



INSIDER



A MONTHLY DIGEST OF ENVIRONMENTAL MANAGEMENT & REGULATORY NEWS

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CERCLA LIABILITY

Burlington N. & Santa Fe Ry. Co. v. United States

THE DEMISE OF CERCLA JOINT AND SEVERAL LIABILITY?

by *J. Mark Morford, Stoel Rives LLP (Portland)*

“He’s not dead. . . . I can’t take him. It’s against regulations.”

“Well, can you hang around a couple of minutes? He won’t be long.”

Monty Python, *Bring Out Your Dead* from the film *Monty Python and of the Holy Grail*.

Overview

From its early years in the 1980s, liability under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) has been balky. CERCLA itself created status liability — i.e., liability imposed based on the status of the individual (such as a property owner) without consideration of fault or even causation — that arguably is anathema to the underpinnings of the US Constitution. The early courts read into CERCLA strict liability that was not apparent on the face of the statute. Holdings of joint and several liability (see sidebar, page 2) quickly followed,¹ even though Congress specifically rejected a joint and several liability standard when it enacted CERCLA.² Then came the cases imposing strict liability on shareholders of companies that fell within the CERCLA liability web.³ Courts further held that CERCLA deprives **potentially responsible parties (PRPs)** of the ability to defend themselves against an order requiring cleanup and denies them the right to contest remedy selection decisions by the US Environmental Protection Agency (EPA).⁴ Remarkably, this draconian liability scheme survived numerous attacks as a violation of due process.⁵ Tossing centuries of staid jurisprudence aside, courts rationalized that this remarkable liability scheme is justified by a polluter-pays policy,⁶ even given the fact that this broad liability net ensnares parties (such as an innocent landowner) who had no role in contributing to the pollution. This unprecedented evolution of legal theory evolved to the point that the Ninth Circuit in the case discussed in this article referred to CERCLA liability as being “super strict” and concluded that “equitable considerations have no role” in determining liability.⁷

Over time, businesses and their attorneys came to numbly accept the reality of the CERCLA liability scheme, as if it were perfectly normal and expected for an absentee landlord to get stuck with millions of dollars of liability for contaminants accidentally released by a former tenant at property that the landlord has not even owned for years. Individuals, companies and even whole industries have been bankrupted by this extraordinary liability, but EPA and the US Department of Justice have zealously rationalized that such a result is preferable to imposing the cost of cleanups on the tax-paying public — i.e., the same public that accepted the products and services that produced the pollution.

In the past decade, however, some courts have begun to awaken to the inequitable and frequently illogical results of this liability scheme. Federal district courts and circuit courts began to chip away at the most heavy-handed concepts. Eventually, the door to reason was swung open by the United States Supreme Court (Supreme Court) with its landmark decision in *United States v. Best Foods*, where it ruled that CERCLA, even with

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its remedial purpose, does not authorize the federal courts to create some super common law (see lower sidebar) beyond traditional theories of shareholder liability.⁸ In *Best Foods*, the Supreme Court rejected the notion that a parent company can be liable under CERCLA for the acts of its subsidiary absent direct involvement and control over those actions. The Supreme Court returned to common-law concepts of limited corporate liability and held that one must actually exercise control over the offending activity to be liable under CERCLA as an operator. On May 4, 2009, the Supreme Court took the next step of returning joint and several liability to its common-law roots by adding an element of intent to dispose before imposing liability on someone who simply sells a product. Although not dead yet, joint and several liability and other aspects of CERCLA’s draconian liability scheme have been dealt a mighty blow by the Supreme Court.

CERCLA & Common Law

Throughout CERCLA case law runs a debate about whether the federal courts should follow common law established by state courts with respect to liability issues (such as limited corporate liability, joint and several liability, lender liability and other significant issues). Some early CERCLA cases found that the broad remedial purpose of CERCLA supported the federal courts in establishing new federal common law (law made by the courts) that trumps state common law—super common law.

