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District Court Rejects *Eastern Enterprises* Argument

Ms. Christine Azzaro¹

In *United States v. Alcan Aluminum Corporation*,² a federal district court examined whether retroactive application of the Comprehensive Environmental Response, Compensation and Liability Act³ ("CERCLA") constituted a taking under the Fifth Amendment of the Constitution. Retroactive application of CERCLA would require Alcan Aluminum Corporation to pay for the clean up of toxic waste that the company had previously disposed of lawfully at a hazardous waste site.⁴ The district court concluded that the Supreme Court's retroactivity analysis in *Eastern Enterprises v. Apfel*⁵ did not apply to CERCLA.⁶

In *Eastern Enterprises*, the Supreme Court examined whether the Coal Industry Retiree Health Benefit Act of 1992⁷ ("Coal Act"), when applied retroactively, constituted a taking under the Fifth Amendment.⁸ The Coal Act would have forced Eastern to pay to its former employees' retirement funds in addition to those that their retirement plan had already established, in compliance with then-current legislation.⁹ The Supreme Court held that the Coal Industry Retiree Health Benefit Act of 1992, constituted a taking under the Fifth Amendment, and thus violated the constitutional rights of Eastern.¹⁰ In a plurality decision, the Court held that the constitutionality of retroactive application of legislation depends upon the "justice and fairness" of the statute.¹¹ Under this analysis, three factors are used in order to determine the whether a regulation constitutes a taking: (1) what is the economic impact which the regulation has upon the defendant? (2) does the regulation

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² *United States v. Alcan Aluminum Corp.*, No. 87-CV-920, 1999 U.S. Dist. LEXIS 7103, (N.D.N.Y.) May 11, 1999).

³ 42 U.S.C. § 9607 (1998).

⁴ *Alcan Aluminum Corp.*, 1999 U.S. Dist. LEXIS at *5.

⁵ *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998).

⁶ *Alcan Aluminum Corp.*, 1999 U.S. Dist. LEXIS at *5-*13.

⁷ 26 U.S.C. §§ 9701-9722 (1992).

⁸ *Eastern Enterprises*, 118 S. Ct. at 2150-2151.

⁹ *Id.* at 2141.

¹⁰ *Id.* at 2150-2151.

¹¹ *Id.* at 2146 (citing *Andrus v. Allard*, 444 U.S. 51, 65 (1979)).

interfere with the reasonable investment backed expectations of the defendant? (3) what is the character of the government action?¹²

Based on this test, four Justices concluded that the Coal Act violated Eastern's Fifth Amendment rights. Eastern's liability under the Coal Act would have been highly disproportionate to its experience with the retirement plan, and therefore would have constituted an unjust economic burden.¹³ Furthermore, the retroactive nature of the legislation interfered with the expectations of Eastern, due to the fact that Eastern had not contributed to the problem that made the legislation necessary, and Congress had never before become involved with the coal industry in such a manner.¹⁴ In a concurring opinion, Justice Kennedy concluded that the retroactive impact of the Coal Act was unconstitutional based upon its violation of the due process clause.¹⁵

In considering Alcan's CERCLA challenge, the district court first concluded that *Eastern* could not be employed as precedent for the *Alcan* case. The court pointed to the fact that the holding in *Eastern* was based upon a plurality decision, in which only four Justices had ruled that retroactive application of the Coal Act constituted a taking.¹⁶ Because the other five Justices, including Justice Kennedy in his concurring opinion, rejected this analysis the ruling in *Eastern* did not constitute binding precedent.¹⁷

This left the due process claim of Alcan to the "well settled rule that economic legislation enjoys a 'presumption of constitutionality' that can be overcome only if the challenger establishes that the legislature acted in an arbitrary and irrational way."¹⁸ Relying upon persuasive precedent, the court concluded that retroactive application of CERCLA was neither arbitrary nor irrational in basis.¹⁹

The district court went on to reason that even if *Eastern* were valid precedent for holding that retroactive use of CERCLA constituted a taking, the specific fact situation in *Alcan* would not pass the three-part test. Rather than finding an insurmountable economic burden, the district court stated that any economic impact that CERCLA would have on Alcan would be diminished by apportionment between responsible parties.²⁰ In addition, even if apportionment were not available, Alcan's potential liability was considerably less than the sum for which Eastern Enterprises would have been liable.²¹

Furthermore, liability was being imposed on Alcan because of actions that it had taken in the past. While Alcan claimed that it had not caused the pollution of the site, that fact still remained to be determined. Despite this, Alcan had indeed dumped toxic

¹² *Id.* (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)).

¹³ *Id.* at 2149-2151.

¹⁴ *Id.* at 2151-2153.

¹⁵ *Id.* at 2154.

¹⁶ *Alcan Aluminum Corp.*, 1999 U.S. Dist. LEXIS 7103 at *5 (citations omitted).

