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## Win the War but Lose the Battle: Is the Federal Government Liable for Waste Resulting from Private Production of Contracted for WWII-Era War Materials? U.S. v. Shell Oil Co.

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## CASENOTE

### WIN THE WAR BUT LOSE THE BATTLE: IS THE FEDERAL GOVERNMENT LIABLE FOR WASTE RESULTING FROM PRIVATE PRODUCTION OF CONTRACTED FOR WWII-ERA WAR MATERIALS?

*U.S. v. Shell Oil Co.*<sup>1</sup>

#### I. INTRODUCTION

In *U.S. v. Shell Oil Co.*, the Ninth Circuit determined the federal government's liability as an arranger under CERCLA for pollution that was created by private parties acting under a contract with the federal government during World War II. The case is unique because of the powers of the War Production Board during the war to compel production and allocate the resources necessary to properly dispose of hazardous by-products.

This case is important not only because of the amount of pollution, and the CERCLA liability that follows, from other World War II and cold-war era military and private defense contractor facilities, but because of the minimal existing case law that exists in this area.

#### II. FACTS AND HOLDING

This appeal was the culmination of three lawsuits<sup>2</sup> involving liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>3</sup> The plaintiffs, the United States and the State of California, sued the defendant oil companies<sup>4</sup> for cleanup of a Superfund site near Fullerton, California contaminated with hazardous waste resulting from the production of aviation gasoline during World War II.<sup>5</sup> The oil companies counterclaimed against the United States alleging that the United States was liable for the costs.<sup>6</sup> The lawsuits were brought in the Central District of California in 1993, 1995, and 1998, respectively.<sup>7</sup>

Aviation gasoline (avgas) is a blend of petroleum distillates and chemical additives, the most prevalent being "alkylate," the production of which requires the use of sulfuric acid as a catalyst.<sup>8</sup> After its use in the "alkylation" process the sulfuric acid was significantly less pure and could either be reprocessed for reuse or could be dumped.<sup>9</sup> Spent sulfuric acid could also be used to improve the effectiveness of other avgas additives and to purify other refinery products.<sup>10</sup> Spent sulfuric acid used in other refinery processes produced waste

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<sup>1</sup> 294 F.3d 1045 (9th Cir. 2002), *cert. denied* 123 S.Ct. 850.

<sup>2</sup> *U.S. v. Shell Oil Co.*, 841 F. Supp. 962 (C.D. Cal. 1993); *U.S. v. Shell Oil Co.*, 1995 U.S. Dist. LEXIS 19778 (C.D. Cal. 1995); *U.S. v. Shell Oil Co.*, 13 F. Supp. 2d 1018 (C.D. Cal. 1998).

<sup>3</sup> 42 U.S.C. § 9601 *et seq.* (2000).

<sup>4</sup> Shell Oil Co.; Union Oil Co. of California; Atlantic Richfield Co.; Texaco, Inc.

<sup>5</sup> *Shell Oil Co.*, 294 F.3d at 1045.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 1049.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 1050.

known as “acid sludge.”<sup>11</sup> During World War II, the production of avgas increased dramatically, rising from roughly 40,000 barrels per day in 1941 to 514,000 barrels per day in 1945.<sup>12</sup> Correspondingly, sulfuric acid was consumed at a much higher rate, rising from 24 million pounds in 1941 to 120 million pounds in 1944.<sup>13</sup> Because of the large increase in avgas production needed for World War II, spent sulfuric acid and acid sludge were created from alkylation and other processes in quantities far greater than ever before.<sup>14</sup>

During World War II, the United States exercised significant control over the avgas production process and its involved industries.<sup>15</sup> The War Production Board (WPB) was established in 1942 and created a nationwide ranking system to identify scarce goods, prioritize their use, and facilitate their creation.<sup>16</sup> The Petroleum Administration for War (PAW) centralized the government’s petroleum-related activities, made policy determinations relating to the allocation of resources and the building of facilities, and had the authority to issue production orders to refineries.<sup>17</sup> Although these agencies had the authority to require the oil companies to take specific actions and could seize the refineries if needed, they relied almost exclusively on contractual agreements to purchase avgas.<sup>18</sup>

The government attempted to maximize the production of avgas through the Planned Blending Program, in which it assisted the oil companies’ refineries in exchanging and blending the various required components to maximize avgas production.<sup>19</sup> The program did not exercise direct control over the production of avgas components, controlling only their exchange and use after their production.<sup>20</sup> Throughout the war the oil companies designed and built their own facilities, maintained private ownership of the facilities, and managed their own refinery operations.<sup>21</sup>

During World War II, there was a lack of available rail transport to ship spent acid and acid sludge from the refineries to other facilities for reprocessing or reuse.<sup>22</sup> On two occasions the government refused to allocate materials to build two acid reprocessing facilities in California.<sup>23</sup> By late 1944 and 1945, the oil companies were producing so much spent acid and acid sludge that they could not reuse it all in their own refineries and existing facilities for reprocessing were incapable of handling the volume of the waste.<sup>24</sup> When the volume of acid by-product threatened the production of avgas at the refineries the companies dumped it.<sup>25</sup>

The government was aware during World War II that avgas production results in acid wastes and that increases in avgas production corresponded to increased acid wastes.<sup>26</sup> The government did take some actions to assist with waste disposal.<sup>27</sup> In 1945, the government leased a large storage tank in southern California.<sup>28</sup> The government never specifically ordered or approved the dumping of avgas wastes by the oil companies, and

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1049.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1050.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1050-51.

