Design and Operation of Stormwater Systems Could Lead to CERCLA Liability

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In *United States v. Washington State Department of Transportation* ("WSDOT")[1], the federal district court for the Western District of Washington recently held the WSDOT liable under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")[2] as an "arranger" for disposal of hazardous substances. This ruling was premised on the discharge to waterways that are part of a Superfund site of contaminated stormwater runoff from several major highways under WSDOT's authority. This holding illustrates the broad scope of arranger liability under CERCLA and raises the possibility of extending such liability to those public and private parties that design and operate stormwater systems.

In 2008, the United States sued WSDOT to recover its unreimbursed costs incurred in response to releases and threatened releases of hazardous substances to portions of the Commencement Bay-Nearshore Tideflats Superfund Site in Tacoma, Washington. Specifically, the United States alleged that: (1) WSDOT owned and operated specific highways and the drainage structures designed to drain runoff away from these highways and to discharge the runoff into specific waterways; (2) the highway runoff contains hazardous substances, including phthalates, heavy metals, and petroleum hydrocarbons; and (3) highway runoff containing hazardous substances was transported from the highway by drainage structures and disposed of in the waterways.

While WSDOT did not dispute the first three elements of a CERCLA § 107 claim-- (1) that the site is a "facility," (2) a "release" or "threatened release" of a hazardous substance occurred, and (3) that the government incurred costs in responding to the release or threatened releases-- WSDOT did dispute that it was a liable party under 42 U.S.C. § 9607(a). WSDOT argued that it may not be held liable as an arranger under CERCLA because it did not have control over the release of hazardous substances and did not intend to dispose of hazardous substances.

The court disagreed with WSDOT's arguments and concluded that WSDOT was an arranger under CERCLA and therefore a liable party under 42 U.S.C. § 9607(a). Citing the recent Supreme Court case *Burlington Northern and Santa Fe Railway Co. v. United States*,[3] the court noted that "an entity may qualify as an arranger under § 9607(a)(3) when it takes intentional steps to dispose of a hazardous substance. The word 'arrange' implies action directed to a specific purpose."[4] WSDOT designed

the drainage systems at issue and the court found designing to be an action directed to a specific purpose. Namely, the purpose was to discharge the highway runoff into the environment. The court held WSDOT was an arranger because WSDOT had knowledge that the runoff contained hazardous substances, there was an actual release of hazardous substances into the environment, WSDOT had control over how the collected runoff was disposed of, and WSDOT had the ability to redirect, contain, or treat its contaminated runoff.

The court declined to rule on the issue of whether WSDOT's Clean Water Act National Pollutant Discharge Elimination System Permit or its Municipal Permit exempt it from liability because there was a dispute as to whether WSDOT was in compliance with the permits and a question regarding the scope of the permits, whether there were releases outside that scope, and whether the injury was divisible. Therefore, the court denied WSDOT's and the United States' motions for partial summary judgment as to Federally permitted releases. Similarly, the court also denied the parties' motions for partial summary judgment regarding third party defense and declined to rule on WSDOT's purported defense that the agency had no ability to control the drivers who caused the contamination because questions remained as to whether WSDOT exercised due care with respect to hazardous material and whether the discharges prior to and post acquisition of the permits are divisible. It is possible that these issues would be addressed at trial and ultimately WSDOT might prevail on one of its argued defenses.

If upheld and followed, this decision could expand the scope of arranger liability under CERCLA to encompass public and private parties that design and operate stormwater systems. This case also highlights the importance of maintaining compliance with a stormwater system's discharge permit requirements and ensuring that there are not discharges made in violation of the permit terms and conditions to maintain the availability of the federally permitted release defense under 42 U.S.C. § 9607(j). Compliance with the permit terms and limits and documenting the same are important practices to help defend against CERLCA claims using the federally permitted release defense. Furthermore, the scope of the coverage of the discharge permits should be carefully considered so that potential CERCLA-related issues can be minimized.

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1. 2010 WL 2302502 (W.D. Wash. 2010).
2. 42 U.S.C. § 9601 *et seq.*
3. 129 S.Ct. 1870 (2009).
4. *WSDOT*, 2010 WL 2302502 at *5.
