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SUPREME COURT CLARIFIES CORPORATE LIABILITY FOR PARENT CORPORATIONS

MAJ Scott Romans

On June 8, 1998, the Supreme Court issued an opinion in the case of *U.S. v. Bestfoods, et al.*,¹ in which a unanimous Court provided guidance on the issue of parent corporation liability for the actions of its subsidiaries under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The Court's decision in this case may affect the Third Circuit's analysis in *FMC Corp. v. U.S. Dept. of Commerce*,² which has been used to impose liability on federal agencies as an operator.

In *Bestfoods*, the Environmental Protection Agency (EPA) brought an action under CERCLA § 107 for cleanup costs at the site of Ott Chemical Company near Muskegon, Michigan. Ott Chemical Company began operations on this site in 1957.³ In 1965, Ott Chemical became a subsidiary of CPC International Corporation. CPC sold Ott Chemical Company to Story Chemical Company in 1972. Story operated the chemical plant until its bankruptcy in 1977.⁴ By 1981, EPA had started cleanup of the site, with the total cost estimated to be "well into the tens of millions of dollars."⁵ EPA filed the suit in 1989, naming CPC International and Arnold Ott (owner of the now defunct Ott Chemical Company), among others, as potentially responsible parties (PRPs).⁶

The district court found CPC liable as an operator, applying the "actual control" test used in *FMC Corp.*,⁷ and focusing on CPC's control over Ott Chemical Company.⁸ The Court of Appeals for the Sixth Circuit reversed the district court, ruling that a parent corporation could only be liable as an operator when the corporate form has been misused and the corporate veil can be pierced.⁹

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The Court analyzed parent corporation liability under two distinct legal theories: the derivative liability of a parent corporation for the activities of a subsidiary, and the direct liability of a parent corporation for its own activities towards the facility in question.

¹ No. 97-454, 1998 U.S. LEXIS 3733 (June 8, 1998) [hereinafter *Bestfoods*]. For information on CERCLA, see, 42 U.S.C. §§ 9601-9675 (1994).

² 29 F.3d 833 (3rd Cir. 1994).

³ *Bestfoods* at 11.

⁴ See, *Id.*

⁵ *Id.* at 13.

⁶ See, *Id.* During the course of the appellate process of this case, CPC changed its name to Bestfoods. *Id.* at n. 3.

⁷ See generally, 29 F.3d at 843-46.

⁸ *Bestfoods* at 15.

⁹ *Id.* at 16. Some circuits follow the rationale that parent corporations can only be liable when the corporate veil can be pierced, while other circuits have held that a parent actively involved in the affairs of a subsidiary can be liable as an operator (i.e. the "actual control" test) without regard for whether the corporate veil can be pierced. See, *Id.* at n. 8.

With regard to derivative liability, the Court determined that CERCLA did nothing to disturb the well-established principle of corporate law that a parent generally is not liable for the actions of its subsidiary unless the corporate form would be misused. Under those circumstances, the corporate veil can be pierced and the parent can be held liable.¹⁰

The Court then went on to address what may be a separate issue – namely, the extent to which a parent corporation may be directly liable as an operator for its activities at a facility. The Court first provided the following interpretation of what it means to be an “operator” under CERCLA:

[A]n operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.¹¹ (emphasis added)

The Court then rejected the district court’s use of the “actual control” test to determine liability. Under this test, adopted by many circuits,¹² a parent corporation can be liable under Superfund if it exerted actual control over the subsidiary responsible for the operation of the facility.¹³ The Court objected to the use of that test, however, because it confused direct and derivative liability by focusing on the relationship between the parent corporation and the subsidiary corporation. The correct focus, according to the Court, is the relationship between the parent corporation and the facility, as evidenced by the parent’s participation in the activities of the facility.¹⁴ In this case, the evidence indicated that an individual who was an officer of CPC, but who was not an officer or employee of Ott Chemical, played a significant role in the environmental compliance policy of the Muskegon facility.¹⁵ The Court remanded the case to the district court for further inquiry into this CPC employee’s role in light of the guidance provided in the opinion.¹⁶

This opinion could have a substantial impact on federal agency CERCLA liability. First, the Court seems to have discarded the “actual control” test, which was used by the Third Circuit in *FMC Corp.*¹⁷ to find the federal government liable as an operator. Of course, it is unclear how the Court’s focus on the relationship between a parent corporation and a facility would apply in situations where federal agencies have been involved with a particular type of industrial operation. Significantly, the Court sharpened the definition of “operator” to include only those activities

specifically related to disposal of hazardous waste and environmental compliance.¹⁸ This definition presumes that many of the factors the Third Circuit found to be relevant to an agency’s control -- such as the government’s ability to direct raw materials to the plant and the government’s involvement in labor issues at the plant -- would not play a role in any new analysis of a federal agency’s operator status.

¹⁰ *Id.* at 20-21. The Court discussed but did not resolve the issue of which law courts should use to decide veil-piercing, state law or federal common law. See, *Id.* at n. 9.

¹¹ *Id.* at 28.

