

An Avenue of Recovery: CERCLA Contribution Claims Against the United States Department of Defense

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Over the past seven decades, companies have worked diligently under contracts with the various branches of the United States Armed Forces and other governmental agencies to fuel the WWII effort, win the Cold War, explore outer space, and preserve the national defense. In the 1940s for example, the aerospace industry was born in California, with hundreds of companies scattered in what was then sparsely populated hills and valleys supporting the war effort by making such things as jet-assisted take-off rocket motors, explosives, and flares at the government's behest.¹ By the height of the Cold War, 15 of the 25 largest aerospace companies in the United States were based in Southern California, and the United States counted on these companies to build modern military weapons like fighter planes, bombers, and ballistic missiles.² As the United States' attention also turned toward the race to outer space, California aerospace companies were there, creating the firepower and making the components needed for the Apollo and Gemini space missions. Throughout these times, the United States Government was driving what the aerospace companies made, how they made it, how they handled the various hazardous materials that went into it, and how they disposed of the hazardous waste generated during its production. The directions given by the government to these ends came in several forms and generally left no room for deviation. Material specifications were exact. Safety manuals and handling guidelines were explicit.³ Instructions on the manner of disposal of wastes were detailed. This level of involvement by the government in the manufacture, handling, shipping, and disposal of munitions and related products can, and has, led to the United States government being held responsible as an "operator" or "arranger" under CERCLA.

A case in point is the government's role in causing the widespread perchlorate contamination recently found to be in the drinking water supplies underlying most of Southern California.⁴ Perchlorate's primary use, particularly from the 1940s through the 1990s, was serving as an oxidizing agent to provide thrust in the rocket motors and missiles.⁵ Indeed, 90% or so of the annual production of ammonium and potassium perchlorate compounds was used by the defense and aerospace industries, with the Department of Defense candidly admitting to Congress that ammonium perchlorate was the life's blood of the nation's strategic defense system and space exploration.⁶ The government's instructions to aerospace companies relating to grinding, storage, handling, use, and disposal of perchlorate from the 1940s through the early 1980s are quite telling. During this time frame, the dangers of exposing perchlorate to the ground surface or to open waters and streams were not appreciated. As such, contractors were advised to do such things as burn waste propellant containing perchlorate in open pits and to flush defective propellant from rocket motors with an auger and high-pressure streams of water (a process known as "Hog-Out"). Only years later was it learned that these types of operations allowed perchlorate to dissolve in water and percolate down through the soil and into drinking water aquifers.

CERCLA's scheme of liability is often unforgiving. Good intentions, like those the government had during the 1940s through the 1980s with respect to the handling and disposal of perchlorate, do not negate liability for the legacy of contamination which has resulted. Similarly, current or former owners or operators of a former munitions manufacturing site often get caught up in CERCLA's web of liability despite a lack of active wrongdoing. CERCLA does, however, provide an equalizer, which is the right of one potentially responsible party ("PRP") to bring an action against another PRP for contribution toward costs expended to clean up a contaminated site. As noted above, among those PRPs for contamination at former munitions manufacturing or testing sites is the United States government (generally, the Department of Defense or "DOD"). Even insurance companies that have paid out insurance proceeds to fund environmental clean-ups may seek contribution from the DOD and other PRPs.

The DOD's liability under CERCLA typically hinges on whether it acted as an "operator" or "arranger" at a contaminated site.⁷ Of course, the DOD may also have liability as an "owner" of a site, which is often the case with former military bases and installations. Under CERCLA, liability as an "operator" depends on whether someone is found to have exercised "substantial control" over the operations at the site, even a site which some third party owned. Liability as an "arranger" depends on whether someone, by contract, agreement, or otherwise, arranged for disposal or treatment of hazardous substances at a particular site.⁸ While arranger liability has become more difficult to establish with the 2009 United States Supreme Court ruling in *Burlington Northern & Santa Fe Railway Company v. United States*,⁹ a finding that the DOD and other PRPs acted as an arranger is possible when it can be shown that they took deliberate steps toward disposing of a hazardous substance at the subject site. The existence of such things as DOD-prepared material and safety manuals from the 1940s through the 1980s which advise government contractors to, among other things, remove defective propellant from rocket motors through Hog-Out operations or dispose of waste perchlorate by burning it in open pits and then wetting those pits down between burn events lend well toward a showing that the DOD bears operator and/or arranger liability for any legacy of contamination left behind as a result of such activities. Indeed, in a July 2005 Report to Congress on perchlorate contamination in the southwestern United States, the DOD candidly admitted that activities at DOD-related facilities that may have contributed to the release of perchlorate to the environment include the open burning of munitions items, rocket motor and ordinance testing, and Hog-Out operations.¹⁰ Similarly, a 2003 analysis prepared by the Democratic Staff of both the House Committee on Energy and Commerce and the House Committee on Resources, reported that "the DOD has created, and is responsible for cleaning up, the largest number of toxic waste sites of any person or entity in the United States."¹¹

