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***CERCLA Section 113(h) Protects the Army From Challenges to
Ongoing CERCLA Remedial Actions - CPT David Stanton***

In an effort to allow Federal agencies to conduct cleanups without having to defend constantly their cleanup decisions in court, Congress enacted CERCLA Section 113(h) as part of the 1986 SARA amendments to CERCLA. CERCLA Section 113(h) deprives Federal courts of subject matter jurisdiction over ongoing CERCLA response actions. This somewhat controversial provision in CERCLA has caused a split in the Federal courts, and continues to be a key issue in litigating cases that relate to ongoing cleanups. Much of the controversy surrounding this provision has origins in the Tenth Circuit decision in *United States v. Colorado*.¹ In that case, the Tenth Circuit upheld a RCRA challenge to an ongoing CERCLA remedial action that was being conducted by the Army at Rocky Mountain Arsenal. As a result, the Army was required to obtain and comply with a RCRA Part B permit, even though the cleanup was a CERCLA response action. Despite Army arguments that this case is limited to its unique set of facts,² *United States v. Colorado* continues to be cited as authority for bringing non-CERCLA challenges to ongoing CERCLA cleanups.

More recent authority, however, suggests that *United States v. Colorado* is indeed a very limited precedent. In *McClellan Ecological Seepage Situation v. Perry*,³ for example, the Ninth Circuit held that “any challenge” to a CERCLA cleanup is subject to CERCLA Section 113(h), even if the challenge is brought under a statute other than CERCLA. In *McClellan*, a local environmental group brought an action to require the Air Force to comply with various environmental laws while conducting a CERCLA cleanup at McClellan Air Force Base, located near Sacramento, California. The Air Force asserted the CERCLA Section 113(h) defense, arguing that the court lacked jurisdiction to entertain challenges to an ongoing CERCLA cleanup. The plaintiffs argued in response that CERCLA 113(h) only operates as a bar to challenges brought under CERCLA. In holding for the Air Force, the Ninth Circuit concluded that “Section 113 withholds federal jurisdiction to review any of MESS’s claims, including those made in citizen suits and under non-CERCLA statutes, that are found to constitute ‘challenges’ to ongoing CERCLA cleanup actions.”

While cleanups may be conducted under the authority of any of a number of statutes, including DERA, RCRA, and various BRAC statutes, CERCLA should, whenever possible, be cited as the primary authority under which environmental cleanups are conducted. This will increase the likelihood that the Army will be allowed to conduct its cleanup in relative peace, without repeated interruption by litigation.

¹ 990 F.2d 1565 (10th Cir.), cert. denied, 112 S. Ct. 922 (1993).

² For example, the Army had submitted the RCRA Part B permit application shortly before commencing the CERCLA cleanup, but subsequently decided that the Permit was no longer required),

³ 47 F.3d 325 (9th Cir.), cert. denied, 116 S. Ct. 51 (1995)

*Stakeholder Meetings on Resource Conservation and
Recovery Act Reform Legislation - MAJ Lisa Anderson-Lloyd*

Although Congress' focus is on Superfund reauthorization, the Clinton Administration is considering the potential for legislative reform of RCRA (42 U.S.C.A. §§ 6901-6992 (West 1995)). In both June and August 1997, the Council for Environmental Quality (CEQ) and the EPA convened meetings in Washington, D.C. to discuss with stakeholders the subject of amending RCRA to modify the regulation of remediation waste. Participants in the meetings included industry, State environmental agencies, national environmental groups, and local community groups. CEQ and EPA also invited congressional staff and Federal agency representatives to the meetings as observers.

The Clinton Administration identified remediation waste management as an area for RCRA reform in the 1995 RCRA Rifleshot Initiative. Last year's legislative proposals resulted in a great deal of debate on RCRA reform, but no consensus was reached. The June and August meetings emphasized that the Administration remains committed to pursuing legislative change in this area.

The first stakeholder meeting in June was structured around seven specific controversial issues that were posed as questions to elicit discussion of solutions on which reform policies could be based. There was not, however, agreement on even whether legislative reform was the preferred method of implementing changes to the remediation process. Although some stakeholders believed legislation was the most efficient means of addressing cleanup problems, environmental and community groups feared that changes to the statute could erode the protection currently provided by RCRA. These groups felt that the current statute provides the framework to develop regulations equipped to address the particular cleanup requirements of a site.

