be  
21 **AFFIRMED** in part, **VACATED** in part, and **REMANDED**.

22  
23 Olin Corporation ("Olin") and E.I. du Pont de Nemours  
24 and Company ("DuPont") appeal from the judgment of the  
25 United States District Court for the Western District of New  
26 York (Curtin, J.), holding them liable to Solvent Chemical  
27 Company, Inc. ("Solvent") for contribution in connection  
28 with the remediation of two Niagara Falls, New York  
29 properties, the "Solvent Site" and the "Olin Hot Spot." In  
30 a December 19, 2011 summary order, we affirmed the  
31 allocation of response costs for the Solvent Site for the  
32 period prior to July 1, 2007 ("Past costs"), but vacated the  
33 district court's Past costs allocation for the Olin Hot  
34 Spot, and remanded for reallocation. New York v. Solvent  
35 Chem. Co., 453 Fed. App'x 42 (2d Cir. 2011) ("2011 Summary  
36 Order"). In an accompanying opinion, we ruled that Solvent  
37 was entitled to a declaratory judgment holding Olin and  
38 DuPont liable for a portion of future response costs.<sup>1</sup> New  
39 York v. Solvent Chem. Co., 664 F.3d 22, 26 (2d Cir. 2011)  
40 ("2011 Opinion"). On remand, the district court entered the  
41 declaratory judgment in favor of Solvent, and in addition,  
42 (i) reallocated Past costs for the Olin Hot Spot; (ii)  
43 allocated costs for both sites for the period July 1, 2007

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<sup>1</sup> The Solvent Site is east of the Olin Hot Spot. Both properties are bordered on the south by DuPont property.

1 through December 31, 2011 ("Past Future costs"); and (iii)  
2 established a formula for the allocation of costs for  
3 periods beginning on or after January 1, 2012 ("Future  
4 Future costs"). In this appeal, Olin and DuPont challenge  
5 all three of these allocations. We assume the parties'  
6 familiarity with the underlying facts, the procedural  
7 history, and the issues presented for review.

8  
9 As a threshold matter, Olin and DuPont argue that,  
10 before ruling on remand, the district court was required to  
11 hold an evidentiary hearing under the Declaratory Judgment  
12 Act ("DJA"), 28 U.S.C. § 2202, or alternatively, under the  
13 2011 Opinion. We need not decide whether Olin and DuPont  
14 waived this argument, as Solvent contends. The 2011 Opinion  
15 ordered entry of a declaratory judgment "leaving for the  
16 future only the need to fix the amount of contribution and  
17 affording the court flexibility with respect to the time and  
18 manner for doing so." The district court thus was given  
19 broad discretion to rely on the developed record and to set  
20 past and future allocations without an additional hearing.

21  
22 The remaining challenges relate to the court's  
23 allocation of (1) all costs (Past, Past Future, and Future  
24 Future costs), (2) Past costs only, and (3) Past Future  
25 costs only. We review the district court's allocation of  
26 response costs for abuse of discretion. Goodrich Corp. v.  
27 Town of Middlebury, 311 F.3d 154, 169 (2d Cir. 2002). A  
28 district court abuses its discretion where (1) its decision  
29 rests on a legal error or clearly erroneous factual finding  
30 or (2) its allocation cannot be located within the range of  
31 permissible outcomes. Id.

32  
33 **1.** Olin argues that the district court erred in all cost  
34 allocations by using combined monitoring well data for the  
35 Solvent Site and Olin Hot Spot rather than site-specific  
36 data, and by allocating 98% of the chlorinated benzenes at  
37 the Olin Hot Spot to Olin.<sup>2</sup>

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<sup>2</sup> Olin also argues that the cost allocation between the Olin Hot Spot and the Solvent Site should have been based on the relative amount of contaminants filtered at each site rather than on the volume of water pumped. The 2011 Summary Order affirmed the use of the water-volumetric approach for allocating Solvent Site Past costs, and on remand the district court reasonably applied it to the Olin Hot Spot (and all Past Future and Future Future costs).

1  
2 Our 2011 Summary Order upheld the allocation of Past  
3 costs for the Solvent Site, which utilized combined  
4 monitoring well data. This data (when averaged with site-  
5 specific pumping well data) was used to bridge the wide  
6 variation between the experts' estimates. New York v.  
7 Solvent Chem. Co., 685 F. Supp. 2d 357, 451 (W.D.N.Y. Jan.  
8 26, 2010). The use of combined monitoring well data was  
9 therefore within the court's discretion in allocating Past  
10 costs for the Olin Hot Spot and all Past Future and Future  
11 Future costs (for both sites).

12  
13 The allocation of 98% of the chlorinated benzenes at  
14 the Olin Hot Spot to Olin was also within the bounds of  
15 discretion. The 2011 Summary Order observed that  
16 attributing 6.35% of the Olin Hot Spot costs to Olin was  
17 without support in the record; when the district court  
18 properly applied its factual findings, it came to a  
19 different result. The flow of groundwater from Olin's plant  
20 to the Olin Hot Spot as affected by the bedrock formation,  
21 and the elevated levels of certain classes of benzenes,  
22 strongly support the conclusion that Olin's plants are the  
23 chief source of the benzene contaminants at the Olin Hot  
24 Spot.