¹² See *supra*, n. 9.

¹³ *Bestfoods* at 29-30.

¹⁴ *Id.* at 31.

¹⁵ *Id.* at 37-38.

¹⁶ *Id.* at 39.

¹⁷ 29 F3rd at 843-46.

¹⁸ *Bestfoods* at 28.

Although each future case will be decided on the basis of its unique facts, *Bestfoods* will certainly influence upcoming decisions concerning federal liability. (MAJ Romans/LIT)

NEW EXECUTIVE ORDER ON NATIVE AMERICAN CONSULTATION

Mr. Scott Farley, Army Environmental Center (AEC)

On May 14, 1998, President Clinton signed Executive Order 13084, "Consultation and Coordination With Indian Tribal Governments" (EO 13084).¹⁹ EO 13084 should not impose any new compliance requirements on individual installations.²⁰ However, read together with "Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments,"²¹ EO 13084 underscores the need for installations to develop proper consulting and coordinating procedures. These procedures should assist the installation in its communication with Federally recognized Indian tribes (tribes) on issues and activities affecting their land, resources, and governmental processes.

EO 13084 and the Executive Memorandum draw upon the United States Constitution, treaties, Federal statutes, and case law to establish the following principles:

1. Tribes are domestic dependent Nations. As such, tribes remain sovereign nations, exercising inherent sovereign powers over tribal members and territory.
2. Tribes have the right to self-government. The Federal government must recognize tribal sovereignty and should carry out its activities in a manner that is protective of tribal self-government, trust resources, and the full spectrum of tribal legal rights, including those provided by treaty.
3. Federal agencies ensure compliance with the foregoing legal mandates by establishing relationships with appropriate tribes on a government-to-government basis and consulting with such tribes in accordance with that relationship.

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Additional information and guidance on tribal consultation can be found in the Army "Guidelines for Consultation with Native Americans." These guidelines are included as Appendix G of the Draft DA Pamphlet 200-4 and at the US Army Environmental Center web page, Conservation section, at <http://aec-www.apgea.army.mil:8080>. (Scott Farley/AEC)

PROPOSED LEAD-BASED PAINT (LBP) RULE

LTC Allison Polchek

¹⁹ 63 Fed. Reg. 27,655 (1998).

²⁰ EO 13084 is primarily concerned with agency development of regulations and regulatory practices and policies that affect tribal communities in a significant or unique manner. It is not clear whether development of Integrated Cultural Resource Management Plans (or similar installation planning and management documents) fall within the ambit of agency policy.

²¹ 59 Fed. Reg. 22,951 (1994).

On June 3, 1998, the Environmental Protection Agency (EPA) issued a proposed rule²² under the authority of Section 403 of the Toxic Substances Control Act (TSCA).²³ Under Section 403, EPA is required to identify lead-based paint hazards. This identification is crucial, as federal facilities are obligated to abate, prior to transfer, hazards in target housing built before 1960.²⁴ The proposed rule establishes numerical levels to identify hazards. In the soil context, hazard levels are established as 2000 parts per million.²⁵ This level is considerably more stringent than current guidelines, which establish 5000 parts per million as the hazard level.²⁶ Adoption of the more stringent level could have important fiscal ramifications for installations transferring property, particularly in the Base Closure and Realignment scenario. Any ELS wishing to provide comments to this proposed rule should coordinate through this office. (LTC Polchek/RNR)

PROPOSED EXECUTIVE ORDER ON ALIEN SPECIES
MAJ Michele Shields

The Department of the Interior has proposed an Executive Order (E.O.), entitled "Invasive Alien Species." The E.O. defines "alien species" as any species or viable biological material derived from a species that is not a native species in that ecosystem. The definition of "invasive alien species" is an alien species that does or could harm the economy, ecology, or human health of the United States if introduced. If adopted, the E.O. will require federal agencies to implement measures to prevent the introduction and to control the spread of invasive alien species into the ecosystems. Information regarding final adoption of this E.O. will be published in future ELD Bulletins. (MAJ Shields/RNR)

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COLORADO CLEAN AIR BILL GOES UP IN SMOKE
LTC Richard Jaynes

The Governor of Colorado recently vetoed an attempt by the State Legislature to discriminate against federal agencies under its Clean Air Act (CAA)²⁷ authority. The Governor acted to strike down Senate Bill (SB) 98-004²⁸ at the urging of Ms. Sherri Goodman, Deputy Undersecretary of Defense for Environmental Security (DUSD-ES), the Department of Agriculture, and the Department of the Interior. The process whereby this result came about serves as a good example of how Army Regional Environmental Coordinators (RECs) and their staffs can be effective advocates for DoD interests.

²² Lead, Identification of Dangerous Levels of Lead, 63 Fed. Reg. 30302 (1998) (to be codified at 40 C.F.R. Part 745) (proposed Jun. 3, 1998).

²³ 15 U.S.C. § 403 (1992). Section 403 was actually created by Title X of the Residential Lead-Based Paint Hazard Reduction Act as an amendment to TSCA. (See, The Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, § 1021(a), 106 Stat. 3916 (1992)).