Background

The case in point is actually a consolidation of two cases, *Burlington Northern & Santa Fe Railway Co. v. United States (No. 07-1601)* and *Shell Oil Co. v. United States (No. 07-1607)*, 556 U.S. ___ (May 4, 2009) (collectively,

Typical Case

BNSF). The facts of *BNSF* paint a picture of a typical contaminated site. Brown & Bryant (B&B) was an agricultural chemical distributor. From 1960, B&B operated from its own 3.8-acre site. In 1975, it expanded by leasing an adjoining 0.9-acre parcel owned jointly by predecessors of Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company (collectively, the Railroads). B&B purchased chemicals from Shell Oil Company (Shell) and others. Over the years, the B&B operations had various spills and frequent incidental leaks and drips, and operated an unlined sump and drainage pond that collected wastewater and stormwater. Predictably, these operations resulted in significant soil and groundwater contamination that warranted designation of the site on EPA’s National Priorities List for cleanup under CERCLA. Just as predictably, B&B became insolvent and could not pay for the cleanup.

Prolonged Contamination

Insolvency

Agency Involvement

EPA and the California Department of Toxic Substances Control stepped in to investigate and clean up the site. In the process, they incurred some \$8 million in response costs. They sued Shell and the Railroads to recover those costs. Also, EPA ordered the Railroads to conduct some of the response actions. The Railroads incurred more than \$3 million in response costs and sued B&B for contribution. These cases were consolidated into a single action before the federal district court.

Litigation

In this litigation, Shell and both Railroads denied all liability under CERCLA. The district court imposed liability on both Shell and the Railroads, but apportioned to each of them relatively small shares, leaving a large unfunded orphan share (attributable to bankrupt B&B). On appeal, the Ninth Circuit upheld the findings of liability, but also held that these parties were jointly and severally liable for all response costs at the site, notwithstanding their minor roles at the site.

Liability

JOINTLY AND SEVERAL V. DIVISIBLE AND APPORTIONED
Under well established common law theories, when several actors cause a common harm, each may be held jointly liable for the entire harm. If the harm is divisible and reasonably can be apportioned, courts may assign to each actor his or her share of the harm. For example, two hunters simultaneously shoot at another hunter mistaking him for a deer. If both shots would be fatal, the hunters are jointly and several liable for the victim’s death. Alternatively, if one shot breaks the victim’s arm and the other breaks his leg, the harm may be divisible and liability may be apportioned.

CERCLA IMPOSES LIABILITY FOR RESPONSE COSTS ON FOUR CATEGORIES OF RESPONSIBLE PARTIES:

- (1) the owner and operator of . . . a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person . . . , and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities^[9]

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THE PRINCIPAL QUESTIONS CONSIDERED BY THE SUPREME COURT IN *BNSF* WERE:

CERCLA

Legal Questions

- (1) when can a seller of a useful product be liable for arranging its disposal (so-called “arranger liability”), and
- (2) what level of proof is necessary to avoid joint and several liability by showing that the harm is divisible and can be apportioned?

Arranger Liability

Liability Differences

CERCLA is relatively clear in imposing liability on someone who sends a waste to a site for disposal. This form of arranger liability is referred to as direct or “traditional”¹⁰ arranger liability. The statute and case law are less clear, however, as to whether and under what circumstances liability can be imposed on a seller of a useful product that is shipped to a site where contamination occurs. In the *BNSF* case, this is referred to as indirect or “broad” arranger liability.¹¹

Case Facts

In its 191-page slip opinion, the district court provided an exhaustive compilation of the facts of the case and its findings.¹² In this case, Shell had sold a product referred to as “D-D” to B&B for many years. Shell shipped the product to B&B using tanker trucks operated by a common carrier. Shipping terms were “F.O.B. Destination”¹³ — F.O.B. means “free on board” and requires the seller to assume the cost and risk of transport to the destination stated. U.C.C. § 2-319(1)(b). The evidence was uncontested that spills of D-D occurred during the unloading of D-D at the B&B facility. Testimony showed that Shell had specified the type of truck and the hoses to be used to unload D-D into B&B’s tanks. For some of the period in question, the truck drivers, rather than B&B personnel, actually performed the unloading tasks. Apparently, some of the releases occurred when hoses were disconnected and product dripped out of the hoses.

