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Environmental Law Division Notes

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CERCLA Non-Time Critical Removal Actions

The Comprehensive Environmental Response, Compensation and Liability Act,¹ (CERCLA) addresses the identification, characterization, and—if necessary—the cleanup of releases of applicable hazardous substances into the environment.² Specifically, CERCLA authorizes the undertaking of cleanups (response actions) that are consistent with the National Contingency Plan (NCP).³ There are two basic types of CERCLA response actions—remedial actions and removal actions.⁴ This article focuses on non-time critical removal actions.

Generally, removal actions involve “removing” contamination that resulted from a CERCLA hazardous substance release. Many removals are emergency or time-critical actions. But, with non-time critical removals, decision makers have more time to plan their approach.⁵ Given the possibility of more planning, non-time critical removal actions can raise some interesting questions. One issue that arose recently was whether the NCP’s requirements for considering a full-blown response action would apply to discrete non-time critical removal actions. In short, the answer is no. Here is why.

Under the NCP, there are nine criteria⁶ for assessing response actions, which include threshold criteria, primary criteria, and modifying criteria. Specifically, the threshold criteria are: (1) overall protection of human health and the environment; and (2) compliance with applicable, relevant, and appropriate requirements (ARARs) or the eligibility of a waiver. The primary criteria are: (3) long-term effectiveness and permanence; (4) reduction of toxicity, mobility or volume through treatment; (5) short term effectiveness; (6) implementability; and (7) cost. The modifying criteria are: (8) state acceptance, and (9) community acceptance.

With non-time critical removal actions, such an in-depth analysis is not necessary. Accordingly, EPA Guidance recommends that decision-makers consider only three criteria when assessing a non-time critical removal action.⁷ These are effectiveness, implementability, and cost.

The main difference between the NCP’s nine criteria and the EPA’s three criteria is that the EPA’s version is shorter. It calls for a more streamlined analysis, without the NCP’s modifying criteria. There is also another important distinction, though less obvious, regarding the use of “applicable requirements” and “relevant and appropriate requirements” (ARARs).⁸ CERCLA on-site remedial actions must comply with the substantive requirements contained in ARARs. Removal actions are only required to attain ARARs “to the extent practicable.”⁹ Lead agencies are permitted to consider whether compliance is practicable by examining the urgency of the situation and the scope of the removal action.¹⁰ Hence, one more reason that the NCP’s nine criteria do not apply to these actions. Kate Barfield.

1. 42 U.S.C. §§ 9601-9675 (1994).

2. See 42 U.S.C. §§ 9601(14), (22) for definitions of key terms, such as what constitutes a “release” or a “hazardous substance.”

3. See generally, 40 C.F.R. pt. 300 (1999).

4. 42 U.S.C. § 9604(a).

5. The administrative record requirements for a removal action can be found at 40 C.F.R. § 300.820.

6. 40 C.F.R. § 300.430(e)(9)(iii).

7. EPA Guidance, OSWER No. 9360.0-32, *Guidance on Conducting Non-Time Critical Removal Actions Under CERCLA*, Aug. 1993.

8. 42 U.S.C. § 9621(a), (d).

9. Note that the removal action must be fund-financed. 40 C.F.R. § 300.415(j).

10. 40 C.F.R. § 300.415(j)(1), (2).

District Court Rejects *Eastern Enterprises* Argument

In *United States v. Alcan Aluminum Corporation*,¹¹ a federal district court examined whether retroactive application of the Comprehensive Environmental Response, Compensation and Liability Act¹² (CERCLA) constituted a taking under the Fifth Amendment of the Constitution. Retroactive application of CERCLA would require Alcan Aluminum Corporation to pay for the clean up of toxic waste that the company had previously disposed of lawfully at a hazardous waste site.¹³ The district court concluded that the Supreme Court's retroactivity analysis in *Eastern Enterprises v. Apfel*¹⁴ did not apply to CERCLA.¹⁵

