

USALSA Report

United States Army Legal Services Agency

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental files area of the Legal Automated Army-Wide Systems Bulletin Board Service. The latest issue, volume 5, number 9, is reproduced in part below.

Supreme Court Clarifies Corporate Liability for Parent Corporations

On 8 June 1998, the United States Supreme Court issued an opinion in the case of *United States v. Bestfoods*,¹ in which a unanimous Court provided guidance on the issue of parent corporation liability for the actions of its subsidiaries under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA). The Court's decision in this case may affect the Third Circuit's analysis in *FMC Corp. v. United States Department of Commerce*,² which has been used to impose liability on federal agencies as an operator.

In *Bestfoods*, the Environmental Protection Agency (EPA) brought an action under CERCLA Section 107 for cleanup costs at the site of Ott Chemical Company near Muskegon, Michigan. Ott Chemical Company began operations on this site in 1957.³ In 1965, Ott Chemical became a subsidiary of CPC International Corporation. CPC sold Ott Chemical Company to Story Chemical Company in 1972. Story operated the chemical plant until its bankruptcy in 1977.⁴ By 1981, the EPA had started a cleanup of the site, with a total cost that was esti-

mated to be "well into the tens of millions of dollars."⁵ The EPA filed the suit in 1989 and named CPC International and Arnold Ott (owner of the now defunct Ott Chemical Company), among others, as potentially responsible parties.⁶

The district court found CPC liable as an operator. In doing so, the court applied the "actual control" test that was used in *FMC Corp.*,⁷ and focused on CPC's control over Ott Chemical Company.⁸ The Court of Appeals for the Sixth Circuit reversed the district court and ruled that a parent corporation could only be liable as an operator when the corporate form has been misused and the corporate veil can be pierced.⁹

The United States Supreme Court analyzed parent corporation liability under two distinct legal theories: the derivative liability of a parent corporation for the activities of a subsidiary, and the direct liability of a parent corporation for its own activities toward the facility in question. Regarding derivative liability, the Court determined that the CERCLA did nothing to disturb the well-established principle of corporate law that a parent is not generally liable for the actions of its subsidiary unless the corporate form is misused. Under those circumstances, the corporate veil can be pierced and the parent can be held liable.¹⁰

The Court went on to address what is a separate issue – the extent to which a parent corporation might be directly liable as an operator for its activities at a facility. The Court first provided the following interpretation of the term "operator" under the CERCLA:

1. 118 S. Ct. 1876 (1998). See 42 U.S.C.A. §§ 9601-9675 (West 1998) (providing information on the Comprehensive Environmental Response Compensation and Liability Act).

2. 29 F.3d 833 (3rd Cir. 1994).

3. *Bestfoods*, 118 S. Ct. at 1882.

4. See *id.*

5. *Id.* at 1882.

6. See *id.* During the course of the appellate process of this case, CPC changed its name to Bestfoods. *Id.* at n.3.

7. See generally *FMC Corp.*, 29 F.3d at 843-46.

8. *United States v. Bestfoods et al.*, 118 S. Ct. 1876, 1882 (1998).

9. *Id.* at 1885. Some circuits follow the rationale that parent corporations can only be liable when the corporate veil can be pierced, while other circuits have held that a parent that is actively involved in the affairs of a subsidiary can be liable as an operator (the "actual control" test) without regard for whether the corporate veil can be pierced. See *id.* at n.8.

10. *Id.* at 1884-85. The Court discussed, but did not resolve, the issue of which law courts should use to decide veil-piercing, state law or federal common law. See *id.* at n.9.

