

**THE ENVIRONMENTAL LAW DIVISION
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HEIGHTENED SCRUTINY ON ENFORCEMENT MATTERS

COL Lawrence Rouse

Practitioners should be aware that we are seeing increasingly expansive interpretations by the Environmental Protection Agency (EPA) of their enforcement authority over federal agencies. Last year, EPA began fining federal agencies for Clean Air Act violations through its Field Citation Program. DoD's challenges to these actions were rejected by the Department of Justice (DOJ) in a far broader interpretation of EPA authority than had previously been issued from DOJ. More recently, EPA has interpreted its authority under RCRA Subtitle I to include authority to fine federal agencies for violations of Underground Storage Tank (UST) requirements, although the legislative history of Subtitle I varies from that of the remainder of RCRA. DoD is conducting internal discussions with EPA on this issue while EPA continues to pursue UST enforcement actions. As we near the December 22, 1998 deadline for UST compliance, several installations across DoD have received voluminous requests for UST data, including requests for information developed during internal audits. Such requests are often a prelude to enforcement actions. Environmental Law Specialists should be aware of these increasing efforts by EPA and advise their installation environmental staffs accordingly. (COL Rouse/Chief Army ELD)

THE PLAINTIFF AS POLLUTER: APPLICATION OF CERCLA AND RCRA

LTC David Howlett

In a recent decision,¹ the Seventh Circuit Court of Appeals decided a case that pitted a current owner of property against a former owner, both of whom had contributed to polluting the property in question. The opinion, by Chief Judge Richard Posner, addressed questions of whether tort law could provide recovery under circumstances not permitted by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)² and

whether a property owner who contributed to pollution could recover under the Resource Conservation and Recovery Act (RCRA).³

In 1985, PMC purchased property from Sherwin-Williams on which the latter had been making paints, insecticides, and other chemicals for a century. The Illinois environmental protection agency required extensive actions at the property beginning in 1992, to include a site assessment and five separate clean-ups. Although PMC had disposed of toxic wastes at the property itself, it sought recovery against Sherwin-Williams

¹ *PMC, Inc. v. Sherwin-Williams*, Nos. 97-2884, 97-3773 (7th Cir. July 30, 1998).

² 42 U.S.C. § 9601 *et seq.*; CERCLA §101 *et seq.*

³ 42 U.S.C. § 6900 *et seq.*

based on its prior ownership and waste disposal. The district court granted PMC recovery of its costs under CERCLA and imposed an injunction on Sherwin-Williams, requiring it to take responsibility for cleaning the property under RCRA.

The court began by reviewing the contract terms between the parties⁴ and concluded that PMC retained statutory recovery rights against Sherwin-Williams. PMC sued Sherwin-Williams for contribution under CERCLA §113(f)(1).⁵ Despite PMC's admissions that it had dumped toxic wastes at the site, the district judge found Sherwin-Williams 100% liable for clean-up costs. The Court of Appeals found this allocation within the judge's equitable discretion; PMC's spills may have been too inconsequential to affect the overall cost of the clean-up. To the argument that this could encourage purchasers of polluted sites to pollute the property themselves, Judge Posner concluded that this could backfire: "[I]t might induce the judge to exercise his equitable discretion against the wise guy."⁶

PMC was not entitled under CERCLA to recover clean-up costs it had already incurred because it had not submitted its plans for public comment in accordance with the EPA's national contingency plan.⁷ The district court, however, awarded these costs to PMC under the Illinois Contribution Act, a general statute governing contribution among joint tortfeasors (with no public notice requirements). Sherwin-Williams argued that this result circumvented CERCLA's limitation on contribution. PMC replied that application of the Illinois law was allowed under CERCLA's savings clause, which preserves common law remedies.⁸

The Court of Appeals began its analysis with the purpose of the savings clause: to preserve to victims of toxic wastes the other remedies they may have under federal or state law. PMC, which bought the property knowing it contained toxic wastes and contributed wastes itself, was not a victim in any real sense. "That PMC may have rights against other, more culpable responsible parties does not change PMC into the victim of a tort; it is merely the less guilty of two tortfeasors."⁹ Finally, the court found that allowing recovery under the Illinois Contribution Act would frustrate the intent of Congress to encourage compliance with the national contingency plan. "PMC's invocation of Illinois' contribution statute is an attempt to nullify the sanction that Congress imposed for the kind of CERCLA violation that PMC committed."¹⁰ Accordingly, the court reversed the award of past clean-up costs.