<sup>23</sup> *Id.* at 1051.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

no evidence exists suggesting the United States was aware of disposal contracts between the oil companies and McColl.<sup>29</sup>

The dumping site involved in this litigation is named the McColl site, named after the man who contracted<sup>30</sup> to receive spent acid and acid sludge from refineries near Los Angeles.<sup>31</sup> He began accepting the waste and dumping it in sumps on his property in 1942 and continued to accept waste until 1945.<sup>32</sup> In the 1950's, McColl, with the assistance of the oil companies, filled and capped the waste sumps to allow residential development nearby, despite the existence of 100,000 cubic yards of acid waste.<sup>33</sup> The government began removing the waste in 1990 at an eventual cost of nearly \$100 million.<sup>34</sup> This action was an attempt to recover those costs under CERCLA.<sup>35</sup>

The United States District Court for the Central District of California determined that about 12% of the waste at the McColl site was spent sulfuric acid from the alkylation process and about 5.5% was acid sludge that resulted from the treatment of government owned benzol.<sup>36</sup> Of the remaining waste, most was acid sludge that resulted from spent sulfuric acid used for non-avgas related processes.<sup>37</sup>

The trial Court granted summary judgment for the United States and California on the issue of whether the oil companies were subject to arranger liability under CERCLA, specifically 42 U.S.C. § 9607(a)(3).<sup>38</sup> The District Court also rejected the oil companies' claims that they were exempt for contamination on the grounds that the contamination was caused by an "act of war," a CERCLA defense under 42 U.S.C. § 9607(b)(2).<sup>39</sup> On cross-motions for summary judgment, the District Court ruled that the United States was liable as an arranger under 42 U.S.C. § 9607(a)(3) for non-benzol wastes dumped at the site.<sup>40</sup> The United States conceded its status as an arranger for the benzol-wastes that resulted from the processing of government-owned benzol.<sup>41</sup> The District Court also held that the United States had waived its sovereign immunity to suit under 42 USC § 9620(a)(1).<sup>42</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> No contracts were found between Eli McColl and any defendant other than Shell, but the parties stipulated that the McColl site contains waste from all parties. *Id.* n.2.

<sup>31</sup> *Id.* at 1051.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1048.

<sup>36</sup> *Id.* at 1051.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1048. "[A]ny 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, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . . shall be liable for . . . all costs of removal or remedial action incurred by the United States Government...." 42 U.S.C. § 9607(a)(3)-(4)(A).

<sup>39</sup> *Shell Oil Co.*, 294 F.3d at 1048. "There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by . . . an act of war." 42 U.S.C. § 9607(b)(2).

<sup>40</sup> *Shell Oil Co.*, 294 F.3d at 1048.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* "Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title." 42 USC § 9620(a)(1) (2000).

At the conclusion of the full trial regarding the allocation of the cleanup costs, the District Court allocated 100% of the cleanup costs for the non-benzol waste to the government based on several factors.<sup>43</sup> First, the cleanup costs were properly seen as part of the war effort for which the American public itself should pay.<sup>44</sup> The second factor relied on by the District Court was the general refusal of the United States to make tank cars available to the oil companies to transport the waste to northern California for reprocessing.<sup>45</sup> The third fact relied on by the District Court was the refusal of the United States to allocate resources to build reprocessing plants.<sup>46</sup> In a later unpublished order, the District Court ruled that 100% of the cleanup costs for the benzol waste should be allocated to the United States for the same reasons as the non-benzol waste.<sup>47</sup>

The United States appealed, arguing the District Court erred in (1) ruling that 42 U.S.C. § 9620(a)(1) waives its' sovereign immunity; (2) ruling the United States is liable as an arranger for the non-benzol waste under 42 U.S.C. § 9607(a)(3); and (3) allocating 100% of all cleanup costs to the United States under 42 U.S.C. § 9613(f)(1).<sup>48</sup> The oil companies cross-appealed, arguing that the District Court erred in dismissing their claim that they are exempt from CERCLA liability under the "act of war" defense in 42 U.S.C. § 9607(b)(2).<sup>49</sup> The State of California appealed only the "act of war" decision.<sup>50</sup>

The Ninth Circuit ruled as follows: (1) the court affirmed the district court's decision waiving the sovereign immunity of the United States; (2) the court reversed the district court's holding that the United States is liable as an arranger for non-benzol wastes; (3) accordingly, the United States' appeal as to the apportionment of the cleanup costs associated with the non-benzol waste was moot and all costs associated with its cleanup are to the defendant- appellant oil companies; (4) the court upheld the district court's apportionment of all benzol-related costs to the United States; and (5) the court upheld the district court's ruling that the oil companies are not immune under the "act of war" defense.<sup>51</sup>

### III. LEGAL BACKGROUND

#### A. CERCLA and Sovereign Immunity

The United States, as sovereign, is immune from suit unless it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.<sup>52</sup> Furthermore, a waiver of the United States' sovereign immunity cannot be implied; it must be "unequivocally expressed in statutory text."<sup>53</sup> Additionally, a waiver of the federal government's sovereign immunity must be strictly construed in favor of the United States.<sup>54</sup> Limitations and conditions upon which the federal government consents to be sued must be strictly observed and exceptions thereto are not to be implied.<sup>55</sup>

<sup>43</sup> *Shell Oil Co.*, 294 F.3d at 1060.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1048.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Shell Oil Co.*, 294 F.3d at 1048-49.

<sup>52</sup> *U.S. v. Sherwood*, 312 U.S. 584, 586 (1941).

<sup>53</sup> *Lane v. Pena*, 518 U.S. 187, 192 (1996).

