

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CITY OF BANGOR,)
)
 Plaintiff,)
 v.)
)
 CITIZENS COMMUNICATIONS) Civil No. 02-183-B-S
 COMPANY,)
)
 Defendant)

**RECOMMENDED DECISION ON
THE CITY OF BANGOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

The City of Bangor has filed suit against Citizens Communications Company seeking to impose liability on Citizens for its alleged part in contributing to the existence of a tar slick on the bottom of the Penobscot River in Dunnett's Cove.¹ The City has moved for partial summary judgment requesting that the Court enter judgment as a matter of law on four matters: (1) that Citizens is liable for any releases of hazardous substances into the Penobscot River that occurred during the entire 110-year operational history of Citizens's former manufactured gas plant; (2) that the discharges from the former gas plant at least partially contributed to the existence of a tar slick in the River; (3) that Citizens is therefore subject to liability under both CERCLA and RCRA; and (4) that the tar slick "may present an imminent and substantial endangerment to health or the environment." (Docket No. 313 at 1.) I recommend that the Court grant the City's motion to a limited extent.

¹ Historically, this area of the River was known as Bangor harbor. It is now sometimes referred to as the Bangor landing.

Statement of Facts

In connection with the City's motion for partial summary judgment, the Court can fairly find the following facts in accordance with the summary judgment standard, which requires that all inferences be drawn in favor of the non-moving party, and Local Rule 56, which governs the manner in which facts must be presented in summary judgment proceedings in this Court.

1. In approximately 1852, the Bangor Gas Light Company built a manufactured gas plant near the intersection of Main Street and Patton Street. (Docket No. 314, ¶ 1.)

2. This location placed the gas plant approximately 1000 feet from the Penobscot River. (This fact is acknowledged by both parties in their respective submissions but is not expressly set out in the City's statement of material fact).

3. The Bangor Gas Light Company owned and operated the manufactured gas plant facilities known as the Bangor Gas Works from approximately 1852 to 1941. (Id., ¶ 15.)

4. At some point over this timeframe, a naturally existing drainage brook (Davis Brook) that ran within the vicinity of the gas plant premises to the River was enclosed in stone to form the Davis Brook sewer. (This fact is acknowledged by both parties in their respective submissions but is not expressly set out in the City's statement of material fact).

5. In 1941, the Bangor Gas Light Company merged with the Penobscot Valley Gas Corporation, with the surviving corporation named the Bangor Gas Company. (Id., ¶ 5.)

6. The Bangor Gas Company owned and operated the manufactured gas plant facilities known as the Bangor Gas Works from approximately 1941 to 1948. (Id., ¶ 16.)

7. In 1948, the Bangor Gas Company merged with Citizens Utilities Company, with the surviving corporation named Citizens Utilities Company. (Id., ¶ 5.)

8. Citizens Utilities Company owned and operated the manufactured gas plant facilities known as the Bangor Gas Works from approximately 1948 to 1963. (Id., ¶ 17.)

9. Tar was a by-product of the manufactured gas plant's operations. (Id., ¶ 4.)

10. Tar is a complex mixture of chemicals that includes compounds classified as hazardous substances pursuant to CERCLA. (Id., ¶ 9.)

11. Records indicate that, as late as the 1950s, Citizens shared in the costs of Davis Brook sewer reconstruction. (Id., ¶ 3.)

12. Samples² collected from beneath the Davis Brook sewer between Citizens's former gas plant premises and Dunnett's Cove contained tar-like material with a chemistry consistent with tars produced in the manufactured gas process. (Id., ¶ 10.)

13. Samples collected from within the former gas plant site contained tar-like material with a chemistry consistent with tars produced in the manufactured gas process. (Id., ¶ 12.)

14. Samples collected from tar deposit in Dunnett's Cove near the outfall of Davis Brook sewer contained tar-like material with a chemistry consistent with tars produced in the manufactured gas process. (Id., ¶ 11.)

15. The tar-like material³ collected from the former gas plant site, from beneath Davis Brook sewer, and from Dunnett's Cove near the outfall of Davis Brook sewer all contain hazardous substances within the meaning of CERCLA. (Id., ¶ 13.)