District Court Decision

THE DISTRICT COURT FOUND SHELL LIABLE AS AN ARRANGER BECAUSE:

- (1) it arranged the delivery of its product to the B&B facility and controlled the delivery process, and
- (2) Shell knew that incidental releases were inevitable and expected in the delivery process.¹⁴

“Useful Product”

Control Issue

The district court reached this decision even though Shell had sold to B&B a “useful product” — not a waste. In prior useful product cases, the Ninth Circuit and other courts have regarded control over the product at the time of release as a “crucial element” to liability.¹⁵ Ownership of the material at the time of release also has been an important factor.¹⁶ Both the district court and the Ninth Circuit, however, did not consider important the question of when ownership of the D-D transferred under the shipping term of “F.O.B. Destination.” Instead, they found that Shell had sufficient control over D-D at the time of delivery spills to be held liable for those spills. They held Shell liable based on its influence over the unloading process by selecting the common carrier and specifying the type of hoses and couplings that were used to transfer the chemical from the truck to the distributor’s tanks.¹⁷ The Ninth Circuit articulated a liberal standard for the “‘broader’ category of arranger liability” to include transactions “in which disposal of hazardous waste is a foreseeable byproduct . . . , but not the purpose.”¹⁸

“Disposal”

Before the Supreme Court, the government argued that because CERCLA defines “disposal” to include passive activity such as “spilling” and “leaking,” arranger liability does not require active or intentional conduct. The government asserted that a person arranges for disposal when he or she “know[s] that some disposal may occur as a collateral consequence of the sale itself.”¹⁹

Intent

The Supreme Court focused instead on the question of whether Shell had actually intended for D-D to be disposed. The Supreme Court addressed the meaning of “arrange,” stating: “In common parlance, the word ‘arrange’ implies action directed to a specific purpose.”²⁰ The Supreme Court acknowledged that the evidence at trial showed that Shell was aware that “minor, accidental spills occurred” during unloading, but found that the evidence did not support “an inference that Shell intended such spills to occur.”²¹ The Supreme Court reversed the Ninth Circuit and held that Shell was not an arranger.

Arranger Holding

THE SUPREME COURT ARTICULATED ITS “ARRANGER” HOLDING IN THE FOLLOWING PASSAGE:

“In order to qualify as an arranger, Shell must have entered into the sale of D-D with the intention that at least a portion of the product be disposed of during the transfer process”²²

CERCLA**High
Liability Bar****Government
Argument****Tenuous
Connection****District Court
Apportionment****Basis for
Apportionment**

With this one statement — sure to be cited in CERCLA defense briefs to come — the Supreme Court has set the bar high for broad or indirect arranger liability. Intent is difficult to prove, and probably will seldom be found in cases involving the legitimate sale of a product — new or used. We can expect that defendants also will try to extend this element of intent to the more traditional arranger cases involving the disposal of wastes. Certainly, the government and private plaintiffs in those cases will seek to limit the *BNSF* holding to the context of the sale of a useful product, and often that distinction will be appropriate. Cunning counsel, however, are sure to find other fact patterns (not involving the sale of a product) where the intent of the arranger should be relevant under the Supreme Court’s reasoning in this case.

Apportionment of Liability

As they have done since the early years of CERCLA litigation, EPA and the US Department of Justice argued here that liability under CERCLA is joint and several, except in very rare circumstances where the defendant can prove divisible harm. As noted, these agencies have cleaved to this position even though CERCLA nowhere states that liability is joint and several or even mentions the concept.

The district court found the harm to be divisible on the facts of this case. It seemed most compelled by the fact that B&B was the principal culprit and that the Railroads and Shell’s connections to the releases at the site were tenuous.

