

Municipal Discharger of Stormwater Runoff Liable Under CERCLA

Ruling affirms arranger liability for stormwater contamination

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Each year billions of gallons of municipal stormwater runoff are discharged to the Nation's waters. Those discharges often contain significant loadings of key contaminants: PCBs, PAHs, heavy metals. In many instances, such municipal discharges have caused or contributed to sediment contamination requiring remediation under CERCLA.

On June 7, United States District Court Judge Robert J. Bryan issued an order finding that the Washington State Department of Transportation ("WSDOT") was liable to EPA under CERCLA for arranging the disposal of contaminated stormwater runoff into the Thea Foss Waterway directly adjacent to downtown Tacoma, Washington. *United States v. WSDOT*, No. C08-5722, slip op. (W.D. Wash. June 7, 2010). The Waterway is part of the Commencement Bay Nearshore/Tideflats Superfund Site, which, in 1981, was listed by EPA as one of the ten highest priority hazardous waste sites in the United States. The ruling is significant in several respects.

First, Judge Bryan's decision affirms that municipal operators of stormwater systems, such as WSDOT, may be held liable under CERCLA for the disposal of hazardous substances contained in stormwater runoff. Liability arises by virtue of a municipality's control over the design, location and operation of drainage systems whose function is to collect highway runoff and dispose of it into nearby water-bodies. In this case, WSDOT knew for years that the runoff it was discharging contained hazardous substances.

Second, the decision rejects previous authority suggesting that municipalities are not responsible under CERCLA for preventing or treating contaminated stormwater runoff from entering the environment. Municipalities have argued, as WSDOT did here, that operators of stormwater systems are not arrangers for disposal of hazardous substances because they lack control over what enters the stormwater system. See *Carson Harbor Village, Ltd. v. Unocal Corp.*, 287 F. Supp.2d 1118, 1194 (C.D. Cal. 2003).

Judge Bryan rejected this cramped interpretation of CERCLA, and succinctly ruled:

WSDOT arranged for disposal of hazardous substances. It is undisputed that WSDOT designed the drainage systems at issue. Designing is an action directed to a specific purpose. The purpose was to discharge the highway runoff into the environment. WSDOT had knowledge that the runoff contained hazardous substances and there was an actual release of the hazardous substances into the environment. WSDOT argues that it did not have control of the hazardous substances. However, it did have control over how the collected runoff was disposed of. WSDOT did design the drainage system and, as noted by the U.S., WSDOT has the ability to redirect, contain, or treat its contaminated runoff. For the foregoing reasons, WSDOT is an arranger under 42 U.S.C. § 9607(a)(3).

Slip op. at 8 (emphasis added).

Having found WSDOT to be a liable party under CERCLA, the court declined to address the issue of whether WSDOT was an owner or operator under 42 U.S.C. § 9607(a)(1) and (2). However, Ninth Circuit precedent likely also supports a finding of operator liability in this case. See *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1342-43 (9th Cir. 1992).

The court left two issues unresolved. First, the court declined to rule on whether WSDOT is exempt from CERCLA liability under the federally permitted release provision in 42 U.S.C. § 9607(i) by virtue of WSDOT's NPDES permit issued under the Clean Water Act, and its Municipal Permit issued to the larger Western Washington municipalities in 1995. The court ruled that there is a dispute as to whether WSDOT has operated in compliance with the permits. And, there is a question of the scope of the permits, whether there were releases outside that scope, and whether the injury is divisible. Second, the court declined to rule on WSDOT's defense that contaminants in the stormwater are caused by third parties over whom it has no control. See 42 U.S.C. § 9607(b). The court ruled that there is a question of whether WSDOT exercised due care with respect to hazardous material.

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