In *Eastern Enterprises*, the Supreme Court examined whether the Coal Industry Retiree Health Benefit Act of 1992¹⁶ (Coal Act), when applied retroactively, constituted a taking under the Fifth Amendment.¹⁷ The Coal Act would have forced Eastern to pay to its former employees' retirement funds in addition to those that their retirement plan had already established, in compliance with then-current legislation.¹⁸ The Supreme Court held that the Coal Industry Retiree Health Benefit Act of 1992, constituted a taking under the Fifth Amendment, and thus violated the constitutional rights of Eastern.¹⁹

In a plurality decision, the Court held that the constitutionality of retroactive application of legislation depends upon the "justice and fairness" of the statute.²⁰ Under this analysis, three factors are used in order to determine whether a regulation constitutes a taking: (1) what is the economic impact which the regulation has upon the defendant? (2) does the regulation

interfere with the reasonable investment backed expectations of the defendant? (3) what is the character of the government action?²¹

Based on this test, four Justices concluded that the Coal Act violated Eastern's Fifth Amendment rights. Eastern's liability under the Coal Act would have been highly disproportionate to its experience with the retirement plan, and therefore would have constituted an unjust economic burden.²² Furthermore, the retroactive nature of the legislation interfered with the expectations of Eastern, because Eastern had not contributed to the problem that made the legislation necessary, and Congress had never before become involved with the coal industry in such a manner.²³ In a concurring opinion, Justice Kennedy concluded that the retroactive impact of the Coal Act was unconstitutional based upon its violation of the due process clause.²⁴

In considering Alcan's CERCLA challenge, the district court first concluded that *Eastern* could not be employed as precedent for the *Alcan* case. The court pointed to the fact that the holding in *Eastern* was based upon a plurality decision, in which only four Justices had ruled that retroactive application of the Coal Act constituted a taking.²⁵ Because the other five Justices, including Justice Kennedy in his concurring opinion, rejected this analysis, the ruling in *Eastern* did not constitute binding precedent.²⁶

This left the due process claim of Alcan to the "well settled rule that economic legislation enjoys a 'presumption of constitutionality' that can be overcome only if the challenger estab-

11. *United States v. Alcan Aluminum Corp.*, No. 87-CV-920, 1999 U.S. Dist. LEXIS 7103 (N.D.N.Y. May 11, 1999).

12. 42 U.S.C.A. § 9607 (West 1998).

13. *Alcan Aluminum Corp.*, 1999 U.S. Dist. LEXIS at *5.

14. *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998).

15. *Alcan Aluminum Corp.*, 1999 U.S. Dist. LEXIS at *5-*13.

16. 26 U.S.C. §§ 9701-9722 (1994).

17. *Eastern Enterprises*, 118 S. Ct. at 2150-51.

18. *Id.* at 2141.

19. *Id.* at 2150-51.

20. *Id.* at 2146 (citing *Andrus v. Allard*, 444 U.S. 51, 65 (1979)).

21. *Id.* (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)).

22. *Id.* at 2149-51.

23. *Id.* at 2151-53.

24. *Id.* at 2154.

25. *United States v. Alcan Aluminum Corp.*, No. 87-CV-920, 1999 U.S. Dist. LEXIS 7103, at *5 (N.D.N.Y. May 11, 1999) (citations omitted).

26. *Id.*

lishes that the legislature acted in an arbitrary and irrational way.”²⁷ Relying on persuasive precedent, the court concluded that retroactive application of CERCLA was neither arbitrary nor irrational in basis.²⁸

The district court went on to reason that even if *Eastern* were valid precedent for holding that retroactive use of CERCLA constituted a taking, the specific fact situation in *Alcan* would not pass the three-part test. Rather than finding an insurmountable economic burden, the district court stated that any economic impact that CERCLA would have on Alcan would be diminished by apportionment between responsible parties.²⁹ In addition, even if apportionment were not available, Alcan’s potential liability was considerably less than the sum for which Eastern Enterprises would have been liable.³⁰

Furthermore, liability was imposed on Alcan because of actions that it had taken in the past. While Alcan claimed that it had not caused the pollution of the site, that fact remained to be determined. Despite this, Alcan had indeed dumped toxic substances in the area that was now contaminated.³¹