<sup>54</sup> *U.S. v. Williams*, 514 U.S. 527, 531 (1995).

<sup>55</sup> *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981).

There is no question that the United States can be held liable under CERCLA. The Supreme Court interpreted the language of 42 U.S.C. § 9620(a)(1)<sup>56</sup> as an unambiguous waiver of the United States' sovereign immunity in *Pennsylvania v. Union Gas Co.*,<sup>57</sup> holding that the waiver of the Federal Government's immunity from suits for damages under § 120(a)(1) of CERCLA, as set forth in 42 U.S.C. § 9620(a)(1), "is doubtless an 'unequivocal expression' of the Federal Government's waiver of its own sovereign immunity, since [the Supreme Court could not] imagine any other plausible explanation for this unqualified language."<sup>58</sup>

The question at issue was whether this abrogation of its sovereign immunity extended to cleanup costs related to non-federal facilities. The two circuit courts considering the issue of whether the sovereign immunity abrogation contained in § 9620(a)(1) is limited to instances where the government has undertaken non-governmental activities have found that the abrogation is coextensive with the scope of liability imposed by 42 U.S.C. § 9607.<sup>59</sup>

The Third Circuit, in *FMC Corp. v. U.S. Dept. of Commerce*, was confronted by an argument by the United States that the abrogation does not extend to federal regulatory actions that a non-governmental entity could not undertake.<sup>60</sup> The court, in concluding that is liable when the government engages in activities that would make a private party liable if the private party engaged in those types of activities, identified three justifications for its decision relevant to the issue at hand.<sup>61</sup> First, the court stated that its decision to extend the abrogation is consistent with its CERCLA statutory interpretation approach, taking the plain language of the statute to mean what it says.<sup>62</sup>

Second, the court argued that the narrow interpretation advocated by the government would be "inconsistent with CERCLA's broad remedial purposes, most importantly its essential purpose of making those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for

<sup>56</sup> "Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title." 42 U.S.C. § 9620(a)(1).

<sup>57</sup> 491 U.S. 1 (1989). Overturned on other grounds in *Seminole Tribe v. Fla.*, 517 U.S. 44 (1996) (overruling its conclusion that Congress has the power under the Commerce Clause to abrogate states' sovereign immunity.)

<sup>58</sup> *Id.* at 10.

<sup>59</sup> *Shell Oil Co.*, 294 F.3d at 1053 (citing *East Bay Mun. Util. Dist. v. U.S. Dept. of Commerce*, 142 F.3d 479, 482 (D.C. Cir. 1998) and *FMC Corp v. U.S. Dept. of Commerce*, 29 F.3d 833 (3rd Cir. 1993). The scope of liability under 42 U.S.C. § 9607 is such: "Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section-(1) the owner and operator of a vessel or 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, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title." 42 U.S.C. § 9607(a).

<sup>60</sup> 29 F.3d 833, 839 (3rd Cir. 1994).

<sup>61</sup> *Id.* at 840.

<sup>62</sup> *Id.*

remedying the harmful conditions they created.”<sup>63</sup> The court stated that in light of CERCLA’s purposes, the United States should be made to internalize the cleanup costs that its actions impose on society and the environment.<sup>64</sup>

Third, the court examined the enumerated defenses to liability contained in § 9607(b), which did not contain the “regulatory” exception to liability asserted by the government.<sup>65</sup>

In *East Bay Mun. Util. Dist. v. U.S. Dept. of Commerce*, the D.C. District Court was confronted by an argument by the United States that the government would be liable when it exercised the sort of direct and detailed control that renders a party an operator through contract and property arrangements but not when it exercised identical control powers through coercive, administrative measures.<sup>66</sup> In rejecting the narrow construction of the sovereign immunity waiver the court discussed three relevant justifications.<sup>67</sup> First, the court stated that the language of §9620(a)(1) does not on its face suggest a distinction between the exercise of private and governmental powers.<sup>68</sup> Second, the court identified that CERCLA’s strong tendency to focus on the substance of the entity’s activities, rather than their form, is contrary to a narrow interpretation.<sup>69</sup> The court noted that the disregard for the formal relationships between the potentially responsible party and the facility is manifest in the very imposition of liability upon the category of “operators,” whose role is defined functionally, not in terms of “the legal structure of ownership.”<sup>70</sup> Finally, the court noted that 42 U.S.C. § 9607(d)(1) “confers a defense on ‘all persons’ ‘for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan,’ but does ‘not preclude liability for costs or damages as the result of negligence.’”<sup>71</sup> The court stated that as it appears that such activities are primarily or exclusively governmental, the creation of the defense suggests a congressional assumption that immunization of specific and purely governmental activities required a specific provision.<sup>72</sup> However, the D.C. Circuit expressly noted that they do not rely at all on the argument that CERCLA’s remedial nature does not warrant a broad governmental nature, noting the Circuit’s expressed doubts about the canon that remedial statutes are to be construed broadly.<sup>73</sup>

However, this view is not unanimous. At least one District Court has ruled that §9620(a) is not a waiver of sovereign immunity. The U.S. District Court for the District of South Carolina held that CERCLA contemplates that a governmental agency may be held liable under its provisions if the agency did indeed act as an owner, operator, generator, or transporter of hazardous substances, but that § 9620(a), however, has not generally been read as a waiver of sovereign immunity.<sup>74</sup>

<sup>63</sup> *Id.* (quoting *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3rd Cir. 1993)).

<sup>64</sup> *FMC Corp.*, 29 F.3d at 840-41.

<sup>65</sup> *Id.* at 841.