¹⁷ *Id.*

¹⁸ *Alcan Aluminum Co.*, 1999 U.S. Dist. LEXIS 7103, at *14.

¹⁹ *Id.* (citations omitted).

²⁰ *See Alcan Aluminum Corp.*, 1999 U.S. Dist. LEXIS 7103, at *3 -*4.

²¹ While Eastern Enterprises would have been liable for \$50 to \$100 million, Alcan's liability was in the approximate range of \$5 million. *See id.* at *10.

substances in the area that was now contaminated.²² In contrast, Eastern Enterprises was being held liable based upon neither its past actions, nor any agreement that it had made in the interim.²³

The Army is subject to liability under CERCLA in the same way that any other private party would be.²⁴ The Army does not, however, have Fifth Amendment rights. A finding that CERCLA violates the Fifth Amendment rights of private parties could leave the Army responsible for a greater allotment of site clean-up costs. Although CERCLA survived the retroactivity challenge in *Alcan*, the issue may be raised continually until it is ultimately resolved by the Supreme Court.
(Christine Azzaro/Lit)

CERCLA Non-Time Critical Removal Actions

Ms. Kate Barfield

The Comprehensive Environmental Response, Compensation and Liability Act,²⁵ (CERCLA) addresses the identification, characterization and -- if necessary -- the cleanup of releases of applicable hazardous substances into the environment.²⁶ Specifically, CERCLA authorizes the undertaking of cleanup (response actions) that are consistent with the National Contingency Plan (NCP).²⁷ There are two basic types of CERCLA response actions -- remedial actions and removal actions.²⁸ This article focuses on non-time critical removal actions.

Generally, removal actions involve "removing" contamination that resulted from a CERCLA hazardous substance release. Many removals are emergency or time-critical actions. But with non-time critical removals, decisionmakers have more time to plan their approach.²⁹ Given the possibility of more planning, non-time critical removal actions can raise some interesting questions. One issue that arose recently was whether the NCP's requirements for considering a full-blown response action would apply to discrete non-time critical removal actions. In short, the answer is no. Here is why.

Under the NCP, there are nine criteria³⁰ for assessing response actions, which are:

²² "CERCLA liability has not been imposed on Alcan for no reason; rather, it has resulted from Alcan's conduct in disposing of waste where hazardous substances have been found. Consequently, Alcan's liability is predicated on the link between its waste disposal activities and the environmental harms caused at [the sites]. *Id.* at *11.

²³ *Id.*

²⁴ 42 U.S.C. § 9620 (a)(1) (1998).

²⁵ 42 U.S.C. § 9601, *et seq.*

²⁶ For definitions of key terms, such as what constitutes a "release" or a "hazardous substance," *see*, 42 U.S.C. §§ 9601(14); (22).

²⁷ *See generally*, 40 C.F.R. Part 300.

²⁸ 42 U.S.C. § 9604(a).

²⁹ The administrative record requirements for a removal action can be found at 40 C.F.R. § 300.820.

³⁰ 40 C.F.R. § 300.430(e)(9)(iii)

Threshold Criteria

1. Overall protection of human health and the environment.
2. Compliance with applicable, relevant, and appropriate requirements (ARARs) or the eligibility of a waiver.

Primary Criteria:

3. Long term effectiveness and permanence.
4. Reduction of toxicity, mobility or volume through treatment.
5. Short term effectiveness.
6. Implementability.
7. Cost.

Modifying Criteria:

8. State acceptance.
9. Community acceptance.

With non-time critical removal actions, such an in-depth analysis is not necessary. Accordingly, EPA Guidance recommends that decisionmakers consider only three criteria when assessing a non-time critical removal action.³¹ These are:

1. Effectiveness
2. Implementability
3. Cost

The main difference between the NCP's Nine Criteria and the EPA's three criteria is that the EPA's version is shorter. It calls for a more streamlined analysis, without the NCP's modifying criteria. There is also another important distinction, though less obvious, regarding the use of "applicable requirements" and "relevant and appropriate requirements" (ARARs).³² CERCLA on-site remedial actions must comply with the substantive requirements contained in ARARs. Removal actions are only required to attain ARARs "to the extent practicable."³³ Lead agencies are permitted to consider whether compliance is practicable by examining the urgency of the situation and the scope of the removal action.³⁴ Hence, one more reason that the NCP's Nine Criteria do not apply to these actions.
(Kate Barfield/RNR)

³¹ EPA Guidance, OSWER No. 9360.0-32, *Guidance on Conducting Non-Time Critical Removal Actions Under CERCLA*, August 1993.

³² 42 U.S.C. § 9621(a);(d)

³³ Note that the removal action must be Fund-financed. 40 C.F.R. § 300.415(j).

³⁴ 40 C.F.R. § 300.415(j)(1),(2).