

Issues & Answers

NATURAL RESOURCES & ENVIRONMENTAL ALERT

Ninth Circuit Makes Two Significant Rulings On Environmental Issues

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The Ninth Circuit Court of Appeals has ruled recently on two significant environmental issues. On October 23, 2001, the Ninth Circuit upheld the federal government's authority to enforce criminal violations of the Resource Conservation and Recovery Act ("RCRA") in states with federally authorized hazardous waste programs. On October 24, 2001, the Ninth Circuit held that the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") does not impose liability solely for passive soil migration.

FEDERAL GOVERNMENT CAN ENFORCE CRIMINAL VIOLATIONS OF RCRA IN STATES WITH FEDERALLY AUTHORIZED PROGRAMS

In a boost to the federal enforcement of RCRA, the Ninth Circuit upheld the federal government's authority to enforce criminal violations of RCRA in states with hazardous waste programs authorized by the United States Environmental Protection Agency ("EPA"). In the case of United States v. Elias, 269 F.3d 1003 (9th Cir. 2001), the Ninth Circuit agreed with the trial court judge and the Department of Justice in allowing the federal government to prosecute Allen Elias criminally for RCRA violations in Idaho, a state with an authorized RCRA program. The court indicated, however, that this enforcement authority may be limited.

Background

In 1996, Elias, the owner of a fertilizer company, ordered his employees to enter a 25,000-gallon storage tank to wash cyanide-laced sludge from the tank. Elias failed to provide his employees with any safety equipment or training for this task. During the second day of cleaning, one of his employees collapsed. Tests revealed that the employee had toxic levels of cyanide in his body. Elias was indicted as a result of this conduct. The first three counts alleged violations of RCRA. Elias was ultimately convicted and sentenced to 17 years in prison. Elias moved to dismiss the three RCRA counts on the basis that the United States had ceded its criminal enforcement authority to the State of Idaho when the EPA authorized the state to manage the hazardous waste program under RCRA.

Federal Government Can Enforce RCRA in an Authorized State

Elias argued that the three RCRA counts should be dismissed because they alleged federal RCRA violations "and when the EPA authorized Idaho's hazardous waste program, that program replaced and supplanted federal RCRA law, effectively stripping the United States of enforcement authority." The Ninth Circuit rejected this argument and deferred to the EPA's interpretation that its criminal enforcement power survived authorization of state programs. The Ninth Circuit ultimately ruled that under RCRA the

federal government retained its criminal enforcement authority.

Limits on Ninth Circuit's Holding

The court indicated that its holding has limits. Elias involves EPA's *criminal* enforcement authority; it does not decide the extent to which EPA retains its *civil* enforcement authority in states with authorized hazardous waste programs. Additionally, the Ninth Circuit left open the possibility that state enforcement authority may in some circumstances supplant federal enforcement authority. The court rejected Elias' attempt to rely on an Eighth Circuit opinion where the EPA sought civil penalties against a defendant after a state court had already approved a consent decree between the state and the defendant, releasing the defendant from any claim for further monetary penalties. The Eighth Circuit concluded that the release was binding on the EPA. Although the Ninth Circuit rejected the application of this civil case to support Elias' theories, the court did not preclude the application of the Eighth Circuit's reasoning in future civil or criminal cases.

Implications

Elias upholds the federal government's criminal enforcement authority in states with authorized hazardous waste programs. The holding is limited to criminal cases, although the reasoning of the opinion may

apply equally to civil cases. Additionally, the decision leaves open the possibility that when a state has commenced or completed enforcement actions, the federal government may need to step back. On the other hand, it is clear that the federal government may step in when the state fails to take criminal enforcement action. As a result of the limited holding in Elias, parties who are negotiating RCRA settlements with a state agency in an authorized state should consider EPA's potential involvement in the matter.

NO CERCLA LIABILITY FOR PASSIVE SOIL MIGRATION

Reversing a previous panel decision in Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863 (9th Cir. 2001), the Ninth Circuit held that the statutory definition of "disposal" does not include the passive migration of contamination through soil. CERCLA imposes liability for four classes of potentially responsible parties ("PRPs") including (i) the current owner or operator and (ii) "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." Thus, past owners and operators are liable only if hazardous substances were "disposed" during their ownership or operation. For purposes of CERCLA, "disposal" means "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid or hazardous waste into or on any land or water...."

The court determined that the gradual spreading of pre-existing contamination is not a "discharge, deposit, injection, dumping, spilling, leaking or placing" of a solid or hazardous waste on the property. Although

the court said that further movement in the environment of pre-existing contamination was not a "disposal," it left open the possibility that other types of "passive migration" may fall within the term "disposal," such as continued leaking from a tank or barrel or continued spilling over of a pond. Accordingly, the term "passive migration" for purposes of the court's holding is limited to the gradual and continual spreading of pre-existing contamination. The court was careful to point out, however, that movement of pre-existing contamination resulting from intentional human conduct (*i.e.*, site grading activities) is an act of disposal for purposes of CERCLA.

Background

Carson Harbor Village, Ltd. ("Carson Harbor") owns and operates a mobile home park. Prior to Carson Harbor's ownership, Carson Harbor Village Mobile Home Park ("Village Mobile Home Park") owned the property and operated a mobile home park on the property. Also, for several years prior to Carson Harbor's ownership, Unocal Corporation held a leasehold interest in the property and used it for petroleum production. The property includes approximately 17 acres of wetlands. Carson Harbor discovered hazardous substances on the site. An environmental assessment revealed tar-like and slag materials in the wetlands, which were a waste or by-product of petroleum production that had been on the property for several decades. Soil samples showed elevated levels of petroleum hydrocarbons and lead. Carson Harbor completed cleanup at the site and then brought a CERCLA contribution action against the Village Mobile Home Park, Unocal and others.

Ninth Circuit Opinion

To determine whether Village Mobile Home Park was a PRP, the Ninth Circuit had to evaluate whether there was "disposal" of hazardous substances during its ownership. The only evidence offered was that pre-existing contamination continued to migrate through the environment at the property during Village Mobile Home Park's ownership.

The Ninth Circuit based its decision on the plain meaning of the terms used to define "disposal." Applying this standard, it concluded that any passive migration of contaminants through the soil during the Village Mobile Home Park's ownership was not a "disposal" because there was no "discharge, deposit, injection, dumping, spilling, leaking or placing" of hazardous substances on the property.

This decision puts the Ninth Circuit generally in line with three of the four other circuits that have ruled on this issue. (The remaining circuit held past owners liable for "disposal" resulting from hazardous wastes leaking from underground storage tanks during the period of their ownership.) Carson Harbor Village provides some additional clarity under federal law in the Ninth Circuit that past owners and operators who do not actively contribute to disposal at a site and whose only alleged act of disposal involves passive soil migration should not be liable as PRPs under CERCLA.

If you have any further questions regarding these cases or any other matter, we recommend that you contact your Fennemore Craig attorney or Robert Kramer of the Environmental and Natural Resources Practice Group, at 602-916-5464. ■

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