

E. MICHAEL THOMAS
STATEMENT OF QUALIFICATIONS
ALLOCATOR/MEDIATOR SERVICES

OVERVIEW:

- ⇒ Thirty years of experience (9 at USEPA, 21 in private practice) specializing in complex multi-party cases and associated allocation and settlement challenges.
- ⇒ Led projects that helped make EPA Region I a recognized national leader in CERCLA allocation and settlement processes, particularly using the *de minimis* settlement tools.
- ⇒ Established cornerstone case law in *US v. Cannons Engineering* governing proposed Superfund settlements.
- ⇒ Led PRP groups in intra-PRP allocation negotiations, as chief negotiator for PRP groups in inter-group allocations, as common counsel and as coordinating counsel.
- ⇒ Served as neutral allocation fact finder and mediator to PRP groups and in mediations between PRPs and the government.
- ⇒ Mediated \$1.5 billion private party environmental lawsuit by WW II munitions manufacturer against U.S.
- ⇒ Served as allocation expert witness in litigation concerning environmental liabilities at Superfund sites: expert allocation opinion adopted by District Court (court viewed my testimony to be “particularly knowledgeable and candid,” adopted my allocation as “an equitable and fair allocation”) and upheld by 3rd Circuit in Caldwell Trucking case (citations *infra*); deemed “most helpful expert” in support of judgment denying \$25m environmental indemnification provision in purchase share agreement at Haverhill Landfill Superfund site; presently serving as expert witness concerning allocation of responsibility for cleanup at a municipal airport in California.
- ⇒ Worked with multidisciplinary panel of technical experts for private client on Lower Fox River Superfund Site to develop “Ecosystem-Based Rehabilitation Plan: An Integrated Plan for Habitat Enhancement and Expedited Exposure Reduction in the Lower Fox River and Green Bay” that integrated CERCLA remedial and natural resource damages concerns into a single approach intended as an alternative to EPA’s remedy and as a basis for allocation and settlement.
- ⇒ Facilitated public stakeholder and agency involvement in closure, decommissioning and beneficial redevelopment of nuclear power plant beneficial as Senior Counsel to Conservation Law Foundations Ventures, Inc.

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QUALIFICATIONS:

I have thirty years of experience successfully resolving environmental disputes under CERCLA and other laws governing hazardous substances cleanups and facilitating cooperation among stakeholders involved in complex regulatory compliance projects. My experience includes more than ten years acting as a third party neutral, mediator and facilitator on allocation issues in these matters. As well, I have served successfully as expert witness on allocation issues in these matters, including compiling and defending an overall allocation structure eventually adopted by the court in a third party cost recovery litigation. Since the beginning of my involvement in Superfund, and virtually since the beginning of the Superfund program, I have specialized in complex multi-party cases and their associated allocation and settlement challenges. My Superfund cases, in the various roles of my practice have included some of the most difficult in the nation but my efforts have often lead to noteworthy successes.

The allocation activities which I designed and led while at EPA made EPA Region I a recognized national leader in EPA's efforts to use the CERCLA allocation and settlement processes, particularly the *de minimis* settlement tools, to yield fair and expeditious settlement of Superfund cases. This work led to cornerstone judicial opinions governing proposed Superfund settlements, notably *US v. Cannons Engineering*.

In my capacity as an EPA attorney, supervisor and manager in the Boston office, I was responsible for site cleanup and enforcement actions at more than 60 Superfund sites in the New England region. While employed at EPA headquarters in Washington, I was the deputy to the Associate Enforcement Counsel in charge of hazardous waste enforcement nationwide and was Special Assistant to the General Counsel on all matters within the General Counsel's responsibility. I received EPA's highest honor, the Gold Medal for Exceptional Service, for extraordinary and precedential Superfund case management.