Other issues considered by the stakeholders at the June meeting included: how to structure oversight of alternative standards for RCRA remediation waste management and disposal; how to ensure community involvement in remediation waste management reform; what the minimum requirements should be for alternative remediation waste management and disposal standards; what types of remediation waste would be eligible for alternative management or disposal standards; how reform legislation should ensure adequate accountability and oversight for state remediation waste management programs; and how to ensure through legislation adequate enforcement of alternative remediation waste management and disposal standards.

The August meeting included a detailed discussion of public participation issues. The discussion addressed whether minimum public participation opportunities should be guaranteed at every waste remediation site and whether a variance from an established minimum should be granted in certain circumstances. The meeting also included a discussion of State authorization issues. The stakeholders considered what type of authorization model might be appropriate for authorization of an alternative remediation waste standard and to what extent it should be predicated on existing State authorization. No follow-on meetings on RCRA reform have been announced by CEQ or EPA.

Application of Joint and Several Liability for Natural Resource Damages under CERCLA and Determining Who Can Recover for Natural Resource Damages - Wan Sun Song⁴

Although joint and several liability is not expressly mandated by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),⁵ CERCLA liability is joint and several where two or more defendants have contributed to a single indivisible harm. The majority of courts adopt the rule found in the Restatement (Second) of Torts: damages should be apportioned only if the defendant can demonstrate that the harm is divisible.⁶ The defendant's limited degree of participation is "not pertinent to the question of joint and several liability, which focuses principally on the divisibility among responsible parties of the harm to the environment."⁷

Imposing the burden of proving divisibility of the harm on the defendant has resulted in defendants rarely escaping joint and several liability due to the difficulty of reasonably ascertaining the proportional causes of environmental harm.⁸ Therefore, a defendant may be responsible for paying an unequal share of the harm. Although the potential inequitable nature of joint and several liability has not gone unnoticed, the courts generally reason "that where all of the contributing causes cannot fairly be traced, Congress intended for those proven at least partially culpable to bear the cost of the uncertainty."⁹

CERCLA provides for the restoration or replacement of natural resources that have been injured, lost, or destroyed by the release of hazardous substances. CERCLA defines "natural resources" broadly to include "land, fish, wildlife, biota, air, water, groundwater, [and] drinking water supplies" that belong to, are managed by, or are held in trust by the federal government, a state or local government, a foreign government, or an Indian tribe.¹⁰ One may be liable for damages to natural resources pursuant to CERCLA § 107(a)(4)(C). It provides that generators of hazardous wastes "shall be liable for ... damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release."¹¹ It extends liability for natural resource damages to the same classes of parties that are liable for cleanup. See CERCLA § 107(a). In addition, section 107(f)(1) of CERCLA expressly limits those who can assert a claim under Section 107(a)(4)(C). "[L]iability shall be to the United States Government and to any State" and "the President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages."¹²

Apparently, joint and several liability applies to both natural resource damages and response actions.¹³ One area of contention, however, is whether a municipality can bring an action pursuant

⁴ Mr. Song was an intern at the Environmental Law Division (ELD) during Summer 1997. While assigned to ELD, he worked with the Compliance Branch and the Restoration and Natural Resources Branch.

⁵ 42 U.S.C. §§ 9601 - 9675 (West 1995).

⁶ See, e.g., *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 809-11 (S.D. Ohio 1983); *United States v. Monsanto Co.*, 858 F.2d 160, 171-73 (4th Cir. 1988).

⁷ *Monsanto*, 858 F.2d at 171.

⁸ See, e.g., *Chem-Dyne*, 572 F. Supp. at 811; *Monsanto*, 858 F.2d at 172-73.

⁹ *O'Neil v. Picillo*, 883 F.2d 176, 179 (1st Cir. 1989).

¹⁰ CERCLA § 101(16), 42 U.S.C. § 9601(16).

¹¹ 42 U.S.C. § 9607(a)(4)(C).

¹² 42 U.S.C. § 9607(f)(1).

¹³ Charles de Saillan, *Superfund Reauthorization: A More Modest Proposal*, 27 E.L.R. 10201 (1997) ("As with liability for cleanup, liability for natural resource damages is strict, joint, and several").