The cost to clean up contamination stemming from releases at former munitions sites has often been paid by insurance companies. These insurance companies, while having an extra hurdle to clear, may also have CERCLA contribution rights to pursue against the DOD and other PRPs. One such hurdle is the "Made Whole Doctrine" which essentially provides that an insurance company may not enforce a right to subrogation until its insured has been "fully compensated."¹² The purpose of the doctrine is to ensure that an insurance company fulfills its contractual obligations to its insureds before pursuing subrogation rights against third-party tortfeasors. To this end though, insurers can generally pursue their subrogation rights where: (1) the insurance policy or some other contract dictates the priority of recovery or otherwise waives application of

the “made-whole” doctrine; (2) the insurer is not competing with its insureds in claims against a particular third-party tortfeasor; (3) the insurer is funding the litigation against the third-party tortfeasor rather than riding on its insured’s efforts to pursue the third party; (4) the common tortfeasor being pursued by both the insurer and the insured has sufficient assets to satisfy both claims; or (5) the insurer has paid out the limits of its insurance policy.¹³ A second hurdle to clear may exist when the claim against the DOD arises wholly out of rights existing under a government contract which, in some circumstances, are barred from assignment under the federal Anti-Assignment Act.¹⁴

CERCLA’s wide net for capturing PRPs has often drawn the ire of manufacturers and landowners. With some creative thinking, however, PRPs can use that breadth to recoup some of the clean-up costs they have incurred from, among others, the United States government itself. It is widely recognized that the DOD has historically been one of the nation’s largest polluters, as expediency in generating weapons and ignorance of potential environmental impacts collided to create a legacy of contamination.

Now, with politicians and environmentalists leading the charge, the DOD is being called upon to help pay for the clean up of former munitions sites.¹⁵ For landowners and PRPs who are ready to act, being able to navigate the terrain, handle liability issues, and deal with surprise contamination issues can often be enough to prevent action altogether. The reality is that there are a range of environmental solutions and recovery mechanisms available to facilitate bringing these properties back to a productive use. Many PRPs and their insurers are, or should be, capitalizing on this momentum by turning to DOD for contribution under CERCLA.

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¹ See e.g. Aerojet History, www.aerojet.com/about/history_p.php (2005) (last visited July 6, 2009).

² Dwayne A. Day, The Space Review: Blue Skies on the West Coast: a history of the aerospace industry in Southern California, (Aug. 20, 2007), www.thespacereview.com/article/938/1.

³ Safety, United States Army, AMCR 385-224, AMC Safety Manual (June 1964); Department of Defense, Office of Assistant Secretary of Defense, DOD 4145.26-M, DOD Contractors’ Safety Manual For Ammunition & Explosives, (March 1986).

⁴ H. Rep. No. 108-187 (2005), Perchlorate in the Southwestern United States.

⁵ Id.

⁶ Id.

⁷ Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 111-32, 42 U.S.C.S. § 9607 (2009).

⁸ Id.

⁹ Burlington Northern and Santa Fe Railway Co. v. United States Et Al., 129 S. Ct. 1870 (2009)

¹⁰ H. Rep. No. 108-187 (2005), Perchlorate in the Southwestern United States..

¹¹ Democratic Staffs of the House Committee on Energy and Commerce and the House Committee on Resources, *The Pentagon's 2003 Sustainable Ranges Agenda and its Effect on Public Health and Environmental Laws and Regulations*, March 31, 2003.

¹² California Department of Toxic Substances Control v. City of Chico, 197 F. Supp. 2d 1227, 1236 (E.D. Cal. 2004)

¹³ Id.

¹⁴ Anti-Assignment Act, Pub. L. No. 111-32, 31 U.S.C.S. § 3727 (2009),.

¹⁵ Press Release of Senator Diane Feinstein, *Senator Feinstein Urges Department of Defense to Address Legacy of Perchlorate Contamination* (May 2, 2003), available at <http://feinstein.senate.gov/03Releases/r-perchloratelettuce.htm>.