LEGAL UPDATES

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The Federal Government Found Liable Under CERCLA as a Result of its Oversight of Federal Mining Leases

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On March 4, 2011, in *Nu-West Mining Inc. v. United States*, the district court for the District of Idaho determined that the United States' oversight of waste disposal activities at historic mines on federal lands was sufficient to render it liable as an operator and arranger under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Owner liability was undisputed. The plaintiffs, Nu-West Mining Inc. and Nu-West Industries Inc. (Nu-West), are the current holders of the government leases under which four mines were operated from the 1960s to the 1990s. In the 1990s, after selenium contamination was discovered at the sites, Nu-West entered into consent orders with the United States to clean up the sites. To date, Nu-West claims to have spent $10 million to clean up the sites.

The selenium contamination resulted from the use of middle waste shale—a layer of rock rich in selenium which lies between economically valuable (phosphate ore-bearing) strata—as a cover over waste rock piles. As part of its oversight of the commercial development of the federal mining leases, the United States allowed waste disposal activities on adjacent federal lands and required lessees to build waste rock piles with covers consisting of middle waste shale. In applying the Supreme Court's standard in *Burlington Northern and Santa Fe Ry. Co. v. United States*, the court focused on the United States' intent that the waste disposal activities occur. At the time of the disposal, neither the United States nor the lessees knew that the middle waste shale would leach selenium. Although the court did not address that fact, it was the use of middle waste shale as a cover for waste rock piles—required by the United States as a condition of mining approval—which ultimately resulted in the release of a hazardous substance.

In this case, the court relied on the government's own documents, which established that the government was directly and extensively involved in the design and location of the waste rock piles and the fact that the government retained its ownership interest over all of its property rights in the mine sites except those conveyed in the mineral leases (i.e., the right to mine for phosphate, phosphate rock, and related minerals). The court flatly rejected the government's argument that it could not be liable under CERCLA for acting in what it characterized as a purely regulatory role. Because many projects on federal land will entail retained federal ownership of the land and similar oversight and control over waste disposal activities, the outcome of this case may be of great utility if the court allocates any significant portion of cleanup costs to the United States in subsequent proceedings.

Neither the issue of the effectiveness of any defenses that may be asserted by the United States nor whether the action was properly brought under §107 (see Jason A. Flower, *The Assault on §107 Cost Recovery Claims*, Environmental Law 360, Sept. 24, 2010) were addressed in this partial summary judgment proceeding. It is unclear what defenses (other than the regulatory action defense rejected in this proceeding), if any, the government may raise. Statutory defenses such as act of God or act of war are not relevant and the third party act or omission defense would be precluded by the contractual relationship and the government's extensive involvement in designing waste rock pile structure and location. Other transactional defenses (secured creditor, innocent landowner, bona fide prospective purchaser, and contiguous property owner) also are inapplicable as the government owned the land and was involved in the waste disposal activities which caused the selenium releases. If equitable defenses are raised, they are more likely to be considered in apportioning costs.

What This Means to You

The potential importance of this case is not limited to mining operations. If you are under a federal cleanup order for waste disposal activities on federal land, you may be able to shift some of that expense back to the federal government. We will track this case to see how the court rules on any defenses raised by the government, whether any recovery may be had, and how it apportions costs. In addition, this case may also be important for other private parties who conducted activities on federal lands where those activities were subject to close federal oversight and approval as arranger liability can be premised on similar oversight.

Contact Info

If you would like to discuss potential remedies available in your situation, please contact Coty Hopinks-Baul at 314.480.1883, Charles Merrill at 314.480.1952, or any members of Husch Blackwell's Environmental and Natural Resources practice group.

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