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LITIGATION

US government cannot escape liability under CERCLA

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The federal government often uses the federal Superfund law, also known as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, or CERCLA, to go after the owners and operators of facilities that are on land that has become contaminated with hazardous substances. In particular, the U.S. Environmental Protection Agency has brought many CERCLA cases against government defense contractors who manufactured products from ammunition to airplanes for the U.S. These contractors have spent many millions of dollars in attorney fees, penalties and settlements to resolve these attacks by the government.

While the government has often gone after parties that it has previously contracted with, a recent opinion shows that the government can face substantial liability for its own role in these activities. The government's liability is often overlooked or ignored by federal enforcement agencies when they pursue other parties under CERCLA. Private parties must take the lead in ensuring that the government is properly held accountable for its prior actions.

In *American International Specialty Lines Ins. Co. v. United States* ("AISLIC"), No. CV09-01734 AHM (RZx), an insurance company filed a lawsuit in the Central District of California against the federal government on behalf of Whittaker Corporation, which operated a facility in Santa Clarita. At this facility, Whittaker and a predecessor company, Bermite, produced ammunition and rocket motors pursuant to contracts with the government. These operations involved the use of ammonium perchlorate, which eventually resulted in the underlying contamination of the site.

In an order issued June 30, 2010, after the completion of the first phase of trial, U.S. District Judge A. Howard Matz ruled that the government was a liable party under CERCLA because the government contracts provided that the U.S. owned the materials and much of the equipment used by Whittaker in conducting its operations. Such title vesting provisions are commonplace in defense contracts. In particular, the court held that the U.S. was liable as the owner of government-furnished equipment that was used in the release of hazardous substances at the site. The court also determined that the U.S. had owned the perchlorate used in the rocket motors manufactured by Whittaker because the perchlorate was a "material" purchased and allocated pursuant to the government contracts. As Whittaker was required to remove and dispose of waste perchlorate pursuant to the government's instructions, the U.S. was then also liable as an arranger for the disposal of this waste material.

After determining that the U.S. was liable under CERCLA, the court needed to allocate the liability for the total response costs between the U.S. and Whitaker. In an order issued Jan. 9, 2013, the court recognized that Whittaker had a history of bad conduct in its early operations. In fact, Whittaker's witnesses acknowledged that the company or its predecessor, Bermite, had a poor safety record and often operated in violation of state and federal environmental laws. Despite these instances of bad conduct, Judge Matz decided that the U.S. should be allocated 40 percent of the overall liability for the past and future response costs to remediate the contamination at the site.

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The court relied on several facts to justify the allocation assigned to the U.S. First, the U.S. knew that the production processes would generate hazardous waste and was aware of "some of the crucial decisions" concerning how Bermite disposed of materials. Second, 90 percent of the major areas contaminated by perchlorate were areas where production of government-procured items occurred. Finally, the government maintained a constant presence of inspectors at the site, although the court admitted that evidence was "conflicting as to the nature of the government's precise involvement in the perchlorate contamination."

None of the facts supporting the U.S.' allocated liability are unique to the Whittaker site. Rather, these facts could be found in a wide variety of contaminated sites that involved significant manufacturing operations by former government contractors. The government typically dictated the manner in which the manufacturing for these government contracts was to be conducted. The U.S. would certainly be aware that hazardous wastes were generated at these sites as a result of these specific instructions. Indeed, in many cases, the government may have actually established procedures dictating the appropriate methods of disposal. Government contractors also typically allocated a large portion of their operations to the government contract work. Finally, these types of operations were heavily overseen by government inspectors.

Even more troubling for the government, other government defense contractors do not have the operational deficiencies admitted by Whittaker in the *AISLIC* case. Many contractors ran clean operations that substantially complied with the existing environmental standards. Nonetheless, historic manufacturing operations are often the subject of CERCLA litigation, either because of dirtier operations from adjacent or subsequent operations or because the best available technology at the time was insufficient to prevent the release of hazardous wastes into the surrounding environment. In such a case, the government is often ready to file complaints against the defense contractor under CERCLA. Given these facts, it is not unreasonable to assume that the U.S. should be required to shoulder most or substantially all of the liability for operations by a government contractor that was in compliance with the existing environmental regulations.

In many cases involving operations of government defense contractors, the U.S. should properly be viewed as the primary responsible party for the remediation of the contamination. The government often owned the materials and equipment that were used by the contractor. The government had the knowledge and experience to know that hazardous wastes would be generated as a result of these operations. And the government had personnel on the ground inspecting and overseeing the operations conducted according to their instructions. In contrast, the contractors typically had to comply with detailed instructions and checklists issued by the government. Further, the contractors did not make the type of profit that would justify incurring CERCLA liability today. Government defense contracts were typically paid on a cost-plus basis where the contractor received only a small amount of profit on top of their operational costs. This marginal return does not justify holding these contractors liable for many millions of dollars to remediate these historical operations. This work was done at the behest of and subject to the strict control of the government. The government should properly be required to pay for any contamination that may have resulted from the manufacturing operations conducted on its behalf.

Despite the U.S.' primary role, it is often overlooked when federal agencies such as the EPA initiate litigation over the contamination at sites where government contractors previously operated. The EPA has conflicted interests when it pursues claims against government contractors. The EPA and the U.S. Department of Defense are part of the same entity — the United States of America. The U.S. will not bring a suit against itself, even where it should properly bear the lion's share of liability for the contamination. Private parties are then forced to take the lead in investigating and pursuing the responsibility of the government, which could be substantial, for any contamination that resulted from these government contracts.

If the government starts to be held responsible for the contamination caused by manufacturing operations conducted pursuant to government contracts, this may cause a shift in how the government exercises its environmental enforcement authority. The government often brings environmental enforcement actions based on cleanup standards that are unrealistic, not based in science and totally groundless. If the government is held accountable for its own role in many of these contamination sites, then it may choose to be more careful about where it exercises its authority and about what sites should properly be the subject of remedial attention.

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