ELD Bulletin
Page Four

to section 107 of CERCLA for natural resource damages. As noted above, section 107(f)(1) expressly limits to the President or an authorized representative of a State the power to assert a claim for natural resource damages. In *Boonton v. Drew Chemical Corp.*,¹⁴ the court held that governmental subdivisions, such as municipalities, are encompassed within the meaning of “State” or, alternatively, that a municipality is an “authorized representative of a State” and is entitled to bring an action for natural resource damages. The court reasoned that it was proper to expand the definition of “State” to effectuate the remedial purpose of CERCLA.¹⁵ Also, the court pointed out that since the definition of “natural resources” under CERCLA includes property belonging to local governments, it would be anomalous to deny relief to a local government when its natural resources are expressly listed within the protected coverage of section 107(a)(4)(C).¹⁶ The rationale and holding of the *Boonton* court were endorsed by the court in *New York v. Exxon Corp.*,¹⁷ where the court held that the City of New York could bring an action for natural resource damages under section 107(a)(4)(C).

This view was not adopted, however, in *Philadelphia v. Stepan Chemical Co.*,¹⁸ where the court disagreed with the holdings in *Boonton* and *New York*. Relying primarily on the plain meaning of the statute, the court held that political subdivisions are not included in the definition of “State.” The court found no support in the statutory language nor in the legislative history for the holdings in *Boonton* and *New York*. Furthermore, the court in *Bedford v. Raytheon Co.*,¹⁹ agreed with the *Philadelphia* court, noting that, since the decisions of the *New York* and *Boonton* courts, Congress has amended CERCLA by passing the Superfund Amendments and Reauthorization Act of 1986 (“SARA”). SARA permits States to appoint natural resources trustees to bring lawsuits seeking natural resource damages. The *Bedford* court stated, “Prior to SARA, a policy-driven, expansive interpretation of the word “State,” designed to include local governments, was the only way a municipality could bring natural resource damages action under CERCLA. In SARA, Congress provided an express means for states to bring natural resource damage actions by permitting the states to designate natural resource trustees.”²⁰ Interestingly, in *Rockaway v. Klockner & Klockner*, 811 F. Supp. 1039 (D.N.J. 1993), Judge Ackerman, the same judge who wrote the *Boonton* decision, was persuaded by the arguments in the *Philadelphia* and *Bedford* decisions and concluded that “the approach of the [Philadelphia court] is the better one. I am, therefore, constrained to retreat from my earlier decision in *Boonton*.”²¹

In conclusion, joint and several liability applies to natural resource damages in the same manner it applies to response actions. Also, a few district courts have extended the definition of “State,” to include municipalities so that local governments can bring a natural resource damages action but with the enactment of SARA, which provides a procedural mechanism for municipalities to bring a natural damages action, the inclusive definition of “State” may no longer be necessary.

¹⁴ 621 F. Supp. 663 (D.N.J. 1985).

¹⁵ *Id.* at 666.

¹⁶ *Id.*

¹⁷ 633 F. Supp. 609 (S.D.N.Y. 1986).

¹⁸ 713 F. Supp. 1484 (E.D. Pa. 1989).

¹⁹ 755 F. Supp. 469 (D. Mass. 1991).

²⁰ *Id.* at 472.

²¹ *Id.*

*Regulation of Oil-Water Separators under
RCRA's UST Regime - MAJ Silas DeRoma*

The imminent approach of the 22 December 1998 underground storage tank (UST) upgrade deadline has prompted several questions regarding oil-water separators. One in particular concerns whether collection tanks for oil isolated by the separator are considered USTs or whether these collection tanks are exempt from the UST regulations. The answer to this question depends on the type of oil-water separator involved and the facts of each particular situation.²²

Underground storage tanks are regulated by the 1984 amendments²³ to the Resource Conservation and Recovery Act (RCRA).²⁴ The implementing regulations for the underground storage tank provisions of RCRA are at 40 C.F.R. part 280.²⁵ Under the regulations, an UST is defined as "any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 percent or more beneath the surface of the ground."²⁶ In the preamble to the Final Rule for USTs, EPA acknowledged that the statutory directive in the RCRA amendments was to "establish an UST program 'as may be necessary to protect human health and the environment,'"²⁷ and recognized that the statute provides "some flexibility for the [agency] to concentrate its resources on tanks that pose the greatest potential environmental threat."²⁸ EPA further explained that this flexibility allowed the agency "to define the universe of regulated facilities in a manner that focuses regulatory resources on the tanks posing substantial risk from storage of regulated substances and . . . fosters development of a program that most effectively protects health and the human environment."²⁹

