# Federal Government Liable Under CERCLA As Both An Arranger and Operator For Leased Property

**03.24.2011**

In a case with significant implications for funding hazardous-waste cleanups, a federal district court recently held that the U.S. government is liable under CERCLA as both an "arranger" and "operator" for cleanup costs at a property the Government leased to a private mining company. (*Nu-West Mining Inc. v. United States*, No. 09-431 (D. Idaho Mar. 4, 2011). The Court held that the Government's permitting, inspection, and oversight functions exposed it to CERCLA liability. The Court also rejected the Government's argument that it acted in a mere "regulatory" capacity. The decision potentially gives the federal government – the largest landowner in the nation – an expanded share of cleanup costs on leased property throughout the country.

**Background**

Under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § § 9601-9675 ("CERCLA"), a plaintiff may recover response costs arising from the release or threatened release of hazardous substances from four categories of persons, generally described as owners, operators, arrangers and transporters. Two of these categories were at issue in the *Nu-West* case, namely "arranger" liability and "operator" liability. CERCLA imposes liability on arrangers – or "any person who by contract, agreement, or otherwise, arranged for disposal or treatment ... of hazardous substances," as well as current and former operators of contaminated facilities. (42 U.S.C. § 9607(a)).

The *Nu-West* case arose from selenium contamination at four phosphate mines at a national forest in Idaho. The Government leased mineral rights in the national forest to various mining companies. Under these leases, the Government inspected the mines to monitor environmental conditions, ensure that waste rock was properly disposed, and validate royalty payments. The Government also issued special use permits for the construction of waste rock dumps adjacent to the mine sites.

To promote re-vegetation, the Government required the companies to cover the waste rock dumps with middle waste shale. However, one of the rock layers within the mines contained selenium. The selenium in this waste rock layer leached into the water flowing from beneath the piles, contaminating the site. The lessee mining company incurred approximately $10 million to remediate the contamination. The lessee then filed a CERCLA action to recover these costs from the Government.

**Arranger Liability**

With respect to arranger liability, the Court looked to the U.S. Supreme Court's decision in *Burlington Northern and Santa Fe Railway Co. v. United States* ("*BNSF*") 129 S. Ct. 1870 (2009). In *BNSF*, the Supreme Court, disagreeing with the Ninth Circuit, explained that an entity may only qualify as an arranger "when it takes intentional steps to dispose of a hazardous substance." The Supreme Court held that the manufacturer's "mere knowledge" that spills would occur did not amount to an "intent" to dispose, and emphasized that arranger liability "requires a fact-intensive inquiry that looks beyond the parties' characterization of the transaction as a 'disposal' or 'sale' and seeks to discern whether the arrangement was one Congress intended to fall within the scope of CERCLA's strict-liability provisions." (*Id.* at 1879).

Applying *BNSF*, the Nu-West court considered three elements for determining arranger liability which include whether the entity: (1) owned the hazardous substance; (2) had the authority to control the disposal of that substance; and (3) exercised some actual control over the disposal of that substance.

The *Nu-West* court concluded that the Government satisfied all three elements for arranger liability. The Court found that the Government owned the source of the selenium, the middle waste shale. The Court further found that the Government had the authority to control the disposal of the mining waste on the land, as no mining or waste disposal could occur without its approval. In addition, the Government exercised actual control over the disposal – and showed its intent that the disposal take place – by requiring its lessees to cover the outer surface of the waste dumps with a layer of middle waste shale.

The Court also rejected the Government's argument that it should not be held liable because it was "acting in a purely regulatory role." The Government asserted that it did not have the requisite intent required under *BNSF*, since it was merely acting to "ensure that the Lessees complied with the law and the terms of their leases, permits, and mine plans that [the Lessees] entered into as a condition of mining on public land." "Regulatory oversight," the Government argued, did not equate to "actual control" of the hazardous substances required under CERCLA. The Government argued that its actions were "aimed only at mitigating the environmental harm caused by private parties' actions...." Therefore, it could not have taken any "intentional steps to dispose of a hazardous substance" as *BNSF* requires.

The Court rejected this defense, relying on the Ninth Circuit's decision in *United States v. Shell Oil*, 294 F.3d 1045 (9th Cir. 2002), where the appellate court concluded that CERCLA's broad waiver of sovereign immunity under 42 U.S.C. § 9620(a)(1) exposed the Government to liability even when acting in a regulatory role. The *Nu-West* court reasoned: "*Shell Oil's* rejection of the 'governmental' defense applies with equal strength to the 'regulatory' defense raised here. Congress could have easily included a regulatory exception to the broad waiver of sovereign immunity contained in CERCLA but did not do so."

**Operator Liability**

With respect to operator liability, the court looked to the 1998 U.S. Supreme Court decision in *United States v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876 (1998). In Bestfoods the Supreme Court held that, to be an "operator" under CERCLA, one "must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." (*Id.* at 66-67). Operator liability "attaches if the defendant had authority to control the cause of the contamination at the time the hazardous substances were released into the environment and actually exercised such control." (*Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp*., 976 F.2d 1338, 1341-42 (9th Cir. 1992)).

Applying these elements, the *Nu-West* court held the Government liable as an "operator," noting that the Government "manage[d], direct[ed], or conduct[ed] operations specifically related to pollution…regularly inspected the dumps…and directed the lessees to take specific actions at the waste dumps." The Court reasoned: "In this case, the record shows conclusively that the Government was managing the design and location of the waste dumps for the four mines….and in ensuring that the waste dumps complied with the mining plans and environmental rules. That is sufficient, as a matter of law, for operator liability."

**Conclusion**

The *Nu-West* decision suggests broader liability for the U.S. Government in cost recovery actions under CERCLA. The Government's leasing, permitting and licensing roles on federal lands may give rise to not only owner liability, but also to operator and/or arranger liability under CERCLA. The fact that the Government took action in a regulatory capacity, to ensure compliance with law, or to mitigate environmental harm is not a defense. As the largest landowner in the Country, this expanded liability on the federal government could have significant implications in cost recovery actions across the nation.