The reviewing court then turned its attention to Sherwin-Williams' appeal of the RCRA requirement, about which it claimed that "the RCRA tail should not be allowed to wag the CERCLA dog." While noting the irony of a joint tortfeasor recovering under a pollution

⁴ The parties were both liable under CERCLA but were free to allocate expenses between themselves by contract. See 42 U.S.C. § 9607(e)(1); CERCLA §107(e)(1).

⁵ 42 U.S.C. § 9613(f)(1); CERCLA § 113(f)(1).

⁶ *PMC, Inc. v. Sherwin-Williams*, U.S. App. LEXIS, at *6.

⁷ 42 U.S.C. § 9607(a)(4)(B); CERCLA § 107(a)(4)(B). Recoverable costs must be "consistent with the national contingency plan."

⁸ 42 U.S.C. § 9652(d); CERCLA § 302 states "Nothing in this in his chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants."

⁹ *PMC, Inc. v. Sherwin-Williams*, U.S. App. LEXIS 17563, at *8.

¹⁰ *Id.*

control law, the court said this was no stranger than the recovery afforded under CERCLA in the same circumstance.¹¹ The court held that PMC was entitled to relief under RCRA if it could show that the pollution caused by Sherwin-Williams created an imminent danger to human health or the environment.¹² Although the evidence of imminent danger was conflicting, it was sufficient to uphold the district judge's finding.

The allowance of recovery under RCRA can be reconciled with the disallowance of relief under the Illinois Contribution Act. The latter is designed to protect tort victims and, for that use, was designed to be saved by CERCLA. RCRA's imminent danger provision, on the other hand, is supposed to protect the health of the general population and the environment as a whole; PMC, a non-victim, could therefore obtain relief.

This case again demonstrates the broad coverage of CERCLA and RCRA and the extent to which they have taken the place of traditional tort law. (LTC Dave Howlett/LIT)

THE PRICE OF VICTORY

Major Scott Romans

On 11 August 1998, the United States District Court for the Central District of California issued an opinion in the case of *United States v. Shell Oil Company, et al.*,¹³ (the McColl case) involving the allocation of CERCLA liability between the federal government and other potentially responsible parties (PRPs) at the McColl Superfund Site in California. In this decision, the court allocated 100% of the clean up costs at the McColl Superfund Site to the federal government. This decision could potentially expand the scope of government CERCLA liability under *FMC Corp. v. U.S. Department of Commerce*.¹⁴

The facts of the McColl case are as follows. During the World War II, four oil companies entered into contracts with the United States to produce aviation fuel (avgas).¹⁵ The companies in turn entered into contracts with Mr. Eli McColl to dispose of the acid wastes that resulted from aviation fuel production. Mr. McColl accomplished this disposal by dumping the wastes on a 22 acre parcel of property that later became known as the McColl Site.¹⁶ The Environmental Protection Agency and the State of California brought an enforcement action under CERCLA § 107 to recover cleanup costs. The Court had previously held that both the oil companies and the United States were liable under § 107 as arrangers.¹⁷ The Court then conducted a trial in February, 1998 to determine the percentage of cleanup costs allocable to each party.¹⁸

¹¹ The court cited recent precedent for this conclusion. *AM International v. Datacard Corp.*, 106 F.3d 1342, 1349 (7th Cir. 1997).

¹² 42 U.S.C. § 6972(a)(1)(B).

¹³ No. CV 91-0589-RJK, 1998 U.S. Dist. LEXIS 12704 (C.D. Cal. Aug. 11, 1998).

¹⁴ 29 F.3d 833 (3d Cir. 1994).