<sup>66</sup> 142 F.3d 479, 482 (D.C. Cir. 1998).

<sup>67</sup> *Id.* at 482-83.

<sup>68</sup> *Id.* at 482.

<sup>69</sup> *Id.* at 482-83.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 483.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 484. See *Ober United Travel Agency, Inc. v. U.S. Dept. of Labor*, 135 F.3d 822, 825 (D.C. Cir. 1998).

<sup>74</sup> *Richland-Lexington Airport Dist. v. Atlas Properties, Inc.*, 854 F. Supp. 400, 414 (D.S.C. 1994). See also *U.S. v. Western Processing Co.*, 761 F. Supp. 725, 728 (W.D.Wash. 1991); *B.R. Mackay & Sons v. U.S.*, 633 F. Supp. 1290, 1296 n. 9 (D. Utah 1986).

## B. CERCLA Arranger Liability

Under 42 U.S.C. § 9607(a), a party can be held liable for the costs of cleaning up a hazardous waste site if that party, by contract, agreement, or otherwise arranged for the disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances.<sup>75</sup>

There is general agreement among courts that a private party who contracts for the disposal of hazardous wastes at a site is liable for the costs associated with the cleanup of that site. However, there is no general consensus on the federal government's liability as an arranger for waste resulting from the production of a product that it contracted for. As such, it is necessary to examine the different approaches various courts have taken.

One circuit court has held that the United States is liable for cleanup costs for contamination from a site where a facility had been operating under federal contract. In *FMC Corp. v. U.S. Dept. of Commerce*,<sup>76</sup> the Third Circuit affirmed without comment the district court's ruling that held the government liable as an arranger for its actions in connection with a facility used during World War II for the production of high-tenacity rayon.<sup>77</sup> The District Court's ruling found the government liable as an arranger for ten reasons:<sup>78</sup> (1) required the facility to produce specified, increased quantities of high-tenacity rayon and to convert and expand its plant to fulfill these production requirements; (2) exercised active control and hands-on participation in the facility's conversion and expansion, and supplied government-owned equipment to the facility; (3) controlled raw materials required for production of high-tenacity rayon yarn, caused those materials to be supplied to the facility, and controlled their use throughout the process; (4) participated in obtaining a labor force at the facility and in constructing housing for that labor force; (5) maintained a presence at the facility, and through continuous informal contacts and communications, as well as through formal contracts and communications, was directly and substantially involved with the facility's production activities and management; (6) was involved in developing and providing specifications for high-tenacity rayon yarn and in requiring the disclosure of confidential information to other producers and the government; (7) defined and controlled the market and end uses of high-tenacity rayon yarn produced at the facility; (8) controlled the price of the high-tenacity rayon produced at the facility and the profit of the facility; (9) required and received extensive information relating to virtually all aspects of the facility; and (10) knew or should have known that the disposal or treatment of hazardous substances was inherent in the manufacture of high-tenacity rayon yarn and that its production requirements caused a significant increase in the amount of hazardous substances generated and disposed of at the facility.<sup>79</sup> As a result of these findings of fact, the court concluded that the government owned and operated the facility, and arranged for the disposal or treatment of hazardous substances at the facility.<sup>80</sup>

An Eighth Circuit case not involving the government is nonetheless useful because the court found a third party liable for contamination created by another party due to the contractual relationship between the two parties.<sup>81</sup> In *Aceto*, the court approved of the plaintiffs' argument that because the generation of pesticide-

<sup>75</sup> 42 U.S.C. § 9607(a).

<sup>76</sup> 29 F.3d 833 (3rd Cir. 1994).

<sup>77</sup> *Id.* at 834.

<sup>78</sup> *FMC Corp.*, 786 F. Supp. at 476-85. The in depth recitation of the court's reasoning, while possibly tedious, is necessary because of the limited case law existing in this area, and because of the very large degree to which resolution of these issues are especially fact-specific. — Author's emphasis.

<sup>79</sup> *FMC Corp.*, 786 F. Supp. at 476-85.

<sup>80</sup> *Id.* at 486.

<sup>81</sup> *U.S. v. Aceto Agr. Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989).



containing wastes is *inherent* in the pesticide formulation process, the third party could not formulate the alleged arranger's pesticides without wasting and disposing of some portion of them.<sup>82</sup> Therefore, the court ruled that alleged arranger could not have hired the third party to formulate their pesticides without also "arranging for" the disposal of the waste.<sup>83</sup>

However, case law also exists supporting the position that the government is not an arranger for contracting for or otherwise directing production at a facility that generates hazardous wastes. The Eighth Circuit ruled in *U.S. v. VERTAC Chem. Corp.*<sup>84</sup> that the United States was not an arranger for contamination from a facility that had contracted with the United States to produce the pesticide Agent Orange.<sup>85</sup> The court justified its decision on the grounds that the facts simply did not support the conclusion that the United States actually or constructively supplied the facility with its raw materials.<sup>86</sup> The court found that it could not reasonably be inferred that the United States constructively owned or possessed the raw materials or the work in process that generated hazardous wastes at the facility, and the undisputed facts established that the United States' actual involvement in the operations of the facility was sporadic and minimal.<sup>87</sup>

A California district court ruled that the government was not liable as an arranger for contamination caused by mining simply by contracting to purchase the mined materials.<sup>88</sup> The court made its judgment based on the lack of allegations that the government possessed the polluting waste or that the government managed the disposal of the waste.<sup>89</sup>

Additionally, a federal district court has ruled that the government's allocation of raw materials to a producer of poison gas during World War II did not establish liability against the United States as an arranger for any contamination created by that producer through the use of those raw materials.<sup>90</sup>