25  
26 **2.** DuPont argues for a 10% reduction in its share of  
27 liability for the Olin Hot Spot, on the ground that the  
28 district court discounted its Solvent Site liability by this  
29 percentage. The district court explained its reason for  
30 treating the site differently. The chlorinated benzenes at  
31 the Solvent Site (and not those at the Hot Spot) were the  
32 primary reason for the remediation. Accordingly, as the  
33 district court concluded, "it would be inequitable to  
34 discount DuPont's share of response cost liability at the  
35 Olin Hot Spot based on the existence of chlorinated benzene  
36 contamination at the Solvent Site that, in all likelihood,  
37 could not have migrated to the Hot Spot." DuPont was  
38 therefore not entitled to any reduction in its liability for  
39 Olin Hot Spot response costs.

40  
41 **3.** With regard to Past Future costs, Olin and DuPont argue  
42 that 2012 pumping well data (not the 2002 pumping well data)  
43 should have been used for allocation. In addition, Olin

1 argues that 2007-11 monitoring well data (not the 2004-06  
2 data) should have been used.<sup>3</sup>  
3

4 The district court was not obliged to obtain new site-  
5 specific pumping well data for purposes of allocating Past  
6 Future costs. The 2012 data, collected after the district  
7 court allocated Past Future costs, indicated a change in  
8 groundwater chemistry. The district court was thus faced  
9 with two alternatives: to utilize the 2012 data and  
10 extrapolate back to the 2007-11 period, or to extrapolate  
11 forward from 2002 utilizing the older data. The latter  
12 approach was within its discretion.  
13

14 However, the district court committed an abuse of  
15 discretion by using 2004-06 monitoring well data in  
16 allocating Past Future costs when contemporaneous 2007-11  
17 monitoring well data was available. In denying Olin's Rule  
18 59 motion, the district court "found nothing in the site-  
19 specific monitoring well data from 2007-2012 . . . that  
20 might reasonably be expected to cast doubt on these findings  
21 or observations, or to otherwise alter the equitable  
22 allocation determinations reached by the court . . . ."  
23 This conflates two distinct challenges: (1) use of combined  
24 monitoring well data in lieu of *site-specific* monitoring  
25 well data, and (2) use of 2004-06 data in lieu of  
26 *contemporaneous 2007-2011* monitoring well data. As  
27 explained above, the court committed no abuse of discretion  
28 in creating a formula that utilizes combined monitoring well  
29 data. But the district court offers no explanation for  
30 ignoring contemporaneous monitoring well data from 2007-11,  
31 which in combined form could be plugged right into the  
32 court's equation.  
33

34 For the foregoing reasons, and finding no merit in  
35 Olin's and DuPont's other arguments:  
36

37 With respect to Olin Hot Spot Past costs, we **AFFIRM** the  
38 district court's allocation.

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<sup>3</sup> These arguments were raised in the parties' Fed. R. Civ. P. 59(e) motions to alter or amend the August 27, 2012 judgment of the district court. We review the December 6, 2012 order denying these motions for abuse of discretion. Munafo v. Metro. Transp. Auth., 381 F.3d 99, 105 (2d Cir. 2004).

1 With respect to Future Future costs for both sites, we  
2 **AFFIRM** the allocation formula established by the district  
3 court, which averages new site-specific pumping well data  
4 and combined monitoring well data gathered twice a year to  
5 determine the relative concentrations of chlorinated  
6 benzenes and chlorinated aliphatics at each site.<sup>4</sup>  
7

8 With respect to Past Future costs for both sites, we  
9 **VACATE** and **REMAND** for reallocation, and direct the district  
10 court to replace the 2004-06 combined monitoring well data  
11 with 2007-11 combined monitoring well data. The formula  
12 averaging site-specific pumping well data with combined  
13 monitoring well data, as well as the use of 2002  
14 site-specific pumping well data, are not to be altered for  
15 purposes of this reallocation.<sup>5</sup>  
16

17 FOR THE COURT:  
18 CATHERINE O'HAGAN WOLFE, CLERK  
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<sup>4</sup> For the Solvent Site: DuPont is responsible for 88% of the chlorinated aliphatics, and Solvent for the remaining 12%. Solvent is responsible for 98% of the chlorinated benzenes. Liability for the remaining 2% of chlorinated benzenes is split between Olin and Solvent. Solvent, 685 F. Supp. 2d at 452.

For the Olin Hot Spot: DuPont is responsible for 100% of the chlorinated aliphatics; Olin is responsible for 98% of the chlorinated benzenes; and Solvent is responsible for 2% of the chlorinated benzenes.

<sup>5</sup> The district court has discretion to average combined monitoring well data for the entire Past Future costs period and fix the relative percentages of chlorinated aliphatics and benzenes; alternatively, the district court may calculate relative percentages for each year or half year (and, in the case of 2007, the second half of the year) separately. If monitoring well data has been collected more than once in any year between 2007-11, the district court has discretion to use some or all of the data collected in that year. For example, if data is gathered quarterly, the district court may choose to utilize the first and third quarter data and ignore the data from the second and fourth quarters.