The Environmental

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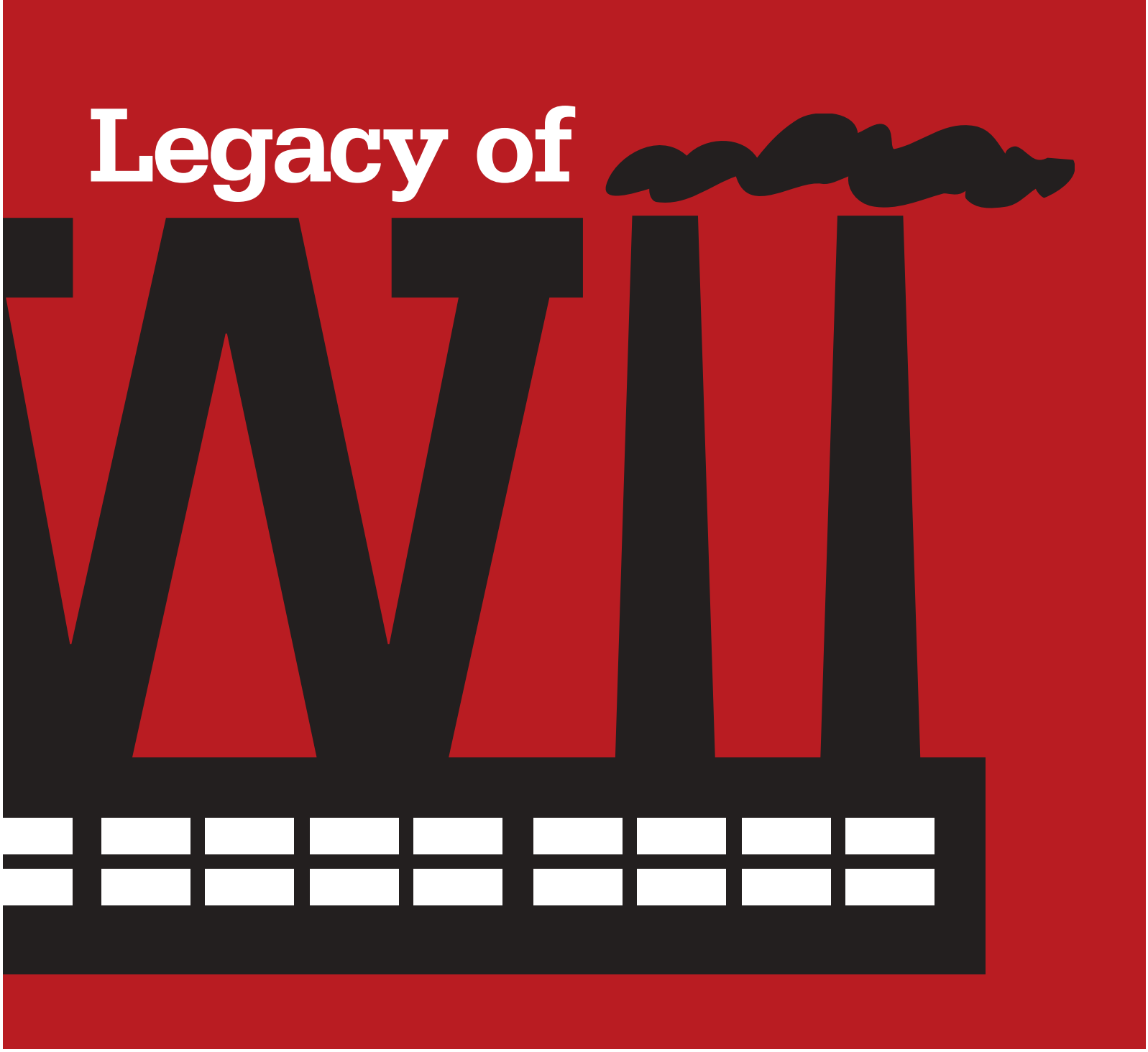
Recovering CERCLA Costs from the U.S. Government

Since its enactment by Congress in 1980, the Superfund statute has ushered in an era of environmental legal warfare between the federal government and companies with cleanup costs that have escalated into the hundreds of millions of dollars.[1] In some cases, the result has been the death or near-death of companies throughout America. If your company is paying these costs, then you may want to consider examining your company's history and the country's



history as a strategy for making claims against another potentially responsible party ("PRP"): the U.S. government. Companies responding to claims by the Environmental Protection Agency ("EPA") under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), the Superfund statute, may be able to seek contribution from the federal government because of federal ownership or operation of industrial and manufacturing facilities and equipment during World War II.[2] This step requires little more than researching your company and the government's wartime records.