In twenty-one years of private practice I have represented and counseled numerous clients on many state and federal Superfund sites, notably the Lower Fox River site in Wisconsin and the Housatonic River site in Massachusetts and Connecticut. I have provided leadership among PRP groups in resolving allocation disputes and settling numerous Superfund cases. I have represented major corporations in hazardous waste enforcement actions, cleanup negotiations and litigation under waste site cleanup, regulatory and permitting programs and have tackled some of the most challenging allocation scenarios in the Superfund program. I have chaired steering committees of groups of potentially responsible parties in multi-party Superfund cases and have led negotiations and participated in allocation and mediation proceedings reaching settlements in these cases.

I have hired and supervised allocation consultants and mediators and have participated in and administered numerous alternative dispute resolution proceedings in pursuit of such settlements. I have also served as neutral allocation consultant and mediator to PRP groups

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which have reached settlements based on my assistance, including at the Fike/Artel, PJP Landfill and Blosenski Landfill sites.

I served as Senior Counsel to CLF Ventures, Inc. (CLFV), a non-profit affiliate of Conservation Law Foundation. CLFV is an organization which assists stakeholders and interested parties in advancing public and private sector projects that have potential environmental benefits. I worked with CLFV to combine the organization's broad substantive expertise with my experience as a mediator and third party neutral to collaborate in resolution of complex environmental, energy and land use issues. In this capacity, I have worked with CLFV in current projects facilitating stakeholder involvement in the decommissioning and closure of nuclear power plants in Massachusetts and Connecticut.

I have also served as an expert witness in several private party cost recovery cases across the country. In *Caldwell Trucking PRP Group v. The Pullman Company et al.*, (D.N.J., Nov. 21, 2002), the Court entered judgment against the defendants for the liability share developed in my expert report to which I testified at trial. The Court characterized my expert testimony as "particularly knowledgeable and candid" (*Caldwell Trucking*, at 5) and adopted my allocation without amendment because it "represents an equitable and fair allocation" (*Id.*, at 45). The allocation was upheld by the Third Circuit in *Caldwell Trucking PRP Group v. Rexon Technology Corporation, et al.* 421 F.3d 234 (3rd Cir. 2005).

A Massachusetts case in which I served as expert was tried to a judgment which quashed the \$25 million environmental indemnity clause in the share purchase agreement sought to be enforced against the prior owner of the site. I was deemed "most helpful expert" in helping to achieve that verdict for the defense.

I recently served as expert witness concerning liability allocation for cleanup of historic contamination at a municipal airport in California that was also used as military air base. I also worked as an expert witness on a project in a Southwest state concerning allocation of responsibility for differing air contaminants emitted by separate industrial facilities adjacent to impacted neighborhoods. I am working presently as an expert witness on a site in the Midwest concerning divisibility issues related to partial owners of Superfund sites.

With my background in Superfund practice, service as third party neutral, persuasive expert witness experience and leadership roles in PRP groups, I strive to provide parties with reliable, carefully conceived and meticulously conducted allocation processes and outcomes that will have maximum factual and legal basis and credibility.

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EXEMPLARY PROJECTS:

As outlined above, my environmental dispute resolution experience spans virtually the entire time frame of the Superfund program. Certain relevant matters are highlighted below.

Lower Fox River Superfund Site

The Lower Fox River Superfund site is comprised of the entire 39 mile Lower Fox River from Lake Winnebago to Green Bay in Wisconsin with sediments significantly contaminated by PCBs. For a private client, I worked with a multidisciplinary panel of experts to develop an alternative ecosystem-based remedial plan intended to integrate remedial and natural resource damages concerns into a single approach to the site and potentially to provide a basis for allocation in support of settlement negotiations. This plan, "Ecosystem-Based Rehabilitation Plan: An Integrated Plan for Habitat Enhancement and Expedited Exposure Reduction in the Lower Fox River and Green Bay," Lue-Hing, *et al.* (2002), was presented to the government and made available to the public as an independent and comprehensive assessment of site conditions to serve as an alternative to EPA's more narrowly focused remedial decision-making. The report also provided a basis for changing EPA's proposed all-dredging remedy to a dredge-and-cap remedy. My work with the panel was to ground the technical considerations within the legal environment of CERCLA remedial and natural resource damages requirements as well as the liability and allocation implications of the technical issues.