### C. CERCLA and Act of War

Section 107(b)(2) of CERCLA provides an exemption from liability for an otherwise liable party where the defendant can establish by a preponderance of the evidence that the release was "caused solely by ... an act of war."<sup>91</sup> The term "act of war" is undefined in CERCLA and, though familiar from common usage, does not disclose its parameters on its face. Nor is there any precedent clearly defining the term.<sup>92</sup> Recent caselaw evidences a habit of merely using the term as a conclusory label.<sup>93</sup>

Earlier caselaw provides more guidance as to the proper construction of "act of war." First, the seizure or capture of property belonging to or benefiting an enemy nation has been authoritatively distinguished from situations in which there is some element of contractual relationship--i.e., an express or implied agreement to

<sup>82</sup> *Id.* at 1383.

<sup>83</sup> *Id.*

<sup>84</sup> 46 F.3d 803 (8th Cir. 1995).

<sup>85</sup> *Id.* at 811.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *U.S. v. Iron Mountain Mines*, 881 F. Supp. 1432 (E.D. Cal. 1995).

<sup>89</sup> *Id.* at 1451-52.

<sup>90</sup> *Elf Atochem N. Am. v. U.S.*, 914 F. Supp. 1166, 1171 (E.D. Pa. 1996).

<sup>91</sup> 42 U.S.C. § 9607(b)(2).

<sup>92</sup> *U.S. v. Shell Oil Co.*, 841 F.Supp. 962 (C.D. Cal. 1993) (overturned on other grounds).

<sup>93</sup> See e.g., *Koohi v. U.S.*, 976 F.2d 1328, 1334 (9th Cir.1992) (shooting down of Iranian passenger jet by United States constituted an act of war); *Agee v. Muskie*, 629 F.2d 80, 97 n. 12, 115 (D.C. Cir.1980) (MacKinnon, J., dissenting) (seizure by Iranians of United States embassy in Tehran characterized as an act of war).

compensate the owner--in the government's use or possession of property.<sup>94</sup>

Second, a helpful line of decisional law arose in the wake of the Civil War as a consequence of the Court of Claims' determination of "acts of war" for which the federal government could not be held liable. The court distinguished cases in which the government appropriated property in order to supply the military, which were compensable, from cases in which the government seized or destroyed property for the purpose of injuring or weakening the enemy, which were not.<sup>95</sup>

In the realm of international law, the term is defined clearly as a "use of force or other action by one state against another" which "[t]he state acted against recognizes ... as an act of war, either by use of retaliatory force or a declaration of war."<sup>96</sup>

#### IV. INSTANT DECISION

The United States presented three arguments on appeal to the Ninth Circuit Court of Appeals: (1) the United States' waiver of sovereign immunity under 42 U.S.C. § 9620(a)(1) is limited to nongovernmental activities; (2) the district court erred in holding the United States liable as an arranger for the non-benzol waste under 42 U.S.C. § 9607(a)(3); and (3) the district court erred in holding the United States liable under 42 U.S.C. § 9613(f)(1) for 100% of the cleanup costs for all of the wastes. The Oil Companies, joined by the State of California, argued that the district court erred in rejecting their argument that they were exempt from liability under the "act of war" provision of 42 U.S.C. § 9607(b)(2). The court addressed each of these claims.

##### A. Sovereign Immunity

The court began its analysis with a discussion of the general requirement that a plaintiff suing the United States must point to an "unequivocal expression" of intent to waive sovereign immunity.<sup>97</sup> The court stressed that a waiver of sovereign immunity must be unambiguous, and that the relevant statutory language is to be strictly construed in favor of the sovereign state.<sup>98</sup>

The court disagreed with the United States' narrow construction of 42 U.S.C. § 9620(a)(1). First, the court rejected the United States' claim that the statutory placement of the waiver in a section entitled "Federal facilities" implies that the waiver only applies to federally-owned facilities, and therefore exempts the United States from liability for actions involving non-governmental facilities.<sup>99</sup> The court observed that nowhere in the text of § 9620(a)(1) is a provision limiting the waiver to federally-owned facilities.<sup>100</sup> The court next observed that the waiver language was enacted in 1980, while the "Federal facilities" portion of CERCLA was enacted in 1986.<sup>101</sup> Additionally, the court noted that when the waiver provision was moved to the "Federal facilities"

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<sup>94</sup> See, e.g., *Juragua Iron Co. v. U.S.*, 212 U.S. 297, 308 (1909) (no act of war where agreement to pay for use of property may be implied); *U.S. v. Winchester & Potomac River Co.*, 163 U.S. 244, 255, (1896) (distinguishing seizure with no implication of compensation of railroad used for benefit of Confederacy, which constituted an "act of war," from situation where property is taken or used by federal government under an implied agreement that owner should be compensated).

<sup>95</sup> See, e.g., *White v. U.S.*, 33 Ct. Cl. 368, 375 (1898) (distinguishing between appropriation of stores and supplies for the use of the military from the "destruction of property as an act of war"); *Conard and Twenty Others v. U.S.*, 25 Ct. Cl. 433, 436-37 (1890) (taking of property properly characterized as act of war where primary purpose was not to supply the military, but rather to injure enemy); *Beasely v. U.S.*, 21 Ct. Cl. 225, 227 (1886).

<sup>96</sup> James R. Fox, Dictionary of International and Comparative Law 6 (1992).

<sup>97</sup> *Shell Oil Co.*, 294 F.3d at 1051.