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Often, companies do not realize that sites where costly remedial actions are taking place were at one time the sites of war production and that the release of hazardous substances that led to such cleanups was often in part the result of wartime federal activities. The benefits to your company can be enormous. For example, Dow Chemical Co. reaped the benefits of asserting a CERCLA contribution claim against the federal government when a court assigned to the federal government 100 percent of the costs of cleaning up a former synthetic rubber facility built and owned by the government and operated by Dow during World War II.[3] Although government involvement with one of your company's Superfund sites may not be so extensive, the following hypothetical illustrates an appropriate situation in which to analyze the potential for such a government contribution.

Imagine that the EPA has demanded that your company, Moderna Corp., remediate contamination found in a riverbed near one of its large manufacturing facilities. The plant sits on land adjacent to the river a short distance upstream of the contamination. Moderna Corp. has owned the facility for the past 20 years, but did not build it. The plant, along with a number of other industrial facilities along the river, dates back to World War II.

You know that some of the constituents in the riverbed contamination are consistent with production activities during Moderna's ownership of the plant. But because of current environmental laws and regulations that limit discharges into the river, you believe that most of the contamination had occurred before Moderna purchased the facility. Nonetheless, you are very concerned about two lagoons on company property immediately north of the manufacturing facility.

Both you and the EPA know that the facility deposited waste products in these lagoons during the initial years of its operation. Moderna, however, has not discharged anything into them. Notwithstanding your misgivings at the time, Moderna Corp. chose to purchase all of the property, including the lagoons, with a partial indemnity from the previous owner, Wargoods Industries, Inc. Wargoods was associated with the manufacturing facility from its wartime construction until its sale to your company.

When the lagoons overflowed, a neighboring landowner sued Moderna Corp., claiming that his property had been contaminated. At the time of this lawsuit, the EPA demanded that controls be installed to prevent contamination from escaping out of the lagoons. Wargoods paid for part of the cost of settling the litigation and for adding the new controls. Unfortunately, because of the shaky financial status of Wargoods, Moderna Corp. also contributed several million dollars toward settlement of the case and installation of the pollution controls. At the time, you were not aware of any other party that might be potentially responsible for liability associated with the lagoons.

The previous owner has since gone out of business and cannot contribute to further remediation. You now realize that contamination from the lagoons may have spread to the river before the installation of the pollution controls. The EPA has identified and sought remediation from all of the nearby industrial facilities along the river.

These or similar facts set the stage for a factual investigation and legal analysis that may lead to a successful contribution claim against the federal government. Despite having contributed to the con-

tamination, your company may be able to avoid further liability for the remediation if you can establish that the government either owned or operated the manufacturing facility during World War II and used the lagoons for disposal of waste from the production process. A contribution or cost recovery action against the government as a PRP requires you to undertake thorough historical research into your company's and public archives that date back to the World War II era. Most of the evidentiary materials required to pursue such a claim consist of public and private documentation. Because World War II ended more than 50 years ago, your litigation costs will be further reduced because very few fact witnesses are likely to still be alive for deposition testimony. At its heart, a claim against the government for the release of wartime hazardous substances is a paper chase. In order to successfully assess this potential contribution claim, you will need to know both U.S. history and recent case law.

Official U.S. government World War II poster.

U.S. GOVERNMENT INVOLVEMENT IN WORLD WAR II INDUSTRIES

The federal government's effort to mobilize the U.S. economy during World War II began before the Japanese attack on Pearl Harbor. On May 16, 1940, President Franklin D. Roosevelt, appearing before Congress, stated that national defense was a necessity and that the country should be ready to produce at least 50,000 planes per year. The call for increased production was enormous and extended to all industries that would be necessary for the war effort, including those producing metals, such as aluminum, steel, magnesium, tin, nickel, copper, lead, and zinc, minerals, machine tools, natural and synthetic rubber, radio equipment, aviation gasoline, and industrial chemicals.[4]