The Army is subject to liability under CERCLA in the same way as a private party.³² The Army does not, however, have Fifth Amendment rights. A finding that CERCLA violates the Fifth Amendment rights of private parties could leave the Army responsible for a greater allotment of site clean-up costs. Although CERCLA survived the retroactivity challenge in *Alcan*, the issue may be raised continually until it is ultimately resolved by the Supreme Court. Christine Azzaro.³³

Litigation Division Note

Voluntary Resignation: A Common Settlement with an Ever Present Pitfall

A Common Scenario

Following a string of misconduct and progressively harsher discipline, a federal employee is finally removed from his position. The employee contests the removal before the Merit Systems Protection Board (MSPB), and threatens to proceed before the Equal Employment Opportunity Commission (EEOC) and federal district court, if necessary. In lieu of incurring the expense and delay of pursuing the dispute before these forums, the former employee and the Army ultimately agree to settle the dispute. The former employee “voluntarily” resigns his federal position in exchange for the Army expunging evidence of an involuntary removal from his Official Personnel File (OPF).³⁴

Such a “divorce” between the parties appears to present an amicable and conclusive resolution for all. However, when the former employee’s future plans fail because potential employers became aware of the proposed involuntary removal and underlying misconduct through criminal investigation and finance records located somewhere other than in the OPF, the dispute arises anew. The former employee then petitions the MSPB or sues in federal court for enforcement of the settlement agreement.

27. *Alcan Aluminum Co.*, 1999 U.S. Dist. LEXIS 7103, at *14.

28. *Id.* (citations omitted).

29. *See Alcan Aluminum Corp.*, 1999 U.S. Dist. LEXIS 7103, at *3-*4.

30. While Eastern Enterprises would have been liable for \$50 to \$100 million, Alcan’s liability was in the approximate range of \$5 million. *See id.* at *10.

31. “CERCLA liability has not been imposed on Alcan for no reason; rather, it has resulted from Alcan’s conduct in disposing of waste where hazardous substances have been found. Consequently, Alcan’s liability is predicated on the link between its waste disposal activities and the environmental harms caused at [the sites].” *Id.* at *11.

32. 42 U.S.C.A. § 9620 (a)(1) (West 1998).

33. Ms. Azzaro is a summer intern at the U.S. Army Environmental Law Division. In August she will be a second year law student at St. John’s University School of Law in New York.

34. A civilian employee’s OPF is a permanent personnel file that contains the primary records of their employment history with the federal government including Standard Form 50s reflecting when he or she was hired, promoted, demoted, resigned, or terminated. In the Army, an employee’s OPF is located at the servicing Civilian Personnel Operations Center (CPOC).

Judicial Treatment

Historically, the Army easily prevailed in such scenarios by simply showing that the OPF was in fact expunged and was not the source of the adverse information. However, the U.S. Court of Appeals for the Federal Circuit no longer endorses this position. The court has embarked on a course that is tantamount to finding federal agencies strictly liable for any “ambiguities” in the resignation-in-lieu-of-removal settlement agreement.

In *King v. Department of the Navy*,³⁵ the Federal Circuit held that the settlement language “remove all reference to the removal action from her Official Personnel File,” required the Navy not only to purge documents from the appellant’s OPF, but also from her files at the Office of Personnel Management (OPM), the Defense Finance and Accounting Service (DFAS), and any other records outside the Navy’s control.

In justifying this broad expansion, the court went beyond the four corners of the agreement and reasoned that when an employee voluntarily resigns in exchange for purging the OPF of prior adverse action, his goal is to eliminate this information from affecting future employment with the government or elsewhere.³⁶ The court went on to note that by correcting only those files in the hands of the Navy, and retaining references to the action that was subsequently revoked in other official government files, the former employee was denied the intended benefit of his assent to the agreement.³⁷

