

Thinking Strategically About Petroleum Contamination

Law360, New York (February 9, 2011) -- Given the maturity of our nation's environmental laws, it comes as a surprise to many new environmental practitioners that no clear federal cause of action exists to recover the costs of cleaning up petroleum released by other responsible parties as a result of the exclusion of petroleum from the Comprehensive Environmental Response, Compensation and Liability Act.

The so-called petroleum exclusion was created during the rush to pass CERCLA in December 1980. The bill that eventually would become CERCLA, the Hazardous Waste Containment Act, began in the House. It specifically excluded petroleum products because the House was simultaneously considering a separate bill entitled the "Oil Pollution Liability and Compensation Act." Both were sent to the Senate, which passed a modified version of the Hazardous Waste Containment Act, but failed to pass the corresponding petroleum legislation. Thus, the federal "comprehensive" environmental liability act does not extend to one of the most ubiquitous products in our economy.[1]

CERCLA excludes petroleum products by modifying the definitions of "hazardous substance" and "pollutant and contaminant," providing that: "[t]he term[s] do not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and ... synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas)."[2]

The scope of the exemption is fairly broad. Even though substances such as benzene are listed on CERCLA's list of hazardous substances, their addition to petroleum or synthetic gas during the refining process to produce usable fuel does not make the substances hazardous under CERCLA. The exclusion also extends to fuel oil, kerosene and other petroleum-based fuels.[3] A recent decision extended this reasoning to PCBs which were added to fuel during the production process.[4]

Recovery for Petroleum Contamination

So how does a landowner who discovers petroleum contamination recover from the prior or neighboring owners or operators who contaminated its property?

If the landowner received proper advice during the land transfer, he or she may have a contractual cause of action against a prior owner that was negotiated as part of the sale. Any purchaser of property that has evidence of prior petroleum use or underground storage tanks must properly allocate responsibility for newly discovered petroleum contamination.

If the contamination was caused by owners farther back in history, or was caused by neighboring facilities, contractual remedies are not always available. Despite the petroleum exclusion, CERCLA is still an option if the petroleum was mixed with other materials prior to release, either through the use of the gasoline/oil or during storage.

In 1987, the U.S. Environmental Protection Agency general counsel issued a memorandum confirming the U.S. Environmental Protection Agency's position that if petroleum is mixed with another hazardous substance prior to release, the entire mixture is hazardous under CERCLA despite the petroleum exclusion.[5] Courts have found that fuel contaminated with potentially hazardous corrosive residues or "sludge" inside steel underground storage tanks do not qualify for the exemption.[6]

In addition, a 2008 district court case from the District of New Jersey held that the U.S. could recover the costs of removing nonhazardous substances during a response action under CERCLA because nothing in the National Contingency Plan limits response actions to hazardous materials.[7]

Under this view, if a landowner is responding to a release of a hazardous substance, the costs of addressing separate petroleum contamination may be recoverable if that cleanup is taken in concert with standards identified in the record of decision by the lead agency. The availability of this relief, however, is extremely uncertain, as it has only been addressed by a couple of district court cases in limited ways.

Although a detailed look at state law remedies is outside the scope of this article, state common law remedies are also potentially available. For various reasons, though, common law often "do[es] not provide an adequate substitute source of relief" to concerned landowners.[8] Courts have consistently denied strict liability claims for abnormally dangerous activities because underground storage tanks (USTs) are very common, are valuable in comparison to the danger they pose, or are not sufficiently dangerous if the owner exercises due care.[9] In addition, applying traditional common-law doctrines such as negligence can be difficult, and are extremely time consuming and expensive.

Recovery is also possible under state statutes. Several states have passed UST management regulations that can offer recovery funds to owners who are dealing with petroleum issues. Often, though, the recovery under these mechanisms is limited in nature, and contains the same limitations the exist under federal law.[10] The First Circuit recently confirmed that the existence of these state law remedies for USTs does not preclude a landowner plaintiff from proceeding under the Resource Conservation and Recovery Act to address existing petroleum contamination.[11]

RCRA is an Imperfect Remedy

The last remedy is the one used most often — citizen suit actions under the RCRA.[12] Unfortunately, one of the reasons that CERCLA was passed in the first place was to address the RCRA's failure to apportion liability amongst responsible parties for past costs.

The RCRA contains two citizen-suit provisions, both of which pose challenges in connection with bringing a claim against past polluters. The first, Section 7002(a)(1)(A) (subsection A), permits a private party to bring suit “against any person ... who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition or order which has become effective pursuant to [RCRA].”[13]

A majority of the courts to decide this issue, including a recent decision from the Northern District of California,[14] have dismissed claims brought under this subsection against former owners or operators on the grounds that if their polluting occurred wholly in the past, they cannot currently be “in violation of” a RCRA obligation at the time the suit is brought.[15]

The second citizen suit provision, section 7002(a)(B) (“subsection B”), undoubtedly applies to former owners and operators. Under this subsection, a party can bring suit “against any person ... including any past or present generator, ... transporter, ... owner or operator ... who has contributed or who is contributing to the past or present handling, storage, treatment, transportation or disposal of any solid waste.” 42 U.S.C. § 6972(a)(1)(B).

But a plaintiff must meet an additional requirement to bring a claim under subsection B — there must be an allegation that the hazardous waste “may present an imminent and substantial endangerment to health or the environment.” 42 U.S.C. § 6972(a)(1)(B).