Although private companies were willing, in most cases, to increase production for the good of the country, they also were concerned about financial risk.[5] If they paid for the expansion of existing production facilities and built new facilities, they worried that the government might cancel its contracts before they recovered the cost of their investment. For its part, the U.S. government did not want to guarantee that the companies would recover their costs regardless of whether the government needed the production or not. If the threat of war ended, guaranteed payments would be a windfall, and the companies would be getting new or expanded facilities at little cost.[6]

The federally created Reconstruction Finance Corporation ("RFC") responded to this dilemma. Established by Congress in 1932 by the Reconstruction Finance Corporation Act, the RFC served as a Depression-era government corporation that provided financial assistance to private banks, insurance companies, mortgage companies, agricultural institutions, and railroads, at first, and then later expanded into other business areas.[7] In summer 1940, the RFC received congressional approval to purchase and stockpile materials of strategic importance to the United States and to assist with the financing of new and expanded industrial facilities. After some debate, the RFC decided to pay for the expansion of industrial capacity and to retain ownership of the new equipment and industrial facilities in which it invested. Once facilities had been built, the RFC entered into lease and operating agreements with private companies. The RFC

created a subsidiary called the Defense Plant Corporation ("DPC") to finance the construction of new industrial facilities and the expansion of existing ones. The DPC eventually owned properties in nearly all states.[8] See the sidebar below for a list of additional wartime governmental agencies that were involved with private industry.

From its creation on August 22, 1940, until June 30, 1945, when it was folded back into the RFC as the Office of Defense Plants, the DPC invested $7 billion to increase the industrial capacity of the United States. It took title to new facilities and equipment. Even after the RFC had subsumed the DPC, the bulk of the properties remained under government title, and in many cases, the government retained title to DPC-owned facilities and equipment until the late 1940s. Some facilities, most notably plants associated with the production of synthetic rubber, were owned until the mid-1950s.

The DPC invested in three principal ways: First, the DPC built entire standalone facilities. Second, it built additional units in existing private industrial complexes, called "scrambled" facilities. Third, it purchased equipment and installed it in privately owned facilities for the purpose of converting the facility to the production of a wartime product or for the purpose of expanding the capacity of an existing facility. The DPC also purchased most of the wartime production of machine tools and allocated the tools among countless private companies, as needed. In one form or another, the DPC invested in many of the industrial facilities operating in the United States during the war.[9]

The EPA and private companies have used wartime history to identify parties that may be liable for environmental cleanups. Recent case law suggests that the federal government, acting through the DPC or another agency, may be such a party.

LIABILITY FOR ENVIRONMENTAL CLEANUP

CERCLA

Congress enacted CERCLA[10] in response to several highly publicized environmental incidents in the 1970s. The most famous of these involved the construction of homes on top of an abandoned waste disposal site at Love Canal, NY.

CERCLA establishes a statutory scheme to provide funds for the identification and cleanup of abandoned waste disposal sites. The statute assigns liability for the cost of such cleanups to certain categories of parties. Any party that might be liable for a cleanup under CERCLA is deemed a PRP. A PRP may be a facility owner or operator or a party that arranged for the disposal of hazardous substances.[11] Liability under CERCLA is joint, several, strict, and retroactive in its application. Moreover and of particular note in the context of this article, the statute contains a waiver of sovereign immunity that courts have broadly interpreted.[12] Any PRP identified by the government may bring a contribution action against other potential PRPs, including the United States.

Other Wartime Government Agencies Involved with Industry

In addition to the Reconstruction Finance Corporation ("RFC") and its subsidiaries, the government also exerted significant control over industrial production through other government entities. Through the following assorted agencies, among others, the federal government exerted unprecedented power and, in many cases, almost dictatorial control over the operation of private industry during World War II:

- War Production Board (controlled the distribution and allocation of essentially all products mined or manufactured in the country).
- Office of Defense Transportation (controlled the trains and the pipelines, among other things).
- War Department and Joint Army-Navy Munitions Board (purchased the needs of the military). In some cases, the military also manufactured products for itself through industrial facilities that it owned directly. Some munitions plants are an example of direct military investment in production.
- Maritime Commission (controlled shipping).
- Petroleum Administration for War (combined petroleum companies' operations, including production, transportation, and refining, into one coordinated entity).
- Smaller War Plants Corporation.
- War Manpower Commission.
- Office of Price Administration.
- National War Labor Board.

