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Big "Superfund" News – Scope of "Arranger" and "Joint and Several" Liability Narrowed

May 8, 2009
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Overview

It is probably safe to say that there isn't any industry that is more dependent upon the environment than is agriculture. Agriculture depends upon fertile soil as well as access to clean and abundant water and air. At the state level, agriculture has taken steps to protect the environment from farming practices that could be damaging. Millions of miles of terraces have been constructed, and over hundreds of thousands of farm ponds have been built. In addition, millions of trees have been planted as wind breaks and to preserve soil. Agriculture is also a heavily regulated industry, particularly when it comes to the environment. At the state level, laws and regulations govern chemical application, pesticide and herbicide use, application and disposal, above and below ground storage tanks, livestock feedlots and confinement operations, manure disposal, solid waste disposal, and disposal of dead animals, among other regulated activities. There also exists a federal level of regulation and statutory law that governs agricultural activity as it impacts the environment. The most important federal environmental protection laws that have an impact on agriculture include the Federal Insecticide, Fungicide and Rodenticide Act, the Federal Water Pollution Prevention and Control Act (Clean Water Act), the Safe Drinking Water Act, the Resource Conservation and Recovery Act, the Endangered Species Act and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as the "Superfund" law).

The Superfund law was enacted in late 1980 and set as a goal the initiation and establishment of a comprehensive response and financing mechanism to abate and control problems associated with abandoned and inactive hazardous waste disposal sites. In many instances, Superfund's application to agriculture is limited, but the potential application of the law to agricultural land and agricultural landowner's requires individuals to understand the potential liability reach of the law. That is particularly the case when agricultural land is purchased. Superfund liability can be imposed on not only the party that created the hazardous waste problem, but also upon subsequent purchasers. In addition, if liability is imposed, it is strict, joint and several. At least it has been until recently. The U.S. Supreme Court has now ruled (in what will likely become a landmark case) that Superfund liability is not joint and several where a reasonable basis exists for apportionment of liability.[1]

Superfund Components

There are four basic components to the CERCLA. First, the statute establishes an information gathering and analysis system to allow state and federal governments to determine more accurately the danger level at various disposal sites and to develop cleanup priorities accordingly.[2] The law requires notification of any "release" into the environment of any substance that may present a "substantial danger" to public health and welfare, or to the environment. Also, the law requires owners and operators of hazardous

waste storage, treatment and disposal sites to provide EPA with notification of the volumes and composition of hazardous wastes that can be found at their facility, and of any known or possible releases.[3] As for "releases" of hazardous substances, CERCLA requires that any person in charge of a "facility" from which a hazardous substance has been released in a reportable quantity (more than 100 pounds per day) must immediately notify the National Response Center.[4] A key question for agriculture is whether large-scale livestock/poultry confinement operations operated by individual growers pursuant to contractual arrangements with vertically integrated firms constitutes a single "facility," or whether each confinement structure on a farm is a separate facility. That issue has led to litigation with the outcome of the rulings making it much more likely that large-scale confinement operations will be subject to Superfund's reporting requirements.[5]

The second component of CERCLA is that is establishes two funds: (1) the hazardous substance response trust fund (more commonly known as the "Superfund") which finances the government's response costs and damage claims for injury to or destruction or loss of natural resources; and (2) the post-closure liability trust fund which finances the costs of response damages or other compensation for injury or loss to natural resources.

The third component provides the federal government with the authority to respond to emergencies involving hazardous substances and to clean up leaking disposal sites. The EPA is given authority to require parties responsible for contamination to clean up the contamination or reimburse EPA for the costs of remediation. If the liable or "potentially responsible party" cannot be found or cannot afford to pay, then EPA may use the Superfund to clean up the contamination.

The fourth component of CERCLA is that it holds persons responsible for releases of hazardous material liable for cleanup and restitution costs. Liability is strict, joint and several, and can be applied retroactively to those having no continuing control over the hazardous substance.

Elements of Liability

The government must establish four elements to prevail against a party under CERCLA: (1) the site in question must be a "covered facility;" (2) there must be a threatened release, that; (3) causes the U.S. to incur "response costs," and (4) the defendant must be a "covered person" (also termed a "potentially responsible party"). If the four elements are proved, the defendant is strictly liable (unless a statutory exemption or defense applies).[6] Typically, the government has little trouble establishing the first three elements. Consequently, most Superfund litigation concerns the issue of whether the defendant is a "covered person" as defined under the law.

The *Santa Fe Railroad Co.*[7] Case

Facts of the case. As mentioned above, Superfund liability is strict, as well as joint and several when multiples parties are involved. But, the U.S. Supreme Court has recently ruled that liable parties at a multi-party Superfund site are not jointly and severally liable if a reasonable basis exists to apportion their liability.[8] The case involved a California chemical distributor that owned and operated a facility at which agricultural chemicals were repackaged. The facility was located on a small tract with a portion of the tract leased from the plaintiff's predecessors (railroad companies). The railroads didn't participate in the chemical distributor's operations at the facility, so the only way the railroads could be liable for cleanup costs under CERCLA was as a prior owner of the property.[9] Problems arose from the chemical distributor's purchase of a soil fumigant for killing microscopic worms that attack agricultural root crops. Unfortunately, minor spills ("releases") occurred upon delivery of the chemical (the chemical distributor received shipment of the soil fumigant via commercial carrier "FOB Destination" - thus, the distributor was responsible for the fumigant upon arrival) and larger "releases" occurred when the distributor washed out its equipment.