THE DISTRICT COURT APPORTIONED LIABILITY TO THE RAILROADS BASED ON THREE FACTORS:

- (1) The ratio of the Railroads’ property leased to B&B (0.9 acres) over the total area of the B&B site (4.7 acres) = 19 percent.
- (2) The ratio of the number of years B&B leased the Railroads’ property (13 years) over the years of B&B’s operations (28 years) = 46 percent.
- (3) The determination that only two out of three chemicals of concern at the site required remediation at the Railroads’ property and that those chemicals were responsible for “roughly two-thirds” of the site contamination = 66 percent. The court actually found that the Railroads’ parcel “could not have contributed to more than 10 percent of the volume or mass of the overall site contamination,” but it did not use this figure in its calculations.²³

These factors multiplied yielded a share of liability allocable to the Railroads of 6 percent, but the district court added a factor of 50 percent to allow for “calculation errors” — which produced a final allocation to the Railroads of 9 percent.²⁴ The court separately allocated to the Railroads a fixed amount that EPA had incurred to investigate releases on the Railroads’ property and all the future cost of paving the Railroads’ property.

The district court performed a similar computation to apportion liability to Shell. First the court assumed that an average of three gallons of D-D were spilled with each shipment. It multiplied this volume by an estimate of the number of shipments Shell sent to B&B to get an estimated spill volume of 1,863 gallons from D-D unloading. The court made similar assumptions and estimates to compute the total volume of D-D spilled at the site and computed a ratio of unloading spills to total D-D releases of 6 percent. The court then apportioned to Shell 6 percent of the liability for the site.²⁵ Interestingly, the court did not adjust this percentage to reflect the fact that D-D was only one of several chemicals released at the site, even though Shell was responsible only for D-D. The volume of other chemicals released at the site was completely omitted from the calculation.

On appeal, the Ninth Circuit agreed that CERCLA defendants can avoid joint and several liability by proving that the harm is divisible and that there is a reasonable basis for apportioning liability.²⁶ The court then examined the bases on which apportionment may occur. Looking first to the principles set forth in the Restatement (Second) of Torts § 433A (1976), the court concluded that apportionment under CERCLA must depart from the Restatement principles of causation, because CERCLA liability is based on status rather than causation.²⁷ The court agreed that liability at the B&B site probably is “capable of apportionment”²⁸ and even acknowledged that the factors considered by the district court might be appropriate bases for apportionment in some cases.²⁹ However, the court concluded that in this case the defendants had not proven a reasonable basis for apportionment and, therefore, were jointly and severally liable. The court suggested that to show a reasonable basis for apportionment the defendants would have to have kept records proving a “minor connection” to the contamination, stating: “Apportionment is the

CERCLA
<i>Perplexing Omission</i>
<i>Operator v. Owner Share</i>
<i>Orphan Shares</i>
<i>Paradox</i>
<i>Decision Impacts</i>
<i>Voluntary Cleanup Chill</i>
<i>Plaintiff Claims</i>
<i>Oregon Affects</i>

as high as it should have been. Since ownership is typically regarded as far less culpable than operation, however, even less than 50 percent should have been allocated to the owners as a group, and the Railroads should have paid for far less than 9 percent.

This perplexing omission of any discussion of apportionment between PRP classes is more than just an academic observation; it ties back to the question of what role equitable factors play. Other than through considerations of equity, one is challenged to imagine an objective basis for apportioning liability between an operator and an owner. The operator’s liability is closely tied to classic Restatement consideration of causation, whereas owner liability is entirely without consideration of causation. The Supreme Court did not have to face this confounding question on the facts of *BNSF*, but had the PRPs played a more active role in arguing apportionment before the district court,³⁷ this issue certainly would have come up. This logical omission leaves subsequent district courts to ponder how to apportion liability between classes of PRPs without using words like equity and fairness.

The Supreme Court’s opinion also raises questions of fairness with respect to orphan shares. In a purely objective analysis, the Supreme Court would have strived to make a fully even-handed apportionment between the Railroads and the orphan share. Instead, the Supreme Court omitted consideration of apportionment between classes and accepted possible errors in the calculation of the Railroads’ share because the district court had added a large margin of error to the final share. In this way, the Supreme Court necessarily saddled the Railroads with more than the share that would have been allocated to them using purely objective evidence and a true division of harm. While such an approach might have been justified by equitable factors or even CERCLA’s broad remedial purpose, the Supreme Court eschewed such considerations and created a paradox. Thus, *BNSF* stands for the proposition that divisibility of harm can leave a large orphan share, but that apportionment is to err toward over-apportionment to the viable PRPs (on a strictly objective basis without consideration of equitable factors).