Because of the federal government's control and ownership of operations in many sectors of American industry during World War II, the government played a significant role in the generation of substances defined as hazardous under CERCLA. Thus, in appropriate circumstances, the United States may fit CERCLA's definition of a responsible party. As in-house counsel for a company required to remediate contamination, you have the task of producing sufficient evidence of this involvement to prevail in a contribution claim.

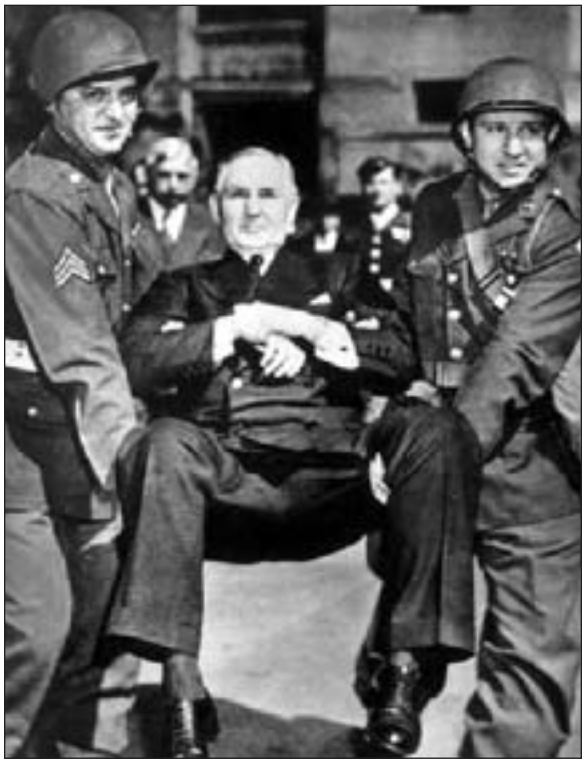
Recent Caselaw

Two federal appellate court decisions strongly support the right of private companies to obtain CERCLA contribution from the federal government as a result of its World War II industrial control. These opinions, one from the Ninth Circuit and the other from the Third Circuit, provide an excellent framework for evaluating the government's potential liability for the costs of remedial activities. The federal government also has negotiated the settlement of numerous claims of this type. See "Settlements," below, for a discussion.

Government Ownership

The 2002 Ninth Circuit decision in *Cadillac Fairview/California v. Dow Chemical Corp.*[13] shows the value of finding federal ownership. Not only did the court rule that the government's ownership of a manufacturing facility had contributed to the contamination at issue and therefore was a basis for establishing liability for a CERCLA cleanup, but also it employed novel reasoning in allocating all of the responsibility to the government.

In this case, the federal government owned a facility in Torrance, CA, that had made styrene, a key component in synthetic rubber, during World War II. After the Japanese had occupied the regions in Southeast Asia that supplied most of the natural rubber to the United States, synthetic rubber became an essential war product. Constructed in 1942, this styrene facility was part of a 280-acre synthetic rubber complex that the federal government had built and owned in its entirety. Dow Chemical oversaw wartime operation of the styrene facility. Private wartime operators at the complex included U.S. Rubber (present-day Uniroyal), Goodyear, and Shell Oil Co.



Sewell Avery, chairman of Montgomery Ward & Co., is shown being carried out of his firm's office by unidentified soldiers in Chicago on October 31, 1944. Avery is being forced out after having refused to cooperate with government officials who have taken over the firm.

The production of styrene created hazardous waste. Under the supervision of the federal government, Dow built evaporation ponds for its disposal during the war. The chemical company operated the styrene facility on behalf of the federal government until 1955 when Shell Oil Co. bought it. Shell continued to run the entire complex of facilities until 1972. Eventually, the developer Cadillac Fairview/California acquired the property.

In 1983, contamination at the site forced Cadillac Fairview to begin remedial activities, and subsequently, it filed suit against Dow Chemical, Shell Oil, and the United States. The complex and protracted litigation ultimately led to the Ninth Circuit's opinion, which affirmed a trial court decision allocating 100 percent of the cleanup cost to the federal government:

> The polluting conduct was completely under the direction of the government, it was legal at the time, and the government promised to hold polluters, who acted as government agents,

harmless. The government decided at the time that polluting the land and water this way was preferable to diverting resources from the war effort to do anything about it. Now the government wants its servants to pay for what it told them to do and promised them they could do with no fear of liability.[14]