²⁴ 42 U.S.C. § 4822(a)(3). While the problem faced by most installations is primarily with LBP in the soil, this rule will also cover hazards associated with dust.

²⁵ 63 Fed. Reg. at 30353.

²⁶ U.S. Department of Housing and Urban Development, Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing (1995). Although this source is only guidance, it has served as the unofficial standard within most military departments.

²⁷ 42 U.S.C. §§ 7401, *et. seq.*

²⁸ S. 98-004 61st. Legis. Sess. 2 (Colo. 1998).

In early 1998, State senators began to push for the passage of SB 98-004, a measure that would direct the Colorado Air Quality Control Commission to ensure all federal facilities minimize air emissions to the maximum extent practicable. This requirement was intended to reduce the impacts of federal facilities on both the attainment and maintenance of national ambient air quality standards and the achievement of federal and state visibility goals. The bill requires each federal agency to submit its land management plans to the Commission for review and, after a public hearing, make any changes to the land management plans required by the Commission. As there is no similar set of requirements that apply to non-federal entities, SB 98-004 exceeds the limited waiver of sovereign immunity in the CAA.

SB 98-004 claims that significant contributions to regional haze and visibility impairment emanate from federal lands, particularly smoke from prescribed burning activities. The potential adverse impacts from the bill, however, also allow direct state regulation of virtually every source of airborne emissions at a federal facility from grounds maintenance to the timing and manner of DoD training operations, including obscurant use, weapons firing, and aircraft flights.

Throughout the limited lifetime of SB 98-004, the staff in the Army's Western Regional Environmental Office (also the DoD REC for EPA Region VIII) was vigilant in representing the interests of the Army and DoD, and in keeping higher headquarters and interested parties within the region informed. The REC ensured that the Army's concerns about the legal authority for SB 98-004 and the severe impacts on military Services were communicated to the Colorado Legislature and the Governor. In addition, close coordination with the Governor's Office, after passage of the bill, was instrumental in facilitating a timely request from the DUSD-ES for the Governor to veto the bill.

While the Colorado Governor did not explicitly credit his decision to veto SB 98-004 to the letters he received from DoD and other federal agencies, his public statements clearly echoed the concerns set out in the federal agencies' letters. Certainly the input from the REC's staff throughout the legislative process and the letter from the DUSD-ES were part of an important effort to influence the process as well as make DoD's concerns a part of the record. In contrast, failure to have participated in this process would have clearly indicated a lack of interest in the outcome. The REC's efforts in this case serve to illustrate how

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essential it is to have REC staffs throughout the Army identifying thorny regional issues and facilitating their diplomatic resolution. This REC's "ounce of prevention" is sure to net many "pounds of cure."

CALL FOR INPUT TO CIVIL/CRIMINAL LIABILITY HANDBOOK
LTC Richard Jaynes

Last year, ELD published the first edition of its *Environmental Criminal and Civil Liability Handbook* after many months of effort. Our intention was to create a resource for environmental law specialists (ELS) to use when grappling with thorny enforcement issues. The *Handbook* gave ELSs a kit containing the basic tools needed for successful negotiations of enforcement actions. We hope that it has become an important resource in your efforts to advocate your command's interests in this complex and sometimes contentious arena. If you do not already have the *Handbook*, you can download it from the Environmental Law Library on the LAAWS BBS.

This summer we will be employing the talents of our Reserve Component JAGs to help us update and revise the *Handbook*. We would appreciate your assistance to ensure that the *Handbook* remains relevant and responsive to your needs. This includes: identifying topics that are not addressed but should be; pointing out unclear statements or policies; and challenging the wisdom of recommendations or policies that are now in the *Handbook*. Simply put, the suggestion shop is open.

I also hope to focus on the *Handbook's* appendix portion, which is not presently located with the on-line version. To solve this problem, the next edition of the *Handbook* and its appendix will be on the BBS and e-mailed out to MACOM and installation ELSs. When revising the appendix, I intend to trim out items that are not essential to your practice and may include references to Internet web sites.

We expect to limit the revised *Handbook* to about 100 pages and will try to keep the appendix material to about the same size. Because you will be part of the revision process, I would like you to think about the sorts of issues that need to be addressed. To help get you started, I list several topics that will be added or updated in the revised *Handbook*:

- EPA's new policy on supplemental environmental projects;
- EPA's policy (revised in October 1997) on use of RCRA §7003 orders;
- EPA's use of RCRA §6003 authority to make onerous information requests;
- EPA's authority to issue punitive administrative fines under the Clean Air Act;
- EPA's efforts to issue punitive fines for underground storage tank violations;
- Regulator attempts to bring media enforcement actions for CERCLA operations.

If you have run into particularly helpful resources on enforcement actions, please e-mail or fax them in. Please e-mail me (jaynera@hqda.army.mil), write, or phone (703-696-1569; fax -2940) with your ideas on any aspects of the *Handbook* that could be strengthened. (LTC Jaynes/CPL)