What’s Next?

We can be sure that every attorney involved in a pending CERCLA case is reading and rereading *BNSF* to evaluate how it affects his or her case. We can anticipate creative attempts to extend the element of intent to arranger cases involving classic solid waste disposal in landfills, wastewater discharges and recyclable secondary materials. Probably more disruptive to pending litigation, however, will be vigorous efforts by all defendants to prove divisibility of harm to avoid joint and several liability, particularly where there is any potential for an orphan share.

BNSF is sure to chill the willingness of PRPs to voluntarily undertake cleanups with the hope of recovering contribution from other PRPs. The Ninth Circuit³⁸ and other federal courts have established that PRPs (including plaintiff PRPs) will be allocated a portion of any orphan share. Under *BNSF*, however, these same PRPs will see that they may avoid the orphan share by not cooperating with EPA in undertaking cleanup. If instead EPA undertakes the cleanup and pursues a PRP, the PRP can argue divisibility of harm to limit its liability for any share but its own. The PRP that can successfully argue divisibility and apportionment potentially can avoid not only the orphan share, but also the cost of seeking contribution from other PRPs for shares for which it otherwise might be held jointly and severally liable.

BNSF also may reduce the importance of whether a PRP plaintiff pursues other PRPs under CERCLA section 107(a) or 113(f). In recent litigation following the Supreme Court’s decisions in *Cooper Industries, Inc. v. Aviall Services, Inc.*³⁹ and *United States v. Atlantic Research Corp.*,⁴⁰ courts have struggled with whether a plaintiff PRP can pursue claims under section 107 where joint and several liability appeared to be the likely outcome or a plaintiff PRP is limited to contribution claims under CERCLA section 113 where equitable allocation could limit what the plaintiff could recover from any one defendant.⁴¹ By setting a low threshold for divisibility of harm and apportionment under section 107, *BNSF* diminishes the importance of this distinction between sections 107 and 113.

Finally, consider how this case affects proceedings under the Oregon Cleanup Law. Although the liability provisions of the Oregon Cleanup Law are loosely modeled after CERCLA and impose liability based mostly on status, the Oregon Cleanup Law does not impose liability on arrangers *per se*, so the arranger liability aspect of *BNSF* probably will not affect claims under the Oregon law. The Supreme Court’s reasoning with respect to divisibility of harm and apportionment, however, should be directly transferrable to claims under the Oregon Cleanup Law brought against owners and other liable parties under Oregon Revised Statutes (ORS) 465.255(1). In some states, mini-Superfund laws may expressly refer to joint and several liability and may do so in ways that suggest a departure from the Restatement concepts of divisibility of harm. In those states, plaintiffs are likely to rely heavily on state law to stifle defense arguments of divisibility. That strategy, however, should not succeed in Oregon.

CERCLA

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How *BNSF* will affect allocation of an orphan share in Oregon is less clear. ORS 465.257(1) governs contribution claims by liable PRPs against other PRPs. Similar to CERCLA § 113(f), ORS 465.257(1) provides for equitable allocation of liability between PRPs and lists equitable factors courts are to consider. ORS 465.257(2) addresses orphan share and gives the court discretion to allocate the orphan "equitable share to the other liable persons" on an equitable basis. Although this orphan share provision clearly applies to contribution suits, litigants may also assert that it should apply in cost recovery suits where an Oregon court follows *BNSF* to conclude that joint and several liability does not apply and costs should be apportioned. Such an interpretation would diminish the potential affect of *BNSF* in Oregon and encourage plaintiffs to pursue claims under Oregon law in preference to CERCLA.

Years ago, I speculated that CERCLA litigation would start winding down because the case law had become relatively well-established and the really big, complex sites had all been discovered. I failed to predict, however, that the courts would eventually temper the extreme rulings of CERCLA's adolescence and create new incentives to resist liability rather than cooperate with the government. Now that CERCLA is growing up, we have even more to litigate. And no, I will not predict the demise of joint and several liability under CERCLA generally, but *BNSF* provides the club to kill it in many CERCLA scenarios.

Endnotes appear on the next page.