CERCLA empowers courts to use "equitable considerations" in allocating the cleanup costs of a Superfund site among the responsible parties.[15] In *Cadillac Fairview/California*, the court used its equitable powers, in effect, to enforce a contractual indemnity clause against the government that might not otherwise be available because of the Anti-Deficiency Act, which limits indemnity clauses in federal contracts, and the Tucker Act, which assigns many contract claims to the U.S. Court of Claims in Washington, DC. Decided in August 2002, the opinion contains a harsh rebuke of the government.[16] "This is a shocking case," the Ninth Circuit wrote. "The government is trying to take money from firms that it conscripted for a critical part of a great war effort. The government's arguments are strikingly weak."[17]

IN ANALYZING THE POTENTIAL FOR FEDERAL LIABILITY FOR CONTRIBUTION TO THE COST OF A REMOVAL ACTION OR A REMEDIAL ACTION UNDER CERCLA, YOU SHOULD FIRST DETERMINE WHETHER ANY OF THE CONTAMINATION WAS GENERATED DURING WORLD WAR II.

Government Operation

Even if you cannot establish historic federal ownership of a contamination-causing facility, you may be able to show that the government once exercised such substantial control of the facility that it was an "operator" under CERCLA.[18] The Third Circuit's 1994 opinion in *FMC Corp. v. U.S. Dep't of Commerce*[19] provides a guide for establishing federal operator liability in the World War II context.

FMC Corp. was the successor in interest to the owner of a Front Royal, VA, facility used during the war to produce high-tenacity rayon, which strengthens and prolongs the life of natural rubber in tires. The federal government never owned the plant.

In 1942, the War Production Board commissioned the owner, American Viscose Corp., to convert the facility from the commercial production of textile rayon into a war plant. The DPC financed and supervised the facility's conversion and subsequently hired a private contractor to install government-owned production equipment, which American Viscose then leased. All plans, specifications, supplies, and purchases regarding the facility's conversion and the equipment's installation required DPC approval. After production had commenced, the government placed a representative onsite to supervise production, manpower, housing, and transportation.

American Viscose sold the facility to FMC Corp. in 1963. In 1982, hazardous waste disposed in the facility was discovered, and FMC Corp. was notified that it was a PRP. In 1990, FMC Corp. sued the U.S. Dept. of Commerce, as the successor to the DPC, claiming that the government was an owner, operator, and arranger under CERCLA. After an adverse decision in the U.S. District Court for the Eastern District of Pennsylvania, the government appealed.

The Third Circuit found that the production process generated waste products, including sulfuric acid, carbon disulfide, and zinc-contaminated wastes, and that workers had placed this waste in unlined basins on the production site. The court further found that the onsite federal representative was fully aware of the waste disposal, which, during the period 1942–45, amounted to at least 65,000 cubic yards.

After having dismissed the government's assertion of sovereign immunity, the court ruled that, because the government had exercised substantial control over the day-to-day operations of the facility, it was liable as an operator under CERCLA for response costs incurred in remediation of the facility. The government stipulated to the ownership of the equipment that had generated the hazardous substances at issue and agreed that, regardless of the decision on operator liability, it had liability under CERCLA as an owner. It also stipulated that, if it were found liable as an operator of the facility as a whole, it would be responsible for about 26 percent of the cleanup costs or as much as $78 million. This stipulation is significant when you consider that the facil-

ity operated for 52 years and that the government was involved for only six of those years (1942–48). See the timeline in the sidebar on this page.

Contrary Rulings

Although *FMC* represents a significant victory for industry in seeking contribution from the federal government, contrary case law exists. In each such case, the court has distinguished *FMC* on the facts and found that the government had not exercised substantial control over the day-to-day operations of the facility in question.[20] These decisions identified the following distinguishing secondary factors:

- Company responded to a government bid, rather than being compelled by the government to produce a particular product.
- Private contractors supplied the raw materials, which were not owned by the government.
- Government onsite presence during production was minimal or nonexistent.
- Government was not an owner of any of the facilities, land, or equipment that produced the hazardous substances at issue.
- Government contracts did not address the subject of waste disposal, nor did the government engage in the disposal of hazardous substances.

