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Editor's Note: In this issue, Laura Maffei of Schwabe Williamson & Wyatt PC summarizes two recent decisions in the *United States of America v. Washington Department of Transportation* litigation, critical to CERCLA liability for stormwater discharges from highways. Ms. Maffei's practice includes Clean Water Act permitting and litigation, hazardous waste remediation, and assistance with environmental aspects of real estate and business transactions. She can be reached at 503-796-2953 or lmaffei@schwabe.com.

We have reproduced the entire article below. For those you prefer to view it in PDF format, a copy will be posted on the Section's website: <http://www.osbenviro.homestead.com/>.

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SUMMARY: *United States of America v. Washington Department of Transportation*, 2010 U.S. Dist. LEXIS 58952 (June 7, 2010)

and

Unites States of America v. Washington Department of Transportation, 2010 U.S. Dist. LEXIS 68100 (July 7, 2010)

The United States District Court for the Western District of Washington at Tacoma recently decided motions for summary judgment in a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) recovery action involving the Thea Foss and Wheeler Osgood waterway cleanup actions in Tacoma, Washington. The court determined that the Washington State Department of Transportation (WSDOT) is a potentially responsible person under CERCLA because of its operation of stormwater discharge systems on highways discharging to the waterways. In a companion decision, the court found that property owned by WSDOT near the waterways did not fall within the definition of a "facility" under CERCLA. Finally, the court declined to make determinations regarding WSDOT's defenses to liability because they involve questions of fact to be addressed at trial.

Background

The Commencement Bay-Nearshore Tidel flats area, including the Thea Foss and Wheeler Osgood waterways (the Waterways), has been a Superfund site since the first National Priorities List was developed. The United States Environmental Protection Agency (EPA) has been overseeing response and remedial actions related to sediments in the Waterways since at least

1989. A number of potentially responsible parties (PRPs) participated in the investigation and cleanup of the Waterways, but WSDOT declined to do so. The United States alleges that it has at least \$6.8 million in unreimbursed costs and is seeking reimbursement of those costs from non-participating PRPs. The United States sued WSDOT to recover unreimbursed costs, alleging that WSDOT has CERCLA liability as an owner or operator of stormwater discharge systems that drain three highways near the Waterways. According to the United States' complaint, the stormwater systems discharge hazardous substances from the highways to the Waterways. The United States also alleged that WSDOT had CERCLA liability arising from contaminated property owned by WSDOT called the "Tacoma Spur" that is near the Waterways.

CERCLA Liability for Stormwater Discharges from Highways

In cross-motions for partial summary judgment, the United States and WSDOT argued whether WSDOT was strictly liable under CERCLA for discharges of stormwater to the Waterways. The parties agreed that three of the four elements for strict liability had been met: the Waterways were part of a "facility" under CERCLA, there was a release of hazardous substances, and EPA incurred response costs associated with the release. The fourth element, whether WSDOT fit within one of the four classes of liable parties, was at issue in the motions for summary judgment.

The court focused on WSDOT's potential liability as an "arranger" for disposal of a hazardous substance and did not decide the United States' claim that WSDOT was an "owner or operator." In finding that WSDOT arranged for disposal of hazardous substances under CERCLA, the court came to the following factual conclusions: (1) WSDOT designed the stormwater systems whose purpose was to discharge stormwater from the highways to the environment; (2) WSDOT knew that the stormwater contained hazardous substances; (3) there was an actual release of hazardous substances to the environment; (4) WSDOT controlled the method of collection and disposal of the stormwater; and (5) WSDOT was able to redirect, contain or treat the stormwater before discharging it. Having determined that WSDOT was an "arranger," the court indicated that WSDOT is a liable party under CERCLA for discharges from the highway stormwater systems.

WSDOT's Defenses to Liability

WSDOT argued three defenses to CERCLA liability, including that it had valid National Pollutant Discharge Elimination System (NPDES) permits for the discharges in question, that third parties were responsible for the releases, and that it was immune as a state sovereign. The court denied WSDOT's sovereignty defense, but determined that factual issues in the "permitted release" and "third party" defenses prevented a decision on those issues.

Specifically, the court found that the mere existence of NPDES permits was not sufficient to meet the requirements of the "permitted release" defense; WSDOT also needed to prove that it was in compliance with the permits. In addition, the court found that there was a question of fact related to the scope of the permits, particularly discharges that occurred before the permits were issued.

The court also could not determine the sufficiency of WSDOT's third party defense because there was a question of fact related to WSDOT's due care in handling the stormwater. CERCLA requires an otherwise liable party to show that it exercised due care in handling the hazardous substance at issue. WSDOT argued that its compliance with the NPDES permits was sufficient to establish due care, but the United States countered that WSDOT failed to meet the standard because it did not retrofit some of its facilities to treat stormwater. The court was unwilling to make a determination about due care without further evidence and therefore denied both parties' motions for summary judgment related to the third party defense.

CERCLA Liability for Nearby Contaminated Property

The court's July 7 decision focused on WSDOT's alleged owner liability related to contaminated property called the Tacoma Spur. The United States contended that WSDOT discharged hazardous substances from the Tacoma Spur to the Waterways and that, as owner of the Tacoma Spur, WSDOT was liable under CERCLA.

It was undisputed that WSDOT owned the Tacoma Spur property and that the Tacoma Spur was impacted with coal tar contamination. The "owner" evaluation therefore turned on the definition of "facility" under CERCLA and whether the Tacoma Spur area was part of the facility for which the United States was seeking response costs. CERCLA states that a "facility" is anywhere hazardous substances have come to be located, but the court declined to extend this to include all property within the CB/NT Superfund site. The court reasoned that the Waterways and Tacoma Spur property had different owners and different purposes and should therefore be considered separate facilities. Finally, WSDOT did not have "owner" liability CERCLA because the United States did not incur response costs related to the Tacoma Spur property. The United States was seeking response costs for the separate Waterways facility; WSDOT's ownership of a nearby contaminated site did not automatically create liability for the Waterways response costs.

The United States also argued that WSDOT was liable as an "arranger" because coal tar from the Tacoma Spur entered a stormwater system that discharged to the Waterways. The court declined to decide this issue, citing a genuine issue of material fact regarding the alleged disposal of coal tar in this manner.

Conclusion

The Western District of Washington has taken a first step toward apportioning costs for the Waterway sediment cleanup to WSDOT, the operator of a stormwater system that discharged to the site, as an arranger for disposal under CERCLA. However, WSDOT's defenses to CERCLA liability have yet to be developed and analyzed. The court also rejected the United States' claim that WSDOT had CERCLA "owner" liability for the Waterway cleanup based on contaminated property WSDOT owned near the Waterways.

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