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Superfund

Superfund is the common name for the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), a United States federal law designed to clean up abandoned hazardous waste sites. Superfund provides broad federal authority to clean up releases or threatened releases of hazardous substances that may endanger public health or the environment. The law authorized EPA to identify parties responsible for contamination of sites and compel the parties to clean up the sites. Where responsible parties cannot be found, the Agency is authorized to clean up sites itself, using a special trust fund.

EPA Cleanup Actions include:

Removal Actions. These are typically short-term response actions, where actions may be taken to address releases requiring prompt response.

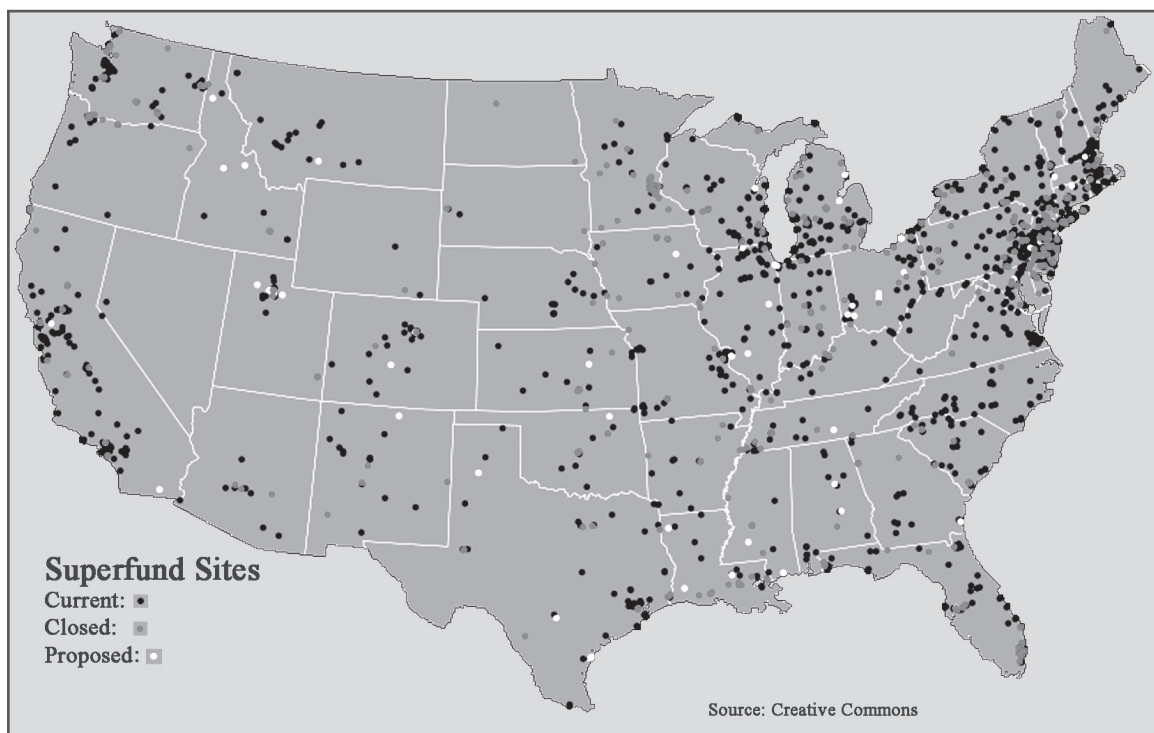
Removal actions are classified as: (1) emergency; (2) time-critical; and (3) non-time critical. Removal responses are generally used to address localized risks such as abandoned drums containing hazardous substances, contaminated surface soils posing acute risks to human health or the environment, etc.

Remedial Actions. These are usually more long-term response actions than a removal action. Remedial actions permanently and significantly reduce the risks associated with releases or threats of releases of hazardous substances that are serious but lack the time-criticality of a removal action, and include such measures as preventing the migration of pollutants and neutralization of toxic substances. These actions can be conducted only at sites listed on the EPA National Priorities List (NPL), in the United States and territories.