Such a broad expansion of the settlement burden placed upon the agency is the result of the court applying contract interpretation rules to a settlement contract that was, in the

court’s opinion, too vague in its terms.³⁸ In interpreting a written agreement or contract, the court will first ascertain whether the written understanding is clearly stated and was clearly understood by the parties.³⁹ Words used by the parties to express their agreement are given their ordinary meaning, unless it is established that the parties agreed to some alternative meaning. If ambiguity is found, or arises during performance, the court looks to the intent of the parties at the time the agreement was made.⁴⁰ This intention controls over any ambiguity or subsequent dispute over the terms of the agreement.⁴¹ In *King*, because the court found that the settlement language was ambiguous, the court was free to expand the Navy’s purging requirement to enable the former employee to realize his intent of eliminating the information from any source that may influence his future employment with the government or elsewhere.⁴²

Still Not Clear Enough

In *Newton v. Department of the Army*,⁴³ the U.S. Court of Appeals for the Federal Circuit had an opportunity to review the terms of a more specific Army settlement. The settlement tried to avoid future problems by more specifically agreeing to purge documents related to the appellant’s removal. Following an investigation and the release of a Criminal Investigation Division (CID) report, the appellant, Mr. Newton, was removed from his position for submitting false claims for living quarters allowance. During the MSPB appeal, he agreed to voluntarily resign, and the Army agreed to “Purge from the records of management and from the Seoul Civilian Personnel Office and the Office of the Civilian Personnel Director, United States Forces

35. 130 F.3d 1031 (Fed. Cir. 1997).

36. *Id.* at 1033.

37. *Id.* The court also cited for support its earlier decision in *Thomas v. Department of Housing and Urban Development*, 124 F.3d 1439, 1442 (Fed. Cir. 1997), where it explained that the agency’s agreement to deny the truth about the appellant’s performance at HUD to potential future employers, including other agencies of the U.S. government, was the major benefit that the appellant received in exchange for agreeing to resign from his position.

38. The interpretation of settlement agreements, or any contract, by the federal courts is a question of law that is reviewed *de novo*. *Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988); *Perry v. Department of the Army*, 992 F.2d 1575, 1578 (Fed. Cir. 1993).

39. *King*, 130 F.3d at 1033.

40. *Id.*

41. *Id.*

42. Interestingly, two months earlier in *Thomas*, the U.S. Court of Appeals for the Federal Circuit foreshadowed the problems that federal agencies might have adhering to such settlement agreements in light of the court’s interpretation favoring the appellant’s intent and their benefit bargained for analysis:

It may well be that it is virtually impossible for agencies to ensure that settlement agreements such as this, requiring the whitewashing of an employee’s disciplinary record, can be performed to the letter.

...

Perhaps as a matter of sound governmental administration such agency agreements should be prohibited.

Thomas, 124 F.3d at 1442.

43. No. 99-3021, (Fed. Cir. Mar. 5, 1999).

Korea, all documents connected with the appellant's removal."⁴⁴

After resigning from his Army employment, the appellant submitted a petition for enforcement to the MSPB and then appealed to the U.S. Court of Appeals for the Federal Circuit. The appellant sought to compel the Army to purge its records located outside of Korea of all references to the appellant's original removal and associated investigation.⁴⁵ The Army admitted that copies of the CID investigation were located at CID Command, Fort Belvoir, Virginia, and at the Central Clearance Facility (CCF), Fort Meade, Maryland, but argued that it had not agreed to purge any records located outside of Korea.

Although the settlement language in *Newton*, which set out the records to be removed and their location, was much more specific than that in *King*, the Federal Circuit was still troubled by the meaning of the phrase "purge from the records of management and from the Seoul Civilian Personnel Office and the Office of the Civilian Personnel Director, United States Forces Korea."⁴⁶

The court found that this language was ambiguous because it was subject to two reasonable interpretations. One interpretation is that the purging applies to *all* Army records, wherever located, *and* to the records maintained in Korea. Another reasonable interpretation is that the purging is to apply to all records held by *Newton*'s supervisors, the Seoul Civilian Personnel Office and the Office of the Civilian Personnel Director located within the jurisdiction of United States Forces Korea, that is, within Korea.⁴⁷

Because of this "ambiguous" language, the court stated that it must discern the intent of the parties at the time of contracting the agreement. In light of the decision in *King*, which only considered the intent of the employee-appellant in making its determination, the court could have easily found that the appellant bargained for eliminating the effect that this information would have on his future employment with the government or elsewhere. Thus, requiring the Army to purge the CID Command records at Fort Belvoir and the CCF records at Fort Meade, as well as any records that may be located at OPM and DFAS.