16. The Maine Department of Environmental Protection (DEP) has designated the tar slick as an Uncontrolled Hazardous Substance Site pursuant to the Maine Uncontrolled Hazardous Substance Sites Law, 38 M.R.S.A. § 1364(4). (Id., ¶ 8.)

² Presumably soil samples.

³ Presumably a reference to the samples collected in connection with this litigation.

The contention that the former gas plant site contributed to the tar slick in Dunnett's Cove is very compelling. Nevertheless, it requires a factfinder to draw an inference based on circumstantial evidence. The City maintains that the inference is inescapable. (Pl.'s Reply Memorandum, Docket No. 363, at 3; Pl.'s Response to Def.'s Statement of Additional Material Facts, Docket No. 364, at 2.) Citizens, on the other hand, maintains that the inference is escapable because a physical pipe or other conduit has never been discovered to link the sewer directly to the gas plant's facilities. (Docket No. 341, ¶ 6 & ¶¶ 1-2 additional.) Moreover, at least one of Citizens's expert witnesses is prepared to testify that the gas plant's 110-year operation did not have any impact on river sediment in Dunnett's Cove. (Id., ¶ 7.) Citizens also appears prepared to offer expert testimony concerning viable alternative sources for the tar slick (id.), although the admissibility of such testimony is challenged by the City in several Daubert motions. (Docket Nos. 298-304.)

Discussion

With its summary judgment motion, the City essentially seeks to establish (1) that Citizens is legally responsible for any environmental contamination that may have been caused by its corporate predecessors, the Bangor Gas Light Company and the Bangor Gas Company; (2) that tar from the gas plant is now deposited in the tar slick in Dunnett's Cove; (3) that Citizens is liable under CERCLA § 107 and RCRA § 7002; and (4) that the tar slick may present an imminent and substantial endangerment to health or the environment. I address these contentions in turn.

1. Successor liability.

The City's first summary judgment request is that the Court enter judgment that "Citizens is legally and equitably responsible for 110 years of gas plant operation." (Docket No. 313 at 6.)

In support of this contention the City cites Maine's corporate merger statutes from 1941 and 1948, which provide that the constituent corporations of a merged entity cease to exist and become the consolidated corporation. R.S. ch. 59 § 84 (1954); R.S. ch. 49 § 80 (1944). These statutes, in conjunction with the summary judgment facts properly introduced by the City in its statement of material facts, establish that Citizens has succeeded to the liabilities of the Bangor Gas Light Company and the Bangor Gas Works. Citizens does not really even dispute this conclusion. (See Docket No. 340 at 3-4 ("Citizens has never denied that it merged with the Bangor Gas Company in 1948. . . . The Certificate of Ownership associated with that merger provides that Citizens will assume the liabilities of Bangor Gas Company.")) Accordingly, I recommend that the Court enter summary judgment to the effect that Citizens has succeeded to the liabilities of the Bangor Gas Light Company and the Bangor Gas Works. But the City asks for something more than just this. The City wants the Court to rule that Citizens's successor liability makes it "equitably responsible" for any and all releases made over the gas plant's entire 110-year history. As my companion recommendation on Citizens's motion for summary judgment points out, there is a distinction in CERCLA between finding a party liable under CERCLA § 107 and finding a party equitably responsible for another party's response costs under § 113(f). A variety of equitable factors will determine the allotment of response costs among liable parties in a CERCLA contribution action. See W. Props. Serv. Co. v. Shell Oil Co., 358 F.3d 678, 693 (9th Cir. 2004); Kalamazoo River Study Group v. Menasha Corp., 228 F.3d 648, 656 (6th Cir. 2000); Minyard Enters., Inc. v. Southeastern Chem. & Solvent Co., 184 F.3d 373, 385 (4th Cir. 1999); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1303 n.4 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998). Although the City's motion for partial summary judgment succeeds in establishing garden-variety successor liability, it does not

succeed in establishing either § 107 liability or § 113 equitable responsibility. As for liability, there is a question of material fact whether the hazardous substances that make up the tar slick were disposed of by Citizens or its predecessors. As for equitable responsibility for the City's response costs, until the City succeeds at establishing Citizens's liability under § 107, there is no reason to address the question. All that is established by the City's motion is that, for purposes of this litigation, the Bangor Gas Works, the Bangor Gas Light Company, Citizens Utilities Company and Citizens Communications Company can be treated as the same entity. If the Bangor Gas Works, Bangor Gas Light Company or Citizens Utilities Company performed acts that would generate liability under § 107, that liability is Citizens's.