Source: Wikipedia

Superfund Sites

EPA estimates that one-in-four Americans lives within three miles of a hazardous waste site. Since 1980, EPA has since identified more than 47,000 hazardous waste sites potentially requiring cleanup actions and has placed some of the most seriously contaminated sites on its National Priorities List. Through fiscal year 2007, EPA had classified 1,569 sites, of which: 321 have been deleted because they no longer posed threats to human health or the environment; 713 have been declared construction complete, but not yet deleted; and 535 were not yet construction complete. Source: Government Accountability Office Report: GAO-08-841R Superfund Funding and Costs (July, 2008)



Source: Creative Commons

CERCLA**CERCLA Update Endnotes**

- 1 *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 945 (9th Cir. 2002) (defendant "may be held fully liable for the entire clean-up costs at a site, despite the fact that the defendant PRP was in fact responsible for only a fraction of the contamination").
- 2 *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983).
- 3 *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665 (D. Idaho 1986); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992); *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338 (9th Cir. 1992).
- 4 CERCLA § 113(h); *see, e.g., Solid State Circuits, Inc. v. U.S. EPA*, 812 F.2d 383, 386 n.1 (8th Cir. 1987).
- 5 *See, e.g., Barmet Aluminum Corp. v. Reilly*, 927 F.2d 289, 293 (6th Cir. 1991). The courts more recently have cracked the gate to constitutional challenges to CERCLA. *See Gen. Elec. v. EPA*, 360 F.3d 188 (D.C. Cir. 2004).
- 6 *EPA v. Sequa Corp. (In re Bell Petroleum Servs., Inc.)*, 3 F.3d 889, 897 (5th Cir. 1993).
- 7 *United States v. Burlington N. & Santa Fe Ry. Co.*, 479 F.3d 1113, 1127 (9th Cir. 2007). The court subsequently amended this opinion to delete all references to "super strict" CERCLA liability. *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 926 (9th Cir. 2008).
- 8 *United States v. Bestfoods*, 524 U.S. 51 (1998).
- 9 CERCLA § 9607(b)(3).
- 10 *BNSF*, slip op. at 6.
- 11 *Id.*
- 12 *United States v. Atchison, Topeka & Santa Fe Ry. Co.*, No. CV-F-92-5068 OWW et al., 2003 WL 25518047 (E.D. Cal. July 15, 2003).
- 13 2003 WL 25518047, at *4.
- 14 2003 WL 25518047, at *57.
- 15 *United States v. Shell Oil Co.*, 294 F.3d 1045, 1055 (9th Cir. 2002).
- 16 *Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688, 695 (9th Cir. 1992).
- 17 The district court reached this conclusion even though it found that "Shell intended that B&B should be responsible for handling D-D after the common carrier tank truck arrived at [the B&B facility]." 2003 WL 25518047, at *5.
- 18 520 F.3d at 948.
- 19 *BNSF*, slip op. at 11.
- 20 *Id.* at 10.
- 21 *Id.* at 12.
- 22 *Id.*
- 23 2003 WL 25518047, at *77.
- 24 *Id.*
- 25 *Id.* at *79.
- 26 520 F.3d at 934 (noting that this is first case in which Ninth Circuit has considered issue of apportionment of CERCLA liability).
- 27 *Id.* at 936-39.
- 28 *Id.* at 942.
- 29 *Id.* at 936.
- 30 *Id.* at 945-46.
- 31 *Id.* at 953.
- 32 *BNSF*, slip op. at 15 n.9.
- 33 The so-called "Gore factors" are equitable considerations for allocation of CERCLA liability set forth in an amendment Senator Gore proposed to CERCLA, but which was not included in the act. For a list of the Gore factors, *see* 2003 WL 25510047, at *84.
- 34 2003 WL 25510047, at *84.
- 35 *Id.* at *81.
- 36 *Id.* at *87.
- 37 At trial, the Railroads and Shell declined to present argument in support of any apportionment scheme. The defendants simply denied liability altogether. *Id.* at *70.
- 38 *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1302 (9th Cir. 1997).
- 39 543 U.S. 157 (2004).
- 40 127 S. Ct. 2331 (2007).
- 41 *See, e.g., W.R. Grace v. Zotos International*, ___ F.3d ___ (No. 05-2798-cv, 2d Cir, March 4, 2009)