[An] operator must manage, direct, or conduct operations *specifically related to pollution*, that is, operations having to do with the *leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.*¹¹

The Court then rejected the district court's use of the "actual control" test to determine liability. Under this test, which had been adopted by many circuits,¹² a parent corporation could be liable under the Superfund if it exerted actual control over the subsidiary that was responsible for the operation of the facility.¹³ The Court objected to the use of that test because it confused direct and derivative liability by focusing on the relationship between the parent corporation and the subsidiary corporation. According to the Court, the correct focus is the relationship between the parent corporation and the facility, as evidenced by the parent's participation in the activities of the facility.¹⁴ In *Bestfoods*, the evidence indicated that an individual who was an officer of CPC, but who was not an officer or employee of Ott Chemical, played a significant role in the environmental compliance policy of the Muskegon facility.¹⁵ The Court remanded the case to the district court for further inquiry into this CPC employee's role in light of the guidance that was provided in its opinion.¹⁶

This opinion could have a substantial impact on federal agency CERCLA liability. First, the Court seems to have discarded the "actual control" test, that was used by the Third Circuit in *FMC Corp.*¹⁷ to find the federal government liable as an operator. It is unclear how the Court's focus on the relationship between a parent corporation and a facility would apply in situations where federal agencies have been involved with a particular type of industrial operation. Significantly, the Court sharpened the definition of "operator" to include only those activities that are specifically related to the disposal of hazardous waste and environmental compliance.¹⁸ This definition

presumes that many of the factors that the Third Circuit found to be relevant to an agency's control, such as the government's ability to direct raw materials to the plant and the government's involvement in labor issues at the plant, would not play a role in any new analysis of a federal agency's operator status.

Although each future case will be decided on the basis of its unique facts, *Bestfoods* will certainly influence upcoming decisions concerning federal liability. Major Romans.

New Executive Order on Native American Consultation

On 14 May 1998, President Clinton signed Executive Order 13,084, Consultation and Coordination with Indian Tribal Governments.¹⁹ Executive Order 13,084 should not impose any new compliance requirements on individual installations.²⁰ When read together with Executive Memorandum of April 29, 1994 on Government-to-Government Relations with Native American Tribal Governments,²¹ however, Executive Order 13,084 underscores the need for installations to develop proper consulting and coordinating procedures. These procedures should assist the installation to communicate with federally recognized Indian tribes on issues and activities that affect their land, resources, and governmental processes.

Executive Order 13,084 and the executive memorandum draw upon the United States Constitution, treaties, federal statutes, and case law to establish the following principles:

- (1) Tribes are domestic dependent Nations. As such, tribes remain sovereign nations, exercising inherent sovereign powers over tribal members and territory.
- (2) Tribes have the right to self-government. The federal government must recognize tribal sovereignty and should carry out its

11. *Id.* at 1887 (emphasis added).

12. *See supra* note 9 and accompanying text.

13. *Bestfoods*, 118 S. Ct. at 1887.

14. *Id.* at 1889.

15. *Id.* at 1890.

16. *Id.*

17. *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 843-46 (3rd Cir. 1994).

18. *Bestfoods*, 118 S. Ct. at 1887.

19. 63 Fed. Reg. 27,655 (1998), available at 1998 WL 248884 (Pres.).

20. Executive Order 13,084 is primarily concerned with agency development of regulations and regulatory practices and policies that affect tribal communities in a significant or unique manner. It is not clear whether the development of integrated cultural resource management plans or similar installation planning and management documents fall within the scope of agency policy.

21. 59 Fed. Reg. 22,951 (1994), available at 1994 WL 163120 (Pres.).

activities in a manner that is protective of tribal self-government, trust resources, and the full spectrum of tribal legal rights, including those provided by treaty.

(3) Federal agencies ensure compliance with the foregoing legal mandates by establishing relationships with appropriate tribes on a government-to-government basis and consulting with such tribes in accordance with that relationship.

Additional information and guidance on tribal consultation can be found in the *Army Guidelines for Consultation with Native Americans*. These guidelines are included as Appendix G in the draft of *Department of Army Pamphlet 200-4* and at the U.S. Army Environmental Center web page, conservation section, at <http://aec-www.apgea.army.mil:8080>. Mr. Farley.