<sup>98</sup> *Id.* See *Lane v. Pena*, 518 U.S. 187, 192 (1996).

<sup>99</sup> *Shell Oil Co.*, 294 F.3d at 1052.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1052-53.

section it contained language that referred without qualification to the liability-creating portion of CERCLA without adding new language limiting the scope of the waiver.<sup>102</sup> The court concluded that the already-existing waiver was placed under the "Federal facilities" heading for organizational purposes only.<sup>103</sup>

The second reason the court rejected the United States' construction of the waiver provision limiting its liability to non-governmental actions was because of numerous past actions in which the United States has been held liable under CERCLA for acts that cannot be considered nongovernmental acts, specifically liability for cleanups involving military installations and activities.<sup>104</sup>

The court ruled that CERCLA's waiver of the United States' sovereign immunity is coextensive with the scope of liability imposed by 42 U.S.C. § 9607.<sup>105</sup>

### *B. Arranger Liability for Non-Benzol Waste*

The court next examined the argument of the United States that the district court wrongly imposed liability on the United States on the grounds that it was an arranger with respect to the non-benzol waste at the McColl site. The court examined this issue in two different respects: (1) whether the United States was an arranger under a traditional direct arranger test used by the district court; and (2) whether the United States was an arranger under a broader theory of arranger liability proposed by the oil companies.

#### *1. Traditional Direct Arranger Liability*

The court recognized the traditional arranger test imposes liability on a party to a transaction if the primary purpose of the transaction is to arrange for the treatment or disposal of the hazardous wastes.<sup>106</sup> The court also recognized that a direct arranger must have direct involvement in arrangements for the disposal of waste.<sup>107</sup> The court noted that the oil companies did not argue for direct liability under this theory, but that the District Court raised the argument on its own.<sup>108</sup> The court rejected the district court's finding that sufficient facts existed to support a conclusion that the United States directly entered into arrangements to dispose of acid waste at the McColl site.<sup>109</sup>

#### *2. Broader Arranger Liability*

The court recognized that control is a crucial element of whether a party is an arranger under 42 U.S.C. § 9607(a)(3), but conceded that there is no bright-line test in statute or case law for the broad theory of arranger liability.<sup>110</sup> The court stated that liability would be determined by comparing the facts of the case at bar with the facts of previously decided cases.<sup>111</sup> The court examined four cases: *U.S. v. Aceto Agric. Chem. Corp.*;<sup>112</sup>

<sup>102</sup> *Id.* at 1053.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*; See *U.S. v. Allied Corp.*, 1990 U.S. Dist. LEXIS 20061 at \*7-9 (N.D. Cal. 1990).

<sup>105</sup> *Shell Oil Co.*, 294 F.3d at 1053.

<sup>106</sup> *Id.* at 1054.

<sup>107</sup> *Id.* at 1055.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 1055-56.

<sup>112</sup> 872 F.2d 1373 (8th Cir. 1989).

*U.S. v. N.E. Pharm. & Chem. Co. (NEPACCO)*; <sup>113</sup> *FMC Corp. v. U.S. Dept. of Commerce*; <sup>114</sup> and *U.S. v. Vertac*. <sup>115, 116</sup>

The court distinguished the current case from *Aceto*, <sup>117</sup> a case relied on by the oil companies and the district court, in which pesticide manufacturers were held to be arrangers for pollution resulting from production of pesticides for three crucial differences in their respective fact patterns. <sup>118</sup> First, in the current case the United States was the end purchaser of the avgas, and not the manufacturer, as were the pesticide manufacturers in *Aceto*. <sup>119</sup> Second, in the current situation, unlike the pesticide manufacturers in *Aceto*, the United States never owned any of the raw materials and or intervening products. <sup>120</sup> Finally, unlike the manufacturers, the United States did not contract out a crucial and waste-producing intermediate step in a manufacturing process, and then seek to disclaim responsibility for the waste generated during that step. <sup>121</sup> Because of the differences between the parties' situations in *Aceto* and the current case, *Aceto* does not control. <sup>122</sup>

The court also distinguished the facts of the current case from those of *NEPACCO*. <sup>123</sup> The court determined that *NEPACCO* holds that responsible officials in the chain of command of a corporation may be held responsible as arrangers when one of those officers has exercised actual control over the disposition of waste on behalf of the corporation, and the other officer has the authority to control the first officer. <sup>124</sup> In the current case the waste was never owned by the United States, so there was never a United States employee in control, in the ownership sense, of the waste as there was in *NEPACCO*. <sup>125</sup> Furthermore, a *NEPACCO* employee exercised actual control over the waste, whereas no United States official or employee ever exercised any actual control over any of the waste in issue in this case. <sup>126</sup> The court concluded that *NEPACCO* does not apply because the United States neither exercised actual control, nor had the direct ability to control the waste. <sup>127</sup>

In *FMC Corp.*, <sup>128</sup> the Third Circuit, sitting en banc, was evenly divided over whether or not the United States acted as an arranger with respect to pollution at a facility used to create high tenacity rayon during World War II. <sup>129</sup> However, the United States exercised a much greater level of control over the rayon production in *FMC Corp.* than it did over avgas production in the current case, installing government owned rayon-manufacturing machinery in the plants and creating acid production facilities adjoining the manufacturing

<sup>113</sup> 810 F.2d 726 (8th Cir. 1986).

<sup>114</sup> 29 F.3d 833 (3rd Cir. 1994) (en banc).

<sup>115</sup> 46 F.3d 803 (8th Cir. 1995).

<sup>116</sup> *Shell Oil Co.*, 294 F.3d at 1055-59.