¹⁵ 1998 U.S. Dist. LEXIS 12704, at *6.

¹⁶ *Id.* at *17.

¹⁷ *U.S. v. Shell Oil Co. et al.*, 841 F.Supp. 962 (C.D. Cal. 1993) (holding oil companies liable), *U.S. v. Shell Oil Co. et al.*, No. CV-91-0589-RJK, 1995 U.S. Dist. LEXIS 12704 (C.D. Cal. Sept. 18, 1995) (holding United States liable).

¹⁸ The total cost of the cleanup has not yet been determined, but is estimated to be between \$70-100 million.

The Court determined that 100% of the costs should be allocated to the federal government, relying on 3 primary factors. First, the Court found that holding the government liable for 100% of the cleanup costs would place the cost of a war on the United States as a whole.¹⁹ The Court noted similar reasoning in *FMC Corp.* case,²⁰ where the Third Circuit found that placing the cost of war on society as a whole was consistent with the underlying policy of CERCLA.²¹ According to the Court, "it stands to reason that just as the American public stood to benefit from the successful prosecution of the war effort, so to must the American public bear the burden of a cost directly and inescapably created by the war effort, the production of avgas waste."²²

The second factor in the Court's decision concerned the options available to the oil companies to dispose of the waste. According to the Court, the decision to dump the waste on the McColl property was directly related to the fact that there were no tank cars available to the companies to transport the waste to another facility for recycling.²³ The Court found that the War Production Board diverted the tank cars for other uses and so the oil companies had no choice but to dump the waste at the McColl Site.²⁴

Finally, the Court found that the government had not provided the necessary priorities to the oil companies to allow them to construct regeneration plants to reprocess the acid and acid waste.²⁵ Apparently, two of the companies had made requests to the WPB to receive the materials required to construct these regeneration plants. Since the WPB did not grant these priorities, the Court again came to the conclusion that the companies had no choice but to dump the wastes at the McColl Site.²⁶

The government argued at the allocation trial that the economic benefits the oil companies received as a result of these contracts should weigh in the government's favor. Not only did the companies profit from these contracts, but they also received tax benefits from their ability to accelerate the amortization of new facilities constructed during the war.²⁷ The Court, however, did not find this reasoning persuasive. The Court noted that after the war, Congress enacted two statutes, called Renegotiation Acts, designed to allow the government to demand repayment of excessive profits obtained by companies during the war. According to the Court, since the oil companies were never required to repay any money to the government, their profits were not excessive and therefore the profits they realized were not an equitable factor to be taken into account in the allocation process.²⁸

This case potentially represents an extension of the reasoning of *FMC Corp.* case. *FMC Corp.* determined operator liability under CERCLA § 107, based on the amount and type of control over the facility involved. The McColl case determined allocation. The issue was the application of equitable factors to determine costs between two liable parties

¹⁹ 1998 U.S. Dist. LEXIS 12704 at **29-30.

²⁰ 29 F.3d 833 (3d Cir. 1994).

²¹ 1998 U.S. Dist. LEXIS 12704 at *31. See *FMC Corp.*, 29 F.3d at 846.

²² 1998 U.S. Dist. LEXIS 12704 at **31-32.

²³ 1998 U.S. Dist. LEXIS 12704 at **32-33.

²⁴ *Id.*

²⁵ *Id.* at *34.

²⁶ *Id.* at *35.

²⁷ *Id.* at *36.

²⁸ *Id.* at *38.

FMC Corp. does not provide guidance in making this allocation decision.²⁹ Also, the McColl court ignored the independent decisions the oil companies made that led to the creation of the CERCLA site, such as choosing to enter into contracts with Eli McColl for waste disposal, expanding their plants and actively competing for aviation fuel contracts at the outset of the war.³⁰ By not considering these factors, the Court ignored an important principle underlying CERCLA: requiring the persons responsible for pollution to pay for the damage they cause.

Argument on the United States' motion for a new trial will occur in October. (MAJ Romans/LIT)

Announcement of Present ELD Staff

We have had many hails and farewells here in the Environmental Law Division, so we take this opportunity to provide you with a list our current staff, along with their areas of expertise.

