CERCLA: "Owner" Means Owner When Cleanup Costs Are Incurred, Not When Reimbursement Is Sought

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The authors examine a recent federal circuit court ruling that will provide clarity to state agencies or other entities that engage in the remediation of contaminated lands.

The U.S. Court of Appeals for the Ninth Circuit Court has recently held that under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA," commonly referred to as the "Superfund" law), the owner of a contaminated site when cleanup costs are incurred is the "current owner" for liability purposes.[1] The decision will provide clarity to state agencies or other entities that engage in the remediation of contaminated lands. In the event that a landowner refuses to accept responsibility for cleanup, the entity that performed the cleanup can easily determine whom to sue for repayment.

Background

This case arose when the Hearthside Residential Corporation purchased a tract of wetlands in Huntington Beach, California. When Hearthside purchased the land, it was aware that the tract was contaminated with polychlorinated biphenyls ("PCBs"), a toxic chemical regulated under CERCLA. The tract was adjacent to several residential parcels owned by other entities, and the California Department of Toxic Substances Control ("DTSC") alleged that PCBs had migrated from Hearthside's tract to the residential parcels, contaminating them as well. Hearthside agreed to remediate its own tract of land, but refused to clean the PCBs from the residential parcels. Despite its assertion that Hearthside bore responsibility for cleanup, DTSC employed a third party to remediate the residential sites.

Hearthside had purchased the contaminated property in 1999. In 2002, DTSC and Hearthside agreed that Hearthside would clean its tract, but disagreed about the residential property. DTSC paid for the residential sites' remediation that took place between July 2002 and October 2003. Hearthside finished cleaning its tract in December 2005, DTSC certified it clean, and Hearthside sold it that same month. In October 2006, DTSC brought a complaint against Hearthside seeking to recover the costs of the residential site remediation. Hearthside disputed liability, claiming that "owner and operator" status was determined when the suit was filed—10 months after it had sold the land—not when it owned the property

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three years prior, when the costs to remediate were incurred.

"Current Owner"

This is an important issue for landowners like Hearthside, since current owners are by definition responsible parties under CERCLA,[2] and the law imposes strict liability on current owners of contaminated sites. Accordingly, if Hearthside were found to be the owner of the site, it would bear responsibility for cleanup costs associated with the contamination of its own and any other land to which the contaminants had migrated. Though it could sue previous owners or polluters for contribution towards payment for remediation, it would be saddled with the need to do so (and the costs in money and time associated with such suits). For these reasons, Hearthside sought to avoid definition as a current owner, which would allow it to escape liability.

Hearthside was not successful. The district court granted partial summary judgment to DTSC, determining that Hearthside was the owner of the tract for CERCLA liability purposes because it was the owner when response costs were incurred. The court certified its finding for immediate appeal, and the Ninth Circuit reviewed the decision on this interlocutory basis. The Ninth Circuit agreed with the lower court and affirmed its judgment, employing statutory construction to bolster its reasoning in the absence of substantive precedent.

Circuit Court's Decision

Seeing that the statutory language of CERCLA provided no guidance in this area, the court gave three reasons for its finding that owners at the time when response costs are incurred are rightfully considered the "owners" responsible for remediation. First, the court found that defining owners as "owners-at-cleanup" best meshed with statute of limitations contained in CERCLA, which starts running when a remediation action begins. Since the statute of limitations is intended to give defendants "the protections of predictability and promptness,"[3] the court reasoned that it only made sense to apply it to the site's owner when the statute began to run. In so doing, the statute would apply to the party with the evidence to defend against a claim, which is also the party most in need of the statute's protections. The court noted that finding the opposite would allow the owners of remediated sites to quickly sell them before the CERCLA statute of limitations began to run—subjecting a later owner with no information about the contamination to liability. Such a finding, according to the court, would be an "unwise and untoward result."

Second, the court considered the purposes of CERCLA, particularly its fundamental goal of encouraging timely cleanup of hazardous waste sites. The court found that Hearthside's position provided every incentive to a landowner to delay remediation until it could sell the land and transfer CERCLA liability. Accordingly, the court ruled that any delay an owner might manufacture to give it more time to sell the land contravened the purpose of CERCLA. Noting that Hearthside's argument did just that, the court rejected it in favor of DTSC's position that owners-at-cleanup are owners for CERCLA purposes.

Lastly, the court noted that another important purpose of CERCLA is to encourage early settlement between responsible parties and environmental regulators in order to shift energies away from litigation and towards the most expeditious remediation possible.

CERCLA's idea that owners and regulators should agree to "fix it before the courts get involved" fundamentally undermined Hearthside's position that a lawsuit had to be filed before one can determine the responsible owner. The court also reasoned that it is preferable that the owners during cleanup be liable because that gives those parties the ability to influence the manner of—and, to some degree, the costs incurred from—remediation. CERCLA seeks to include the owners in the technical aspects of cleanup planning, and the court held that determining ownership at the time cleanup starts best serves that goal.

The court rejected Hearthside's arguments that ascertaining the date at which cleanup starts would be difficult, and that using the date of lawsuit would be clearer. It found that the above reasons outweighed the possibility of hard-to-determine cleanup start dates, and noted that courts already resolve questions surrounding relevant cleanup dates in many CERCLA actions. It held that Hearthside was indeed the owner of the contaminated tract which DTSC alleged produced the pollution under the residential parcels, and remanded the case to the district court to determine if, and to what degree, Hearthside would be responsible for those parcels' remediation.

Conclusion

In the absence of other precedent, the Ninth Circuit's ruling represents the first holding that owners of contaminated sites when the government or other entities incur costs related to those sites' remediation will be considered current owners for CERCLA purposes, and will thus be "responsible parties" from whom the remediating agencies can recover costs. In light of the decision, site owners now face strong incentives to work directly with environmental agencies to cleanup the sites they own, or to remediate other lands affected by pollution originating from their property. Unless other facts about the ownership or the source of pollution are in question, property owners should expect state agencies to press them for cooperation and contributions when remediating sites polluted by chemicals migrating from their property. The issue of responsibility for costs is now much clearer.

NOTES:

[1]California Dep't of Toxic Substances Control v. Hearthside Residential Corp., No. 09-55389 (9th Cir. July 22, 2010).

[2]*See* 42 U.S.C. § 9607(a)(1).

[3]Quoting *United States v. Hagege*, 437 F.3d 943, 955 (9th Cir. 2006).