<sup>117</sup> *Aceto*, 872 F.2d 1373.

<sup>118</sup> *Shell Oil Co.*, 294 F.3d at 1055-56.

<sup>119</sup> *Id.* at 1056.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* The Court disagreed with the interpretation of *NEPACCO* relied upon by the oil companies and the District Court that mere authority to control is sufficient. *Id.* at 1057. The Court recognized that if this interpretation of *NEPACCO* controls the United States would be liable as an arranger, because at that time the United States did have ultimate authority to exercise such control. However, the Court rejected that interpretation. *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> 29 F.3d 833.

<sup>129</sup> *Shell Oil Co.*, 294 F.3d at 1058.

facility.<sup>130</sup> The court recognized that if it was a close question for the Third Circuit on the facts of *FMC Corp.* whether the United States was an arranger, then with the lower level of involvement in the current case the United States could not be considered an arranger.<sup>131</sup>

Finally, the court compared the facts of *Vertac*,<sup>132</sup> in which the United States was held to not be an arranger for its involvement in the production of the pesticide Agent Orange, with the facts of the current situation.<sup>133</sup> The court noted many similarities between the facts of the two cases: (1) in both cases the products were manufactured for purchase by the United States in wartime; (2) in both cases the manufacturing was carried out under government contracts and pursuant to government programs that gave it priority over other manufacturing; (3) both companies voluntarily entered into the contracts and profited from the sale; and (4) in both cases the United States was aware that waste was being produced, but did not direct the manner in which the companies disposed of it.<sup>134</sup> The court recognized that the government's involvement in the avgas production was somewhat greater than in the Agent Orange production, but determined that the facts were sufficiently similar to apply the reasoning and ruling of the *Vertac* Court.<sup>135</sup>

Based on the comparisons of the facts of the current case with the facts of *Aceto*, *NEPACCO*, *FMC Corp.*, and *Vertac*, the Court determined that the United States was not an arranger under 42 U.S.C. § 9607(a)(3) with respect to non-benzol waste, even under a broad theory of arranger liability.<sup>136</sup> Because the United States was not an arranger under CERCLA, the court ruled that it has no liability for the cleanup costs for non-benzol wastes.<sup>137</sup>

### C. Liability for Benzol Waste

The United States argued on appeal that the district court erred in allocating 100% of the cleanup costs of the benzol waste to the government.<sup>138</sup> The court first recognized that CERCLA provides that the district court "may allocate response costs among the liable parties using such equitable factors as the court determines are appropriate."<sup>139</sup> Furthermore, the court stated that the language of CERCLA gives district courts discretion to decide what factors ought to be considered, as well as the duty to allocate costs according to these factors.<sup>140</sup> Finally, the court stated that they have the power to reverse the district court's decision "only for the abuse of the discretion to select factors, or for clear error in the allocation according to the factors."<sup>141</sup>

The court upheld the decision of the district court with respect to the allocation of the cleanup costs of the benzol waste.<sup>142</sup> The court ruled that the district court was justified in extending its non-benzol waste allocation, in which the United States was allocated with 100% of the costs, to benzol-waste.<sup>143</sup> The court recognized that to the degree the equitable factors supported allocation of the non-benzol waste costs the United States, where liability as an arranger was disputed, the factors are even stronger with respect to the benzol

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> 46 F.3d 803.

<sup>133</sup> *Shell Oil Co.*, 294 F.3d at 1058-59.

<sup>134</sup> *Id.* at 1059.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 1059-60.

<sup>139</sup> *Id.* at 1060 (quoting 42 U.S.C. § 9613(f)(1) (2000)).

<sup>140</sup> *Shell Oil Co.*, 294 F.3d at 1060.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 1060-61.

waste, where the United States conceded that it was an arranger.<sup>144</sup> Because the court found that the district court did not abuse its discretion in choosing which equitable factors to use to determine allocation, and because it did not clearly err in applying those factors to benzol waste, the court upheld the decision of the district court allocating 100% of the cleanup costs associated with benzol waste to the United States.

#### D. Act of War

The final argument addressed by the court was whether the oil companies enjoyed a defense to liability under CERCLA because the government's activities in regulating wartime petroleum production constitutes an "act of war" under 42 U.S.C. § 9607(b)(2).<sup>145</sup> The court recognized that minimal authority exists involving the issue, with the statute silent regarding a definition of "act of war" and no case law addressing the defense.<sup>146</sup>

The court upheld the district court's rejection of the application of the defense by the oil companies for three reasons. All of these reasons were apparently persuasive to the court, although it did not discuss the relative merits of one argument compared with the others.

First, the court determined that "act of war" should be applied narrowly.<sup>147</sup> The court approved the district court's holding that since CERCLA used broad language to define liability but narrow language to define defenses, any definition of "act of war" should be applied narrowly.<sup>148</sup> The court also followed the district court's recognition that the legislative history of CERCLA, while not explaining the "act of war" defense, did emphasize that CERCLA was to be a strict liability statute with narrowly construed exceptions.<sup>149</sup> Furthermore, the court discussed the academic discourse on the definition of "act of war" as applies to international law, which suggested a narrow definition of "act of war."<sup>150</sup> All of these grounds for interpreting "act of war" narrowly apparently create a situation where the court decides to apply the defense narrowly, although it did not list any factual justifications for its decision.