U.S. ARMY ENVIRONMENTAL LAW DIVISION
 AREAS OF RESPONSIBILITY
 as of 15 SEP 98

<u>AREA/POSITION</u>	<u>PRIMARY</u>	<u>ALTERNATE</u>
Chief	COL Rouse 1230/1570	LTC Howlett 1563
Chief, Compliance	LTC Jaynes 1569	LTC Grant 1592
Chief, Litigation	LTC Howlett 1563	Mr. Lewis 1567
Chief, Restoration & Natural Resources	Mr. Nixon 1565	LTC Polchek 1562
Executive Officer	LTC Polchek 1562	
Alternative Dispute Resolution (General)	MAJ Cotell 1593	LTC Jaynes 1569
Alternative Dispute Resolution (Litigation)	Ms. Greco 1566	LTC Howlett 1563
Asbestos	LTC Jaynes 1569	MAJ Egan 1623
BRAC/CERFA	LTC Polchek 1562	Mr. Wendelbo 1597
CERCLA	Mr. Nixon 1565	Ms. Barfield 1572
Chemical Weapons Demilitarization (Genl)	MAJ Egan 1623	LTC Grant 1592
Chemical Demilitarization (Litigation)	MAJ Zolper 1624	MAJ Romans 1596
Clean Air Act	LTC Jaynes 1569	LTC Grant 1592
Clean Water Act	MAJ Cotell 1593	LTC Grant 1592
Criminal Liability	MAJ Cotell 1593	LTC Jaynes 1569
Cultural Resources	MAJ Shields 1568	LTC Polchek 1562

²⁹ The United States has filed a motion for a new trial, which will be argued in October. The United States raised this issue in its motion, as well as a number of factual issues related to the Court's second and third reasons for its decision (the lack of tank cars and the WPB's refusal to grant priorities).

³⁰ The motion for new trial raises this issue as well.

ECAS	Mr. Nixon 1565	MAJ Shields 1568
ELD Bulletin	Ms. Barfield 1572	MAJ Cotell 1593
Enforcement Actions	MAJ Cotell 1593	LTC Jaynes 1569
EPCRA	Mr. Nixon 1565	LTC Polchek 1562
ESA/Natural Resources	MAJ Shields 1568	LTC Polchek 1562
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Litigation	MAJ Zolper 1624	
Litigation	MAJ Romans 1596	
Litigation	MAJ DeRoma 1648	
Litigation	CPT Bergen 2516	
Litigation	Ms. Greco 1566	
LL.M. Program Liaison	LTC Grant 1592	MAJ Egan 1623
Military Munitions	LTC Grant 1592	MAJ Egan 1623
NEPA	LTC Polchek 1562	MAJ Shields 1568
OSHA	Mr. Nixon 1565	LTC Polchek 1562
Overseas & Deployment Issues	MAJ Shields 1568	LTC Polchek 1562
PCBs	LTC Jaynes 1569	MAJ Egan 1623
Pollution Prevention	Mr. Nixon 1565	Ms. Barfield 1572
Radiation	LTC Jaynes 1569	MAJ Egan 1623
Range Rule	LTC Grant 1592	MAJ Egan 1623
RCRA (includes OB/OD)	MAJ Egan 1623	LTC Grant 1592
Reserve Component	MAJ Egan 1623	MAJ Cotell 1593
Safe Drinking Water Act	MAJ Cotell 1593	LTC Grant 1592
Safety	MAJ Cotell 1593	MAJ Egan 1623
TSCA	LTC Jaynes 1569	MAJ Egan 1623
USTs	MAJ Egan 1623	LTC Grant 1592
Water Rights	MAJ Cotell 1593	LTC Grant 1592

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Announcements

The Air Force Environmental Law Courses at Maxwell AFB in Montgomery, Alabama are:

Advanced Course, 7-9 December 1998
 Update Course, 22-24 February 1999
 Basic Course, TBD

ELD serves as the POC for Department of Army slots only.