Fike/Artel Superfund Site

I served as neutral Allocation Consultant and mediator, jointly with Clean Sites, Inc., in settlement of the Fike/Artel Superfund Site in Nitro, West Virginia. This site was a former World War I chemical munitions plant at which subsequent chemical manufacturing, reclamation and disposal was conducted. The settlement process included the United States Air Force and United States Army as active participants, as well as other parties associated with the World War I activities and with the more recent chemical manufacturing activities at the site. The settlement process was conducted under a series of rigid deadlines imposed by a case management order arising out of the site litigation, each of which was met throughout the duration of the project.

The settlement process included more than 20 individual mediations to facilitate *de minimis* settlements. The case management order process required preparation of a draft allocation methodology, a draft allocation report and a final allocation report. These reports addressed substantial environmental fate and transport issues and complex legal issues relating to arranger liability and the law of contribution and allocation under CERCLA. A week-long mediation enabled the parties, including the United States-as-defendant, to reach an overall allocation agreement.

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The parties then entered mediation between the PRPs and the United States-as-plaintiff which reached an agreement in principle to resolve the litigation and perform the site cleanup. Mediations were also conducted involving the two remaining parties who did not participate in the earlier settlements. At the time, the various agreements reached pursuant to these mediations were valued at \$140 million.

Pine Street Barge Canal

In the *Pine Street Barge Canal* Superfund site, I served as lead negotiator for a group of PRPs who owned property adjacent to the manufactured gas plant that was responsible for virtually all of the relevant contamination. I negotiated an allocation agreement and settlement with the plant operators. This settlement was premised on an intra-landowner allocation, including municipal and state shares, which I helped to establish. I served on the Pine Street Barge Canal Coordinating Council, consisting of citizens, environmental groups, government and business representatives, which conducted an extensive third-party neutral facilitated process to redefine the remedy for the Site after EPA was forced to withdraw entirely its initial cleanup proposal due to outcry from local stakeholders. I am currently serving as common counsel to the landowner PRPs in the cleanup phase of the case.

DuPont War Plant Cost Recovery Mediation

I served as mediator in early stages of this litigation brought by E.I. duPont against the United States seeking recovery of costs incurred in environmental cleanup of fifteen manufacturing plants which had been operational during World War II and the Korean War. The mediation was focused on allocation of responsibilities at one of the plants in an attempt to develop a template that could be used to resolve allocation issues at the remaining fourteen. After several months of negotiation and mediation activities, for reasons confidential to the mediation process, the parties determined that further discovery and motions practice would be necessary before mediations could succeed.

Blosenski Site Ad Hoc Generators PRP Group

At the Blosenski Landfill Superfund site in Pennsylvania, I was retained as Allocation Consultant by the PRP Group to develop a comprehensive allocation that could be used to resolve ongoing litigation concerning the site and as a basis for addressing anticipated Section 106 orders compelling performance of the site remedy. The Group was under extremely tight time constraints which were met in every detail, completing the final allocation report within five months of project startup. These time constraints required efficient and accurate development of a detailed factual basis for allocation, relying on the Allocation Consultant to exercise a high degree of judgment in the absence of the more typical numerous procedural steps soliciting and responding to input from the Members. The allocation considered complex waste-type distinctions, such as proposed distinctions for plant trash, filter cake and biodegradable organic solvents, and fate and transport and driving the remedy arguments advanced by parties associated with differing waste streams with the assistance of technical staff and consultants, and included

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the United States Navy as a notable participant in the process. The allocation report was used by the Group as the basis for a negotiated comprehensive settlement of the case upon which the site cleanup work was conducted.

PJP Landfill Site

I served as allocation consultant to the PRP Group at the PJP Landfill site in Jersey City, New Jersey involving approximately 60 alleged waste generators associated with the site. The allocation process for the PJP site took place in the context of active discovery, which posed special challenges for the allocation process, and necessitated a high degree of flexibility in adjusting the allocation process to the vagaries of the litigation schedule. I provided draft and final allocation reports to the Participants which served as the basis for an allocation agreement with greater than 90 percent participation.