Fortunately for the Army, the court was able to glean enough additional evidence from the employee's pleadings to determine that such an expansive reading of the settlement agreement was in fact not what the appellant had bargained for. The court found that the appellant was aware of the existence of records outside of Korea relating to his fraudulent activity before he entered into the settlement agreement.⁴⁸ Additionally, since the appellant required that all inquiries from prospective employers be directed to the Seoul Civilian Personnel Office, it was apparent to the court that the appellant intended that the Army purge the records at that office and prospective employers be directed to the sanitized records at that office rather than to unsanitized records elsewhere.⁴⁹ Although the Army prevailed in this case, but for the admission in the plaintiff's pleadings, the "ambiguous" settlement language may well have resulted in Army liability for a breach of that agreement and the requirement to purge the records located outside Korea.

The Ever Present Pitfall

Records on an individual employee can be as extensive as they are diverse. The former employee's OPF and his supervisor's files may be just the tip of the iceberg. If the CID investigated the employee, there will be records located at the servicing CID office and at the CID Command at Fort Belvoir, Virginia. If the employee held a security clearance, there will be records in the CCF at Fort Meade, Maryland. If the dispute or misconduct giving rise to an employee's removal resulted in an inspector general (IG) inquiry, there will be records at the servicing IG office and at the Department of the Army Inspector General Headquarters in Washington, D.C.

Records are also maintained by agencies outside the Department of the Army. The OPM and the DFAS may maintain records referencing a federal employee's removal. Depending on the extent of the misconduct, the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco and Firearms and even local law enforcement authorities may also maintain records on the former employee. For the unwary or careless labor counselor, agreeing to expunge a former employee's "record" or even "Official Personnel File" could result in the requirement to expunge the former employee's files at every one of these record locations.

44. *Id.* at 2. The agreement also stated that the documents removed shall include, but not be limited to, the CID investigation, the notice of proposed removal, the reply to the proposed removal and the decision to remove; that appellant would be provided with a neutral reference which states only his dates of employment, positions held, rates of pay, and that he was performing at a satisfactory level at the time of his resignation; and, that all inquiries from prospective employers were to be directed to the Seoul Civilian Personnel Office for this neutral reference.

45. *Id.*

46. *Id.*

47. *Id.* at 5 (emphasis added).

48. In his reply brief, the appellant stated that "[w]hile subconsciously I may have known that files [outside of Korea] did exist, no one specifically stated what type of files or where the files were specifically located." *Id.*

49. *Id.* at 5-6.

The Obvious Solution

Government counsel who agree to purge a complainant's records and enter into a resignation-in-lieu-of-removal settlement agreement must make every effort to detail what documents will be purged from which employee records. Even more important, counsel must specifically set out the location of those records. Using personnel or legal jargon, even a term as specific as "OPF," to refer to files and their locations will be found to be too ambiguous and result in the court examining the

former employee's intent and using the benefit of the bargain analysis to favor the former employee. Specifically identifying the location of the records to be purged should not only avoid a suit for enforcement of the settlement agreement in the future, but if a suit for enforcement is filed, it will avoid the court's broad expansion of the record cleansing requirement to other agency records. Finally, for policy reasons labor counselors should never agree to purge CID, IG, or CCF records.⁵⁰ Major Berg.

50. The importance of the Army's maintaining investigative records goes beyond the re-employment concerns contained in the typical settlement agreement of this nature and should therefore not be curtailed by such an agreement. While such agreements may be enforceable, they give relief that the employee could not get even if the appeal to the MSPB was successful. A labor counselor faced with the proverbial unique case where such an agreement actually might be in the Army's best interest should coordinate, through his respective MACOM labor counselor, and with the Labor and Employment Law Division of the Office of The Judge Advocate General.