2. *Presence of gas plant tar in Dunnett's Cove.*

The City's second summary judgment request asks the Court to conclude that the tar slick is at least partially composed of tar discharged from the gas plant. (Docket No. 313 at 8.) In support of this core finding, the City cites not one iota of the evidence it has presumably marshaled in support of its case. Instead, the City cites a single page from the expert report prepared by one of Citizens's liability experts, Andrew C. Middleton, Ph.D. Within this page of material, Dr. Middleton asserts that the tar slick is composed of tar deposits contributed from sources other than the former gas plant "rather than just solely tarry matter from the gas plant." (Docket No. 314, Ex. 6 at 18.) In other words, the City wants the Court to infer from the phrase "rather than just" that Dr. Middleton has admitted liability, even though he intends to offer an opinion that the gas plant did not contribute to the tar slick. It should go without saying that inferences are to be drawn in favor of the non-movant, which for purposes of the instant motion is Citizens, not the City. Based on my review of other portions of Dr. Middleton's report and his deposition testimony (both of which are cited by Citizens in opposition to such a finding), I am

persuaded that Dr. Middleton was merely characterizing the City's position, not conceding that the tar slick is composed at least in part of gas plant tar. Although it may be hard to swallow the contention that the gas plant did not contribute any tar to the tar slick, especially when Citizens admits that tar was the chief by-product of the gas plant's operation, the City's shoestring summary judgment motion strikes me as inappropriate given that the City is the plaintiff and bears the burden of proof. I am not persuaded that the City should win summary judgment on such a record. Accordingly, I recommend that the Court deny this aspect of the City's motion.

3. *CERCLA and RCRA liability.*

The City's third request is that judgment enter to the effect that Citizens is liable under CERCLA and RCRA as a matter of law, because the record establishes that Citizens's or its predecessors' operation of the gas plant contributed to the deposition of a tar on the bottom of Dunnett's Cove. Because I conclude that there remains a genuine issue of material fact whether the gas plant contributed to the tar slick, I recommend that the Court deny this aspect of the City's motion.

4. *The existence of an imminent and substantial endangerment.*

With this aspect of its motion, "the City asks the [C]ourt to rule that Citizens is a 'person . . . who has contributed . . . to the past . . . disposal of [a] solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.'" (Docket No. 313 at 9 (quoting 42 U.S.C. § 6972(a)(1)(B)).) This request is meant to build on the foundation of the prior two; a foundation that has not been laid. Still, the Court might nevertheless resolve the narrow question of whether the tar slick presents an imminent and substantial endangerment, leaving aside the gas plant's relationship to the tar slick. "Under § 6972(a) of RCRA, it is not necessary that Plaintiffs show that the contamination is harming, or will harm, health or the

environment. A finding that an activity may present an imminent and substantial endangerment does not require a showing of actual harm. . . . This sweeping provision indicates Congress's intent 'to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes.'" Me. People's Alliance v. Holtrachem Mfg. Co., L.L.C., 211 F. Supp. 2d 237, 246-47 (D. Me. 2002) (quoting United States v. Price, 688 F.2d 204, 213-14 (3rd Cir. 1982), and collecting cases). The evidence cited by the City is the State's designation of the site as an uncontrolled hazardous substances site. (Docket No. 314, Ex. 8.) In the designation, the Maine Department of Environmental Protection concludes that "[h]azardous substances located at and released from the Site pose or potentially pose a threat or hazard to the health, safety, or welfare of citizens of Maine, and pose or potentially pose a threat or hazard to the health of the environment of the State" and that "[a] continued potential danger to the public health or safety of any person and to the environment exists as a result of the continued presence of hazardous substances at the Site." (Id., Conclusion ¶¶ 2 & 3.) In answer to the City's assertion that the tar slick may present an imminent and substantial endangerment to health or the environment, Citizens offers only that the City has never treated the site as a danger, such as by posting the area with warning signs. (Docket No. 341, ¶ 19.) This is a pretty anemic response to findings by an expert agency that are directly designed to answer the material question at issue. Compare Lefebvre v. Cent. Me. Power Co., 7 F. Supp. 2d 64, 68-69 (D. Me. 1998) (denying summary judgment to plaintiff where defendant relied on "older DEP findings" to counter plaintiff's reliance on a more recent DEP "field data summary"). In my assessment, the unrebutted DEP designation is sufficient evidence to establish the existence of an imminent potential harm to health and the environment, whereas Citizens's "denial" is insufficient to