Ultimately, the state ordered the distributor to clean-up its soil and groundwater contamination at the facility. However, the distributor ceased operations, and in 1989 the EPA listed the site on the National Priorities List. The railroads were listed as potentially responsible parties for the cleanup cost (as was another party as a result of delivering chemicals to the site)[10] and were ordered to clean-up the site. In 1996, the U.S. and California brought a CERCLA cost-recovery action against the railroads and the party that delivered the chemicals to the site in an attempt to recover over $8 million in "response costs." The trial court held the railroads liable under CERCLA's "arranger" provision, but determined that a reasonable basis existed for apportioning liability for damages among the deliverer, the railroads and the chemical distributor – and that the government would have to "eat" the amount of response costs (85% of the total costs) allocated to the defunct chemical distributor. On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed.[11] The court determined that the evidence was insufficient to justify apportionment and that the railroads had not proven a reasonable basis for apportioning liability. As for "arranger" liability, the court followed the trial court's rationale that a party can be a responsible party as an "arranger" even without intent of personally disposing of the product at issue, on the grounds that spillage constitutes disposal and disposal by the chemical distributor was foreseeable.

The U.S. Supreme Court, while confirming that arranger liability under CERCLA is to be determined on a case-by-case basis, determined that the evidence was sufficient to arranger liability. The Court reasoned that a plain reading of the statute (42 U.S.C. §9607(a)(3)) led to the conclusion that a party may qualify as an arranger "when it takes intentional steps to dispose of a hazardous substance." Thus, applying that rationale to the facts, the Court determined that the party that delivered the chemicals to the distributor was not liable for CERCLA clean-up costs (they took numerous steps to encourage distributors to reduce the likelihood of spills and assisting them in achieving that objective). On the apportionment issue, the Court noted that the concept of joint and several liability is not contained in the Superfund law – it has been crafted into the CERCLA statue by judicial opinion. As such, the Court held that apportionment of liability (joint and several liability) is only proper when there is a "reasonable basis for determining the contribution of each cause to a single harm." Where multiple parties cause a single harm, the court held that the defendants bear the burden to prove divisibility of the harm and that a reasonable basis for apportionment exists. But, such evidence need not be precise – just sufficient facts in the record that reasonably support apportioning liability. That may include such things as percentage of land owned or leased, time period of ownership or possession and types of hazardous chemicals spilled on the subject property.

Implications of the Supreme Court's opinion. Clearly, CERCLA liability as an "arranger" now requires evidence of intent that the subject chemicals will be "disposed" of. How much intent and the kind of intent necessary to support liability are less clear. So, in any given Superfund clean-up action in the future, a greater share of liability for clean-up will probably fall on actual owners and operators of subject property. As for apportionment, the Court's opinion could mean that arrangers will be responsible for contamination that the arranger *actually caused*. That's clearly the case when a reasonable basis exists for apportioning liability. In those situations, liability apportioned to defunct entities will result in the associated costs for that portion of clean-up costs being borne by the government (the taxpaying public). So, the Court's opinion could result in fewer potentially responsible parties as "arrangers," greater potential liability for landowners and operators, more cases filed concerning "intent" as applied to disposal of hazardous waste and more litigation on the issue of whether a reasonable basis for liability apportionment exists. In any event, the court's opinion does not alter state laws that provide for joint and several liability.

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[1] Burlington Northern and Santa Fe Railway Company, et al. v. United States, *et al.*, 129 S. Ct. 1870 (2009).

[2] 42 U.S.C. §9604 (2008).

[3] The EPA uses this information to develop a national priorities list (NPL) in order to prioritize hazardous waste sites from those most dangerous and in need of immediate cleanup to those least dangerous and not as urgently in need of cleanup.

[4] 42 U.S.C. §9603(a). A comparable state-level requirement also applies under the Emergency Planning and Community Right-to-Know Act. See also 42 U.S.C. §11004(a) (2008).

[5] See Sierra Club, Inc. v. Tyson Foods, Inc., 299 F. Supp. 2d 693 (W.D. Ky. 2003)(integrator was "operator" of chicken farms at issue pursuant to production contracts with growers, and that entire chicken farm site constituted a "facility" from which releases must be reported under Superfund); Sierra Club v. Seaboard Farms, Inc., 387 F.3d 1167 (10th Cir. 2004)("facility" means any site or area where hazardous substances come to be located; thus, large-scale confinement hog operation subject to Superfund reporting requirements for ammonia emissions that exceeded the per-day limit as a whole even though no single confinement building at the operation exceeded the limit

[6] Exemptions exist for secured creditors whose only interest in the subject property is that of the property serving as collateral for a loan the lender has advanced to the party operating the premises; for response costs or damages arising from the application of registered pesticides; for recyclers and small businesses. Defenses from liability exist for "acts of God," and "innocent purchasers."

[7] Burlington Northern and Santa Fe Railway Company, *et al*. v. United States, *et al*., 129 S. Cr. 1870 (2009).

[8] *Id.*

[9] 42 U.S.C. §9607(a)(2) imposes CERCLA liability on "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,…".

[10] Under 42 U.S.C. §9607(a)(3), a potentially responsible party for "response" costs includes "any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person…".

[11] United States v. Burlington Northern & Santa Fe Railway Co., 502 F.3d 781 (9th Cir. 2007).