Next, the court recognized a distinction between the acts of two mutually contracting parties and a unilateral act of the government. The court specifically discussed the Supreme Court case of *Farbwerke Vormal's Meister Lucius & Bruning v. Chem. Found.*,<sup>151</sup> in which the Court characterized, in dictum, the United States' wartime seizure and assignment of German-owned patents as "acts of war," contrasting that action with acts of mutually contracting parties.<sup>152</sup> The court impliedly recognized the contractual relationship between the United States and the Oil Companies at the time of the dumping and the absence of coercion by the government.

Finally, the court held that the oil companies could not show that their actions were caused "solely" by an act of war, as required by the statute.<sup>153</sup> The defense of "act of war" did not apply to the oil producers because: (1) the oil companies had other disposal methods available to them at the time; (2) they dumped acid waste both before and after the war; (3) they dumped acid waste from operations unrelated to avgas production at the McColl site; and (4) they were not compelled by the government to dump waste in a specified manner.<sup>154</sup>

<sup>144</sup> *Id.* at 1060.

<sup>145</sup> *Id.* at 1061.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> 283 U.S. 152 (1931).

<sup>152</sup> *Shell Oil Co.*, 294 F.3d at 1061.

<sup>153</sup> *Id.* at 1062.

<sup>154</sup> *Id.*

## V. COMMENT

In *U.S. v. Shell Oil Co.*, the Ninth Circuit held that although the waiver of the United States' sovereign immunity under CERCLA was coextensive with the scope of liability imposed by the statute,<sup>155</sup> the United States was not liable for the disposal of wastes created by third parties from the manufacturing of materials for the United States under a contract.<sup>156</sup>

The first step the court took in reaching this conclusion was that CERCLA's waiver of sovereign immunity extended beyond exclusively non-governmental activities to nonfederal facilities. This was the only logical conclusion that the court could have reached, and to hold otherwise would defeat the purpose of CERCLA. The Supreme Court has held that the section of CERCLA that imposes liability on the federal government in the same manner and to the same extent as any nongovernmental entity, 42 U.S.C. §9620(a)(1), is an unambiguous waiver of the United States' sovereign immunity.<sup>157</sup> There is no additional language that contradicts this statement. The claim that the federal government is liable to a lesser degree than a private actor is plainly contrary to the statute and was properly discarded by the Court.

The second step that the court had to take, after deciding that the federal government could be held liable, was whether the government had met the statutory requirements of an arranger of the waste. Interestingly, the court declined to adopt or create a bright line test for non-traditional arranger liability. In comparing the facts of the current case to those of previously decided federal appellate cases, the court determined that the facts most closely resembled those of the Eighth Circuit case of *U.S. v. Vertac Chem. Corp.*<sup>158</sup> Therefore, to the extent that waste was created by third parties manufacturing products under voluntary contract with the federal government, so long as the government does not direct the manner in which the waste is disposed of, the federal government will not be liable as an arranger for that waste.

The ruling can only be rationally applied to situations in which the government has assumed oversight and prospective control over manufacturing and transportation. In the post-World War II era the government has exponentially less control over the manufacturing and transportation processes of private enterprises. In the WWII-era cases examined by the court the manufacturers could have transported the waste to other locations for proper disposal only if the governmental gave its approval, because of the large restrictions on transportation. A credible argument could be made that the government did control the disposal of the waste by not allowing the companies the resources required to properly dispose of the waste. However, in the modern era no manufacturer could credibly claim that they were unable to properly dispose of waste because of a lack of access to transportation.

Finally, the court examined whether or not one of the three statutory defenses applied to relieve the oil companies from CERCLA liability. The only defense claimed by the companies was the "act of war" defense. The court's discussion of the act of war CERCLA defense is the first appellate-level discussion of the issue. The court ruled that the defense did not apply because the pollution was not solely caused by an act of war, because the waste was the result of a contractual relationship between two consenting parties, and because of the strict liability CERCLA attempted to impose.<sup>159</sup> The status of the phrase and concept "act of war" in American jurisprudence is vague at best. Congress has not had occasion to define "act of war," or even "war." The closest that it has come is in the veterans benefits context when it defined periods of war by reference to

<sup>155</sup> *Id.* at 1053.

<sup>156</sup> *Id.* at 1048-49.

<sup>157</sup> *Pa. v. Union Gas Co.*, 491 U.S. 1 (1989) (overturned on other grounds).

<sup>158</sup> 46 F.3d 803.

<sup>159</sup> *Shell Oil Co.*, 294 F.3d at 1062.

specific dates and theaters of operation.<sup>160</sup> There is also a dearth of judicial treatment of the issue, as previously discussed, and the few cases that touch upon the issue do not lend themselves to CERCLA application.

The act of war defense may, unfortunately, become an issue in the foreseeable future. A terrorist attack on American soil that releases hazardous materials into the environment may conceivably result in owner liability for the entity that possessed the materials. Would a terrorist act constitute an act of war for CERCLA purposes and release the victim of the attack from liability? An attack on an oil company's storage facility that releases petroleum products into the environment is an example. The company is unquestionably the owner of the waste, creating the possibility of liability. However, the discharge was caused solely by an act of terrorism. Would this constitute an "act of war" relieving the company of liability? This question raises issues that far exceed the scope of this note, but presents a very interesting problem.

## VI. CONCLUSION

The Ninth Circuit's decision in *Shell* is a logical and proper approach to allocating financial responsibility for what has been, and will certainly continue to be, a hotbed of CERCLA liability. Private parties who voluntarily contract with the government should not evade liability simply because of their relationship with the government, and those same parties should not be able to pass their liability to the government simply because the government was the party contracting for the finished product.

ALLAN ZUGELTER

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<sup>160</sup> 38 USC § 101(6) *et seq.* (2000).