generate a genuine issue of material fact on the question.⁴ Accordingly, I recommend that the Court grant this aspect of the City's motion.

Conclusion

For the reasons stated herein, I **RECOMMEND** that the Court **GRANT** the City's motion for summary judgment **IN PART** by finding as a matter of law: (1) that Citizens has succeeded to the liability of the Bangor Gas Light Company and the Bangor Gas Works and (2) that the tar slick in Dunnett's Cove may present an imminent and substantial endangerment to health and the environment.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
Margaret J. Kravchuk
U.S. Magistrate Judge

Dated: July 6, 2004

⁴ At oral argument, counsel for Citizens argued that the designation was not admissible under the hearsay rule and is not of evidentiary quality because it does not reflect final agency action. Although the hearsay rule or some other rule applicable to the introduction of exhibits might have supplied a basis on which to have the designation stricken, Citizens chose to simply deny the City's statement of fact by responding with a completely insubstantial denial. Under these circumstances, I think it is appropriate for me to admit the document and credit the relevant conclusions regarding imminent and substantial endangerment. If Citizens wanted this piece of evidence disregarded, it should have moved to strike and actually briefed the evidentiary issue. I do agree with Citizens that as to evidentiary quality the City's presentation is not overwhelming. One would think that among the legion of experts on each side there would be at least one individual who has been designated to opine yea or nay as to whether this tar slick may pose an imminent danger. Expert testimony is often the way this issue is proven. See, e.g., Holtrachem, 211 F. Supp. 2d at 245 (recounting testimony of the plaintiff's expert concerning the harm posed to humans and animals from mercury exposure). Moreover, expert witnesses are the appropriate vehicle for introducing in evidence and explaining the contents of documents in the nature of the State's designation.

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ThirdParty Plaintiff

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ThirdParty Defendant

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Counter Claimant

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JULIE ANNA POTTS
(See above for address)

V.

Counter Defendant

BANGOR, CITY OF

represented by **P. ANDREW HAMILTON**
(See above for address)
LEAD ATTORNEY
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W. SCOTT LASETER
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WILLIAM B. DEVOE
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LEAD ATTORNEY
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Counter Claimant

UGI UTILITIES INC

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TERMINATED: 05/04/2004
LEAD ATTORNEY
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DOUGLAS A. GRAUEL
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E. TUPPER KINDER
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V.

Counter Defendant

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JULIE ANNA POTTS
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Counter Claimant

**S E MACMILLAN COMPANY
INC**
TERMINATED: 11/07/2003

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ROGER L. HUBER
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V.

Counter Defendant

BANGOR, CITY OF
TERMINATED: 11/07/2003

Counter Claimant

**HONEYWELL
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V.

Counter Defendant

**CITIZENS COMMUNICATIONS
COMPANY**

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V.

Cross Defendant

**HONEYWELL
INTERNATIONAL INC**

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Counter Claimant

**BARRETT PAVING
MATERIALS INC**

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JOHN P. MCVEIGH
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V.

Counter Defendant

**CITIZENS COMMUNICATIONS
COMPANY**

represented by **JOHN S. HAHN**
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Counter Claimant

**BARRETT PAVING
MATERIALS INC**

V.

Counter Defendant

BANGOR, CITY OF

V.

