

Chemical Waste Litigation Reporter

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HIGHLIGHTS

The most noteworthy decisions this month are the following:

- In *Sierra Club v. El Paso Gold Mines, Inc.*, No. 03-1105 (10th Cir. August 24, 2005), Judge Tymkovich, writing for the Tenth Circuit Court of Appeals, reversed summary judgment for a citizen suit plaintiff but held that a mine owner could be liable for leaching contaminants through a mine shaft on its property, even though it had never mined the site. Contaminants were released through the shaft, which represented a point source, so the violation was continuing as leachate continued to be released from the shaft. No affirmative action was necessary under section 402, because it focuses liability on the owner of a point source, not on any activity taken by the defendant. The ruling for plaintiff was reversed, though, because it had not conclusively established the link between the shaft and the releases.
- In *Browder v. The City of Moab*, Nos. 04-4198 & 4206 (10th Cir. October 14, 2005), Judge McKay, writing for the Tenth Circuit Court of Appeals, reversed and remanded a district court decision denying attorneys' fees in a RCRA citizen suit. The plaintiff had prevailed on only one of several counts and obtained some limited injunctive relief. The district court denied fees without explanation. The circuit court held that the success on one issue, combined with a judgment altering the defendant's behavior was sufficient to warrant some fee award. The case was remanded to determine the fees recoverable, which were to be limited to the issue on which plaintiff prevailed.
- In *State of Utah v. Kennecott Corporation*, No. 2:86CV902 (D. Utah September 29, 2005), Judge Greene of the federal district court for the District of Utah denied an individual's motion to intervene in and void an approved consent decree settling natural resource damages claims. The motion,

(continued on page 695)

Contents

Page

FEDERAL AND STATE HAZARDOUS SUBSTANCE LITIGATION:

ALLOWING A REMEDIATION
CONTRACTOR TO ASSUME SITE
LIABILITIES – DISCUSSION OF
*UNITED STATES V. MATTIACE
INDUSTRIES, INC.* 696

RECENT DECISIONS 699

RECENT DEVELOPMENTS 731

DOCUMENTS

Opinion, *Sierra Club v. El Paso
Gold Mines, Inc.* 732

Opinion, *Browder v. The City of Moab* 746

Opinion, *State of Utah v.
Kennecott Corporation* 752

Opinion, *U.S. v. Board of County
Commissioners of Hamilton County* 760

Opinion, *Environmental Conservation
Organization v. Bagwell* 778

Opinion, *Aggio v. Aggio* 782

Opinion, *Atlantic Research
Corporation v. United States* 787

Opinion, *In re FV Wire and
Steel Company* 791

**Federal and State Hazardous Substance Litigation:
Allowing a Remediation Contractor To Assume Site Liabilities –
Discussion of *United States v. Mattiace Industries, Inc.***

by

Stanley N. Alpert*

Introduction

A new method of achieving settlements at federal and State Superfund sites has emerged in the past few years. It involves the following creative solution: the responsible parties fund a remediation contractor in advance to complete the foreseeable cleanup activities. That contractor not only assumes full responsibility to complete the cleanup, it may actually join on the Consent Decree as an additional fully liable party under CERCLA. The contractor bears the risk of cost overruns and may see rewards if it is able to achieve the cleanup under EPA or State supervision at reduced costs. In addition, the responsible parties may decide to insure cost overruns by funding an insurance policy to cover cost overruns, and such policy may name EPA or the State as one of the beneficiaries of the policy.

EPA Consent Decree: *United States v. Mattiace Industries, Inc.* (E.D.N.Y. 2003)

In June 2003, the United settled a civil environmental CERCLA case with 84 parties to

fund and complete the cleanup at the Mattiace Petrochemical Company Superfund site in Glen Cove, Long Island, New York.

The settlement, valued at approximately \$15 million, included \$1.3 million to reimburse EPA for past costs at the site. \$200,000 went to State of New York, the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration to fund restoration projects for natural resource damages. The balance covered the ongoing long-term remedial action for groundwater (plus a small amount of soil cleanup remaining) and its operation and maintenance.

Mattiace was a former chemical solvent distribution company in Glen Cove, New York, which operated from the early 1960s through 1987. From 1974 to 1983, the company also operated the M&M Drum Company at the site, where it cleaned and reconditioned thousands of drums containing industrial solvent residues. In September of 1986, a Nassau County grand jury handed up a 21-count charge against the company and three of its officers, and there were both guilty pleas and convictions after trial for different corporate officers and the company for unlawful possession and disposal of hazardous wastes. In 1987, after litigation with the New York State and EPA concerning numerous violations of waste-handling and environmental laws, the facility closed, and in 1988, EPA was called in to remove more than 120,000 gallons of liquid hazardous industrial solvents. In June 2000, EPA completed construction of an integrated facility on the

* Stanley N. Alpert is a partner with the Alpert Firm in New York. From 1995-2003, Alpert held the role as Chief of Environmental Litigation for the U.S. Attorney's Office, Eastern District of New York. This article was previously prepared and presented at the June 22-25, 2005, ALI-ABA Course of Study entitled "Environmental Litigation." Reprinted with permission from the © 2005 ALI-ABA. All rights reserved. Further duplication without permission is prohibited.