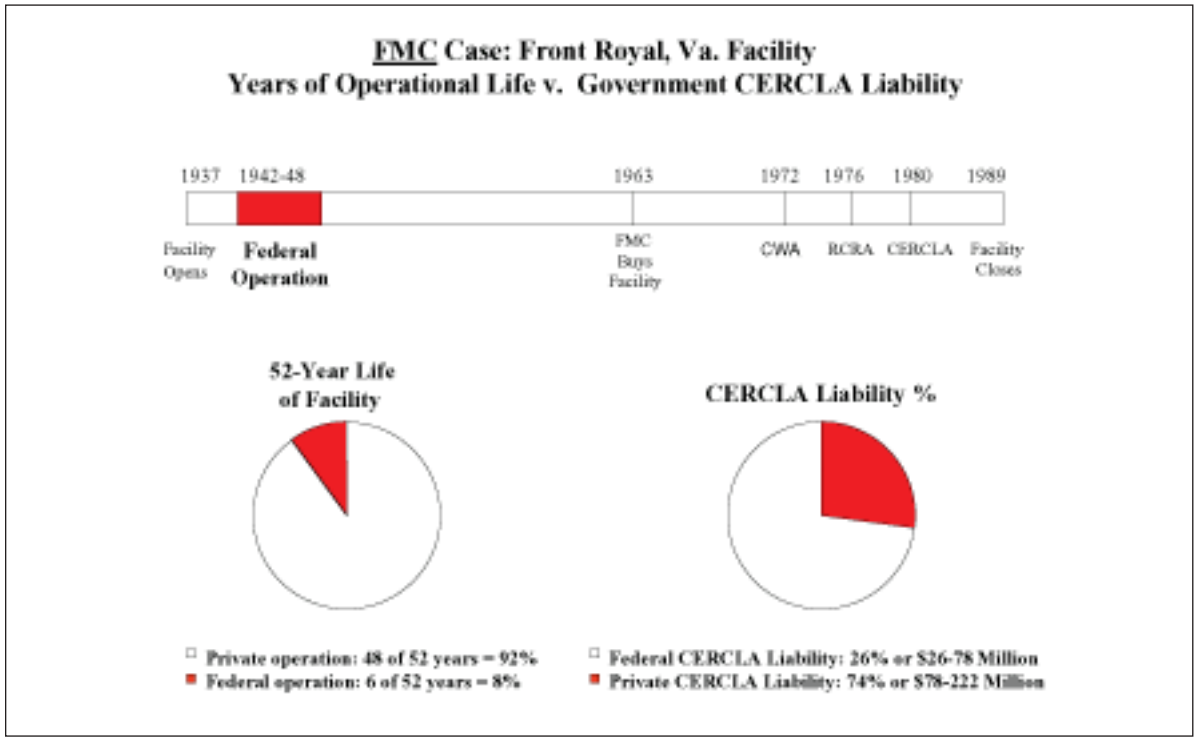
These adverse cases have reinforced one crucial lesson: to prevail in a CERCLA contribution claim, you must approach the facts demonstrating federal involvement in a facility from the World War II era in a broad and all-encompassing manner. In establishing government-operator liability, less is not more.

CERCLA CONTRIBUTION

Analysis

The Moderna Corp. hypothetical provides an example of a situation that might lead you to investigate the relationship of the federal government to environmental contamination. Because of the breadth of the government's investment in and control of industrial operations and production during World War II, the manufacturing facility could be in almost any imaginable manufacturing business or industrial area.[21]

In analyzing the potential for federal liability for contribution to the cost of a removal action or a remedial action under CERCLA, you should first determine whether any of the contamination was generated during World War II. Did commercial operations during World War II contribute to the



contamination in question? If they did, you should look next for government ownership of a facility or of equipment in a privately owned facility that contributed to the contamination. If you find such federal ownership, you likely will be able to establish liability on the part of the government for at least some portion of the cleanup costs, as was the case in *Cadillac Fairview/California*. Alternatively, in the absence of federal ownership, you may be able to establish federal liability by proving federal control of operations at an otherwise private facility.

IN ASSERTING A CERCLA CONTRIBUTION BASED ON GOVERNMENT OPERATOR LIABILITY, YOU MUST RESEARCH YOUR FACILITY'S HISTORY THOROUGHLY TO FIND THE BROADEST EVIDENCE OF THE GOVERNMENT'S INVOLVEMENT.