Using this flexibility, the EPA created "regulatory exclusions"³⁰ to exempt four classes of tanks from the UST regulations, one of which was wastewater treatment systems permitted under the Clean Water Act.³¹ The EPA included in the universe of waste water treatment systems "any oil-water separators subject to regulation under either section 402 or 307(b) of the Clean Water Act."³² Most oil-water separators fall into this exemption. By virtue of these exclusions, therefore, if the oil-water separator collection tank is included in a "wastewater treatment tank system that is part of a wastewater treatment facility regulated under section 402 or 307(b) of the Clean Water Act (CWA),"³³ the UST regulations are not applied.

²² This article examines this question in terms of the Federal UST program.

²³ Pub. L. No. 98-616, 98 Stat. 3221 (1984). The amendments added Subtitle I (codified at 42 U.S.C. §§ 6991-6991(i)).

²⁴ 42 U.S.C. §§6901-6991(i)(West 1995).

²⁵ Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks, 40 C.F.R. pt. 280 (1996).

²⁶ *Id.* at § 280.12.

²⁷ *Preamble to Final Rule for Underground Storage Tanks, Technical Requirements*, 53 Fed. Reg. 37082 (1988), available in LEXIS, Genfed Library, Allreg Files at *42 [hereinafter Preamble].

²⁸ *Id.*

²⁹ Preamble at *44.

³⁰ The EPA noted that "[u]nlike statutory exclusions, regulatory exclusions may be modified by the Agency in the future should new information show that regulations of an excluded tank type is necessary." Preamble at *42.

³¹ 33 U.S.C. §§ 1251-1387 (West 1995).

³² Preamble at *44.

³³ Preamble at *66. Under the CWA, section 402 imposes National Pollutant Discharge Elimination System (NPDES) permit requirements and section 307(b) imposes Pretreatment Standards upon discharges of pollutants.

ELD Bulletin
Page Six

In some, cases, however, the oil collection tank is located in close proximity³⁴ to the oil-water separator but is not covered by either CWA NPDES permit requirements or pretreatment standards. EPA chose to defer these tanks from the UST regulations. Specifically, the agency deferred from regulation tank systems that treat waste water, but are not subject to section 402 or 307(b) of the CWA.³⁵ Although the EPA did not specifically mention the collection tanks described above, these tanks presumptively are included in the deferred subset of tanks that includes oil water separators for several reasons. First, the regulations envisioned USTs being defined in terms of “tank systems.”³⁶ Second, EPA created the deferral in conjunction with the exclusion for waste water treatment “tank systems.”³⁷ Finally, a “tank system” is defined as an “underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any.” Under these criteria, therefore, an oil-water separator with an immediately adjacent collection tank would qualify as a waste water treatment “tank system” composed of an underground storage tank designed to receive and treat an influent wastewater through physical, chemical, or biological methods, and would also include any connected underground piping, underground ancillary equipment, and containment system. In such a situation, the collection tank would be deferred from UST regulation.³⁸

Editor’s Note: Some readers have been unable to access the ELD web page. We regret any inconvenience this may have caused and are working to fix this problem. The web page should be active again by mid-October.

³⁴ In the question that prompted this article, “close proximity” is defined as two or three feet away.

³⁵ Preamble at *44. The tank systems, however, are exempt only from Subparts B through E and G, and are, therefore, subject to all remaining applicable provisions of the UST regulations. Preamble at *46. Furthermore, exclusion and/or deferral of an UST does not excuse noncompliance with other statutes, such as CWA or the Clean Air Act, 42 U.S.C. 7401 - 7671(q) (West 1995).

³⁶ Preamble at *7.

³⁷ Preamble at *42, *46.

³⁸ Thus, in this scenario, the answer regarding UST regulation of the adjacent collection tank under the Federal UST program is “probably not;” however, the more remote the collection tank is from the separator system, the more probable the answer is “yes.”