Cross Claimant

**BARRETT PAVING
MATERIALS INC**

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Cross Defendant

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**NORTH AMERICAN UTILITY
CONSTRUCTION CORP**

**NORTHWESTERN GROWTH
CORPORATION**
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ATTORNEY TO BE NOTICED

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TERMINATED: 11/07/2003

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TERMINATED: 05/04/2004
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**UNITED STATES ARMY CORPS
OF ENGINEERS**
TERMINATED: 05/07/2004

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Cross Claimant

BEAZER EAST INC

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V.

Cross Defendant

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**CENTERPOINT ENERGY
RESOURCES CORP**

DEAD RIVER COMPANY

**GUILFORD TRANSPORTATION
INDUSTRIES, INC**

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**HONEYWELL
INTERNATIONAL INC**

**MAINE CENTRAL RAILROAD
COMPANY**

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**NORTHWESTERN GROWTH
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TERMINATED: 10/01/2003

**S E MACMILLAN COMPANY
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TERMINATED: 05/07/2004

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Cross Defendant

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CORPORATION**

TERMINATED: 10/01/2003

**S E MACMILLAN COMPANY
INC**

TERMINATED: 11/07/2003

**UNITED STATES ARMY CORPS
OF ENGINEERS**

TERMINATED: 05/07/2004

Cross Claimant

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Cross Defendant

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MATERIALS INC**

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**UNITED STATES ARMY CORPS
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TERMINATED: 05/07/2004

Cross Claimant

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Cross Defendant

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RESOURCES CORP**

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**NORTHWESTERN GROWTH
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TERMINATED: 10/01/2003

**S E MACMILLAN COMPANY
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TERMINATED: 11/07/2003

UGI UTILITIES INC

**UNITED STATES ARMY CORPS
OF ENGINEERS**

TERMINATED: 05/07/2004

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DEAD RIVER COMPANY

**GUILFORD TRANSPORTATION
INDUSTRIES, INC**

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**NORTH AMERICAN UTILITY
CONSTRUCTION CORP**

**NORTHWESTERN GROWTH
CORPORATION**
TERMINATED: 10/01/2003

**S E MACMILLAN COMPANY
INC**
TERMINATED: 11/07/2003

UGI UTILITIES INC

**UNITED STATES ARMY CORPS
OF ENGINEERS**
TERMINATED: 05/07/2004

ThirdParty Plaintiff

**CITIZENS COMMUNICATIONS
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ThirdParty Defendant

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ThirdParty Plaintiff

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MARY S PRICE

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ROBINSON SPEIRS

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LEAD ATTORNEY
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ThirdParty Plaintiff

DEAD RIVER COMPANY

V.

ThirdParty Defendant

NANCY S DAWSON

JULIE ANN MACMANNIS

MARY S PRICE

ELIZABETH H SPEIRS

ROBINSON SPEIRS, JR

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ROBINSON SPEIRS

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Counter Claimant

**CITIZENS COMMUNICATIONS
COMPANY**

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V.

Counter Defendant

BANGOR, CITY OF

ThirdParty Plaintiff

**HONEYWELL
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ThirdParty Defendant

SOCIETE ROUTIERE COLAS SA

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ROBERT S. FRANK
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*LEAD ATTORNEY
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V.

Cross Defendant

BANGOR, CITY OF

represented by **P. ANDREW HAMILTON**
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MATERIALS INC**

BEAZER EAST INC

**CENTERPOINT ENERGY
RESOURCES CORP**

**CITIZENS COMMUNICATIONS
COMPANY**

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**GUILFORD TRANSPORTATION
INDUSTRIES, INC**

**HONEYWELL
INTERNATIONAL INC**

represented by **FRANCIS G. KELLEHER**
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**MAINE CENTRAL RAILROAD
COMPANY**

represented by **FREDERICK J. BADGER, JR.**
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FREDERICK F. COSTLOW
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MARY F. KELLOGG
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

**NORTH AMERICAN UTILITY
CONSTRUCTION CORP**

**NORTHWESTERN GROWTH
CORPORATION**
TERMINATED: 02/04/2004

**S E MACMILLAN COMPANY
INC**

UGI UTILITIES INC

**UNITED STATES ARMY CORPS
OF ENGINEERS**
TERMINATED: 05/07/2004