Proposed Lead-Based Paint (LBP) Rule

On 3 June 1998, the EPA issued a proposed rule²² under the authority of Section 403 of the Toxic Substances Control Act (TSCA).²³ Under this section, the EPA is required to identify lead-based paint hazards. This identification is crucial because federal facilities are obligated to abate, prior to transfer, hazards that are present in target housing built before 1960.²⁴ The proposed rule establishes numeric levels to identify hazards. In the soil context, hazard levels are established as 2000 parts per million.²⁵ This level is considerably more stringent than current guidelines, which establish 5000 parts per million as the hazard level.²⁶ Adoption of the more stringent level could have important fiscal ramifications for installations that are transferring property, particularly in the base closure and realignment scenario. Any environmental law specialist (ELS) who wishes to provide comments to this proposed rule should coordinate through this office. Lieutenant Colonel Polchek.

Proposed Executive Order on Alien Species

The Department of the Interior has proposed an executive order, entitled "Invasive Alien Species." This proposed executive order defines "alien species" as any species or viable biological material derived from a species that is not a native species in that ecosystem. The definition of "invasive alien species" is an alien species that does or could harm the economy, ecology, or human health of the United States if it is introduced. If adopted, the executive order will require federal agencies to implement measures to prevent the introduction and to control the spread of invasive alien species into the ecosystems. Information regarding the final adoption of this executive order will be published in future ELD Bulletins. Major Shields.

Colorado Clean Air Bill Goes Up In Smoke

The Governor of Colorado recently vetoed an attempt by the Colorado State Legislature to discriminate against federal agencies under its Clean Air Act (CAA)²⁷ authority. The governor acted to strike down Senate Bill 98-004²⁸ at the urging of Ms. Sherri Goodman, Deputy Undersecretary of Defense for Environmental Security (DUSD-ES), the Department of Agriculture, and the Department of the Interior. The process whereby this result came about serves as a good example of how Army regional environmental coordinators (RECs) and their staffs can be effective advocates for Department of Defense (DOD) interests.

In early 1998, state senators began to push for the passage of Senate Bill 98-004, a measure that would direct the Colorado Air Quality Control Commission to ensure that all federal facilities minimize air emissions to the maximum extent practicable. This requirement was intended to reduce the impacts of federal facilities on both the attainment and maintenance of national ambient air quality standards and the achievement of federal and state visibility goals. The bill requires that each federal

22. Lead, Identification of Dangerous Levels of Lead, 63 Fed. Reg. 30,302 (1998) (to be codified at 40 C.F.R. pt. 745) (proposed June 3, 1998).

23. 15 U.S.C.A. § 403 (West 1998). Section 403 was actually created by Title X of the Residential Lead-Based Paint Hazard Reduction Act as an amendment to TSCA. See The Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, § 1021(a), 106 Stat. 3916 (1992).

24. 42 U.S.C.A. § 4822(a)(3) (West 1998). While the problem that is faced by most installations is primarily with lead-based paints in the soil, this rule will also cover hazards that are associated with dust.

25. Lead, Identification of Dangerous Levels of Lead, 63 Fed. Reg. 30,353.

26. See U.S. DEP'T OF HOUSING AND URBAN DEV., GUIDELINES FOR THE EVALUATION AND CONTROL OF LEAD-BASED PAINT HAZARDS IN HOUSING (1995). Although this source is only guidance, it has served as the unofficial standard within most military departments.

27. 42 U.S.C.A. §§ 7401-7671 (West 1998).

28. S. 98-004, 61st Leg., 2d Sess. (Colo. 1998).

agency submit its land management plans to the commission for review and, after a public hearing, make any changes to the land management plans that are required by the commission. As there is no similar set of requirements that applies to non-federal entities, Senate Bill 98-004 exceeds the limited waiver of sovereign immunity in the CAA.