Using *FMC* as a guide, you should conduct research and discovery in a CERCLA owner and/or operator liability case as follows:

- **Search for government ownership.** DPC or other RFC subsidiary involvement in your facility may indicate some measure of government ownership. The DPC created the word "PLANCOR" and an assigned number as an official designation of one its projects. If the DPC owned an entire production unit or industrial complex, the project probably received one or more "PLANCOR" numbers. The term "PLANCOR" associated with a particular facility or equipment can be found in various government documents and indexes, and it is your first evidentiary step in proving that wartime federal involvement was present at your facility. Even if the DPC did not assign a "PLANCOR" number, the facility may have had government-owned equipment integrated into it. In *FMC*, for example, the first step in plaintiff's victory was to establish that the DPC had used the government's equipment in the conversion of its facility from commercial to war production.
- **Determine the degree and extent of the involvement of the DPC.** A DPC-owned facility or equipment may have contributed to the contamination at issue today. In *FMC*, for example, plaintiff established that the DPC had leased production equipment that generated the hazardous substances deposited in the unlined basins on the facility property.
- **Determine whether the federal government assigned employees to the facility and what the scope of any such federal employees' activities was.** In *FMC*, for example, plaintiff could show that the government had had onsite personnel that were substantially involved in the day-to-day operations of the facility. If possible, you should demonstrate to the court that agents or officers of the federal government actively participated in production decisions, determining such matters as production volume, timetables, and transportation of final products. Government involvement may also have included purchasing the products, supplying raw materials, and transporting raw materials into and out of the facility. Additionally, the government may have been involved in decisions concerning employee hiring, wages paid to employees, work hours, employee discipline, and employee housing matters. Your investigation should include looking into the government's involvement with all of these issues.
- **Determine the nature of the product manufactured at your facility during the war.** In *FMC*, for example, the World War II owner of the facility, American Viscose Corp., produced high-tenacity rayon, a substance used to lengthen the life of rubber tires. The government considered this substance a vital war product. Find out whether the production at the facility in your case was vital to the war effort.
- **Determine whether the government was involved in the disposal of hazardous substances at your facility.** If the government controlled any aspect of the facility's waste disposal during World War II, it may be an arranger under CERCLA.[22] In *FMC*, for example, the fact that the government owned the equipment and controlled the method of waste disposal made more effective plaintiff's argument that the government had operated the facility.
- **Find and read the government's wartime contracts with your facility.** Though enforcement of the government's contract with American Viscose

was not at issue in *FMC*, other courts, most notably the Ninth Circuit in *Cadillac Fairview/California*, use evidence of the government's wartime contracts with private industry as an "equitable factor" in allocating CERCLA liability. These contracts may contain language that demonstrates the government's production requirements, as well as delineates its powers regarding daily operations at your facility. Contractual language and duties may include all of the factors needed to establish operator liability, such as authority over production methods, timetables, employees, raw materials, transportation, product price, and waste disposal.

In asserting a CERCLA contribution based on government operator liability, you must research your facility's history thoroughly to find the broadest evidence of the government's involvement. Merely giving the court selective pieces of evidence, such as government contracts or directives demonstrating control over product price, will be insufficient to establish operator liability. To prevail in court, you must present every aspect of the government's participation in your facilities, paying particular attention to evidence of substantial control over the daily operations.

MERELY GIVING THE COURT SELECTIVE PIECES OF EVIDENCE, SUCH AS GOVERNMENT CONTRACTS OR DIRECTIVES DEMONSTRATING CONTROL OVER PRODUCT PRICE, WILL BE INSUFFICIENT TO ESTABLISH OPERATOR LIABILITY.

Returning to the Moderna Corp. hypothetical, historical research into its manufacturing facility reveals that Wargoods operated the plant for the DPC during the war and purchased the facility from the government in the late 1940s. After the war, Wargoods stopped using the disposal lagoons because of complaints from the neighbors. Thus, much of the riverbed contamination resulted from lagoon waste deposits and facility operations during and immediately after World War II. After Moderna Corp. had purchased the plant in the early 1970s, it discharged only a very small amount of the contaminants. Because the lagoons were the primary responsibility of the government as the wartime owner of the facility, contribution under CERCLA appears likely.

Government Settlements or Informal Resolutions

In light of the case law described in this article and in recognition of the government's role with industry during World War II, the federal government through the Department of Justice ("DOJ") has shown a willingness to negotiate settlements in cases like those described here. One example of such a settlement is the government's contribution to the cost of remediating the tin smelting facility that the government had built during World War II in Texas City, TX.[23] One settlement strategy might be for a company to research and package together evidence of stronger claims for contribution based upon government ownership with other control/operator or contract based claims