Despite the seemingly high hurdle this presents, courts have leniently interpreted this requirement, and it is satisfied “if there is some reasonable cause for concern that someone or something may be exposed to risk or harm ... if the remedial action is not taken.”[16] Petroleum contamination in soils would almost certainly satisfy that test, particularly where the contamination is migrating towards groundwater.[17]

Unlike CERCLA, however, a plaintiff cannot clean up a hazardous waste release and file suit to recover its costs under the RCRA. The Supreme Court squarely addressed this issue in *Meghrig v. KFC Western Inc.*, explaining that the substantial endangerment requirement, as well as the limited remedies listed in the citizen-suit provisions of RCRA, indicated that RCRA was “designed to provide a remedy that ameliorates present or obviates the risk of future ‘imminent’ harms, not a remedy that compensates for past cleanup efforts.”[18]

Although *Meghrig* is not a new decision, landowners should not forget the lesson of the case. When faced with contamination by a prior owner or operator, he or she should not clean up the site and sue to recover costs. Provided the owner has the luxury of postponing remediation, the owner should file suit and “seek a mandatory injunction, i.e., one that orders a responsible party to ‘take action’ by attending to the cleanup and proper disposition of toxic waste.”[19]

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[1] For a detailed discussion (albeit one-sided) of the legislative history of the petroleum exclusion, see Roger Armstrong, Comment, CERCLA’s Petroleum Exclusion: Bad Policy in a Problematic Statute, 27 Loy. L.A. L. Rev. 1157, 1159-60 (1994).

[2] 42 U.S.C.A. § 9601(14).

[3] See generally, *Cose v. Getty Oil Co.*, 4 F.3d 700, 704 (9th Cir. 1993); *Carterair Int’l Corp. v. LCL Transit Co.*, No. 94-c-1049, 1995 WL 348045 (N.D. Ill. 1995) (discussing substances to which the petroleum exclusion applies).

[4] See *Chubb Custom Ins. Co. ex rel. Taube-Koret Campus for Jewish Life v. Space Systems*, No. 5:09-cv-04485, 2010 WL 5069827, at *11 (N.D. Cal., Nov. 7, 2010) (dismissing claims for the recovery of costs related to PCBs added to petroleum).

[5] *S. Pac. Transp. Co. v. California*, 790 F. Supp. 983, 986 (C.D. Cal.1991) (quoting EPA General Counsel, Scope of the CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2) 5 (July 31, 1987)). See also *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 266 (3d Cir.1992); *United States v. Amtreco, Inc.*, 846 F. Supp. 1578, 1584-85 (M.D. Ga.1994).

[6] *Marrero Hernandez v. Esso Standard Oil Co.*, 597 F. Supp. 2d 272 (D.P.R. 2009).

[7] See *United States v. Sensient Colors, Inc.*, 580 F. Supp. 2d 369, 385 (D.N.J. 2008); *United States v. Glidden Co.*, 3 F. Supp. 2d 823, 836 (N.D. Ohio 1997) (permitting the plaintiff to recover the costs of removing empty drums and an underground storage tank, neither of which contained hazardous wastes).

[8] This quote is taken from the Ninth Circuit opinion, later reversed by the Supreme Court, justifying its decision to allow plaintiffs to recover petroleum cleanup costs under RCRA. *KFC W., Inc. v. Meghriq*, 49 F.3d 518, 524 (9th Cir. 1995), rev'd, 516 U.S. 479 (1996).

[9] See Allison Rittenhouse Hayward, *Common Law Remedies and the UST Regulations*, 21 B.C. Envtl. Aff. L. Rev. 619, 619 (1994).

[10] For example, Indiana's UST statute mimics the language of RCRA in most respects, but the private contribution-action language mimics CERCLA. The first court to interpret the contribution section held that the Indiana legislature intended for the more broad contribution provisions of CERCLA to apply. *The Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 777 F. Supp. 713, 720 (S.D. Ind. 1991).

[11] See *Chico Service Station Inc. v. Sol Puerto Rico Ltd*, No. 10-1200, 2011 WL 228048 (1st Cir. Jan. 26, 2011).

[12] In some circumstances, the Oil Pollution Act may be a vehicle to recover costs expended remediating petroleum contamination. The act contains a citizen suit provision and permits claims for removal costs. See 40 U.S.C. § 2717(f)(2). However, the Oil Pollution Act applies to discharges "into or upon the navigable waters or adjoining shorelines," and thus would not cover contamination at sites without a nexus to a navigable water.

[13] 42 U.S.C. § 6972(a)(1)(A).

[14] *N. Cal. River Watch v. Exxon Mobil Corp.*, No. 10-0534, 2010 WL 3184324, at *5-6 (N.D. Cal. Aug. 11, 2010).

[15] See, e.g., *Conn. Coastal Fisherman's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1315 (2d Cir. 1993); *La Plata Cnty. Bd. of Comm'rs v. Brown Group Retail, Inc.*, 598 F. Supp. 2d 1185, 1201 (D. Colo. 2009). A minority of the courts will permit claims against former owners, reasoning that failure to clean up hazardous waste contamination is a continuing violation. See *Scarlett & Assoc., Inc. v. Briarcliff Ctr. Partners, LLC*, No. 05-cv-0145, 2009 WL 3151089, at *10 (N.D. Ga. Sept. 30, 2009) (collecting cases).

[16] In fact, a recent district court decision from Tennessee held that a plaintiff satisfied standing as well as the "substantial endangerment" requirement where the plaintiff reasonably feared that the defendants' contamination could reach her well in the future. *Nat'l Res. Def. Council Inc. v. County of Dickson*, No 3:08-229, 2011 WL 8214 (M.D. Tenn. Jan. 2, 2011). See also *Attorney General of Okla. v.*

Tyson Foods, Inc., 565 F.3d 769, 783 (10th Cir. 2009).

[17] See *Avondale Fed. Savings Bank v. Amoco Oil Co.*, 170 F.3d 692 (7th Cir. 1999).

[18] *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996).

[19] *Id.*

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