Cannons Engineering Case

My most substantial settlement project as a government attorney was in the *Cannons Engineering* case. This case involved transshipment and distribution of waste among four sites in two states. My management of the *Cannons* case led to comprehensive settlement or resolution, within three years of issuance of notice letters, with all but 25 of the 600 parties initially notified concerning the four sites. The *Cannons* settlements included the first multi-party *de minimis* settlements in the country which achieved settlement with more than 300 *de minimis* parties. The allocations for this case, and the resultant settlements, included parties ranging from local school districts and small businesses to Fortune 50 companies. It also included several agencies of federal and state governments as both *de minimis* and large volume contributors and settlers. The settlement process in the *Cannons* case was approved by the District Court and the First Circuit, whose opinions have become cornerstones in cases involving judicial review of Superfund settlements. See *United States v. Cannons Engineering Corp.*, 720 F.Supp. 1027 (D.Mass. 1989), *aff'd*, 899 F2d 79 (1st Cir. 1990).

Silresim Chemical Corporation

I was the lead government attorney for negotiations on funding the RIFS and recovery of the government's past costs in the *Silresim Chemical Corporation* case, a Superfund matter initially involving 300 PRPs. In *Silresim*, I oversaw development of a volumetric ranked list, which was then shared with the PRP steering committee to develop consensus about evidence interpretation principles. I also directed an audit procedure which allowed individual PRPs to contest their volumetric allocations and developed an allocation process between generators and transporters. Almost all PRPs participated in these settlements, with fewer than ten non-settlers. A unique feature of the *Silresim* allocation was a contribution in excess of \$500,000 toward the past cost settlement which I obtained from a prominent New England bank that mortgaged the facility and allegedly had participated in its management, the first such recovery from a financial institution in the Superfund program. In large part because of the success of the previously

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completed allocation process, the entire negotiation concerning past costs was completed in 90 days.

CLF Ventures Nuclear Power Plant Closure Projects

I worked with CLFV to assist an electric utility company coordinate the effective and constructive involvement of regulatory and community stakeholders in the site closure, decommissioning and beneficial re-use of the Yankee Nuclear Power Station in Rowe, Massachusetts. I have assisted CLFV in a similar project concerning the Connecticut Yankee power plant. These power plant closure and beneficial re-use projects require the utility company to work successfully and cooperatively with stakeholders with a much broader range of interests and authority than those stakeholders involved with the operation of the plant. We have helped the utility company to identify and communicate effectively with these stakeholders in the interest of completing the closure process in a manner that meets the needs and concerns of all of the relevant stakeholders.

Other Superfund Experience

In private practice, I have had significant involvement at the Housatonic River PCB site in Massachusetts and Connecticut, the Lower Fox River PCB site in Wisconsin, the Pine Street Barge Canal, the Town of Moreau Site, the York Oil Site, the Logan Airport environmental remediation in Boston, the Miami International Airport environmental remediation as well as a number of individual RCRA facilities involved in corrective action and regulatory issues.

In the course of my Superfund work in private practice, I have played prominent roles in moving several cases toward settlement. For example, when I became involved in the *United States v. Peirce* litigation concerning the York Oil Superfund site, the case had been underway for eight years and was severely hampered by flawed allocation by the government. I first convinced the fractionated and contentious PRP group to conduct an interim allocation and to assemble a belated offer to perform the Second Operable Unit RIFS. Then, as chair of the PRP Steering Committee, I led the successful negotiation of an agreement with EPA under which the PRPs' offer was accepted. We then conducted a comprehensive allocation process and negotiated a Consent Decree with the United States for an overall settlement of the case for most of the participants in the allocation.

I was also involved, as a government attorney or supervisor, in several other notable Superfund allocations including the *Keefe Environmental Services* site, the *Iron Horse Park* site and the *Wells G & H* site (upon which the book and movie *A Civil Action* was based). I was responsible for allocation and remedial issues for some 25 other National Priority List sites during my work at EPA.