The bill claims that significant contributions to regional haze and visibility impairment emanate from federal lands, particularly smoke from prescribed burning activities. A potentially adverse impact from the bill, however, is that it allows direct state regulation of virtually every source of airborne emissions at a federal facility. Such regulation would extend into areas such as grounds maintenance, the timing and manner of DOD training operations (including obscurant use), weapons firing, and aircraft flights.

Throughout the limited lifetime of Senate Bill 98-004, the staff in the Army's Western Regional Environmental Office (also the DOD REC for EPA Region VIII) was vigilant in representing the interests of the Army and DOD, and in keeping higher headquarters and interested parties within the region informed. The REC ensured that the Army's concerns about the legal authority for Senate Bill 98-004 and the severe impacts on military services were communicated to the Colorado State Legislature and the Governor of Colorado. In addition, close coordination with the Governor's Office, after passage of the bill, was instrumental in facilitating a timely request from the DUSD-ES for the Governor to veto the bill.

While the Governor of Colorado did not explicitly credit his decision to veto Senate Bill 98-004 to the letters that he received from DOD and other federal agencies, his public statements clearly echoed the concerns set out in the federal agencies' letters. Certainly the input from the REC's staff throughout the legislative process and the letter from the DUSD-ES were part of an important effort to influence the process as well as make DOD's concerns a part of the record. In contrast, failure to have participated in this process would have clearly indicated a lack of interest in the outcome. The REC's efforts in this case illustrate how essential it is to have REC staffs throughout the Army identify thorny regional issues and facilitate their diplomatic resolution. This REC's "ounce of prevention" is sure to net many "pounds of cure." Lieutenant Colonel Jaynes.

Call for Input to Civil/Criminal Liability Handbook

Last year, environmental law specialists (ELs) published the first edition of its *Environmental Criminal and Civil Liability Handbook* after many months of effort. Our intention was to create a resource for ELs to use when dealing with difficult

enforcement issues. The *Handbook* gave ELs a kit containing the basic tools that are needed for successful negotiations of enforcement actions. We hope that it has become an important resource in your efforts to advocate your command's interests in this complex and sometimes contentious arena. If you do not already have the *Handbook*, you can download it from the Environmental Law Library on the LAAWS BBS.

Last summer ELD employed the talents of a reserve component judge advocate to help us update and revise the *Handbook*. We would appreciate your assistance to ensure that the *Handbook* remains relevant and responsive to your needs. This includes: identifying topics that should be addressed, pointing out unclear statements or policies, and challenging the wisdom of recommendations or policies that are now in the *Handbook*.

We also hope to focus on the *Handbook's* appendix portion, which is not presently located with the on-line version. To solve this problem, the next edition of the *Handbook* and its appendix will be on the BBS and e-mailed out to the major command and installation ELs. When revising the appendix, we intend to trim out items that are not essential to your practice and may include references to internet web sites.

We expect to limit the revised *Handbook* to about one hundred pages and will try to keep the appendix material to about the same size. Because you will be part of the revision process, we would like for you to think about the sorts of issues that need to be addressed. To help get you started, we have listed several topics that will be added or updated in the revised *Handbook*:

- EPA's new policy on supplemental environmental projects;
- EPA's policy (revised in October 1997) on use of RCRA §7003 orders;
- EPA's use of RCRA §6003 authority to make onerous information requests;
- EPA's authority to issue punitive administrative fines under the Clean Air Act;
- EPA's efforts to issue punitive fines for underground storage tank violations; and,
- Regulator attempts to bring media enforcement actions for CERCLA operations.

If you have run into particularly helpful resources on enforcement actions, please e-mail or fax them in. Please e-mail me (jaynera@hqda.army.mil), write, or phone (703-696-1569; fax -2940) with your ideas on any aspects of the *Handbook* that could be strengthened. Lieutenant Colonel Richard Jaynes.