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Mattiace site to clean up an estimated 28,000 cubic yards of soil and one-half billion gallons of groundwater throughout its lifetime. The groundwater treatment had the potential to continue for another 25 years.

By the time of the settlement, Mattiace Industries—which manufactured and distributed the solvents—was defunct, and the responsible individual corporate officers were without substantial assets that the government could pursue. In seeking viable responsible parties, the government relied upon the drum cleaning operation at the site. It assessed “arranger” liability as against companies that either returned drums in which they purchased solvents to the site for cleaning, or made separate arrangements to have drums cleaned at the site. Each drum contained a residue of hazardous chemicals that was rinsed out and disposed of on the land.

Courts have allowed for arranger liability in similar circumstances. *United States v. Cello-Foil Products, Inc.*, 100 F.3d 1227 (6th Cir. 1996).¹

¹ In *Cello-Foil*, the district court granted summary judgment in favor of the defendants on the issue of arranger liability under CERCLA, ruling that the government had failed to establish that the purpose of the defendants in returning to another party drums that contained some amount of hazardous substances was to arrange for the disposal of those hazardous substances. The Court of Appeals reversed and remanded, ruling that although “the requisite inquiry is whether the party intended to enter into a transaction that included an ‘arrangement for’ the disposal of hazardous substances . . . [t]he intent need not be proven by direct evidence, but can be inferred from the totality of the circumstances.” *Id.* at 1231.

Courts in other circuits, however, have rejected the Cello-Foil intent requirement, holding instead that while intent, knowledge of disposal, and ownership of the substances disposed of are relevant factors, no one factor is determinative of whether there has been an arrangement for disposal, and all of the facts in a particular case must be considered by the trier of fact. *See, e.g., South Florida Water Management District v. Montalvo*, 84 F.3d 402, 406-07 (11th Cir. 1996); *United States v. TIC Investment Corp.*, 68 F.3d 1082, 1087-89 (8th Cir. 1996) (finding of arranger liability requires showing of participation in or exercise of control over activities having nexus with disposal; specific intent not required); *United States v. Vertac Chemical Corp.*, 966 F. Supp. 1491, 1508, fn. 28

Nonetheless, with in excess of eighty responsible companies, each of which made a relatively small contribution to the overall site contamination, it would have been difficult to find a responsible party or group of parties to step up and assume oversight of the actual cleanup. The new mechanism of having an environmental contractor join the Consent Decree, in this case backed by an insurance policy, assisted the responsible parties and the government to move toward a settlement.

TRC Companies Inc./TRC Engineers Inc., an environmental contractor, was hired by the settling parties to perform the actual cleanup. TRC signed the Consent Decree and accepted responsibility, along with the other parties, for carrying out the cleanup work although it was not otherwise liable for work at the site. In addition, the settling parties contracted with an insurance carrier, Commerce and Industry Insurance Company, a member company of American International Group, Inc., for cleanup funding and to insure the risk of cost overruns, with EPA named as one of the beneficiaries. The Consent Decree provided that EPA will look for performance to TRC first, but EPA does retain its enforcement discretion to pursue other Consent Decree signatories in the event TRC fails to perform. There are also provisions for replacing TRC in the event of a default. Attached hereto are relevant excerpts from the Mattiace Consent Decree.

Although TRC did not have pre-Consent Decree liability at the Site, the government determined that the Attorney General could, in her inherent authority to conduct and supervise litigation, authorize this additional party to join the Consent Decree and act as an additional responsible party.

28 U.S.C. §§ 516, 519. The Attorney General’s discretionary authority includes the power to enter into consent decrees and settlements. *Swift & Co. v. United States*, 276 U.S. 311, 331-32 (1928).

(E.D. Ark. 1997); *see also General Electric Co. v. Aamco Transmissions*, 962 F.2d 281, 286-87 (2d. Cir. 1992); *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1199 (2d. Cir. 1992).

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This power may be limited by Congress, but such limitation requires a clear and unambiguous directive from Congress. *Marshall v. Gibson's Prods., Inc.*, 584 F.2d 668, 676 n.11 (5th Cir. 1979). See also *United States v. Hercules*, 961

F.2d 796 (8th Cir. 1992) (the court found that CERCLA section 122 is an affirmative grant of settlement authority as opposed to any limitation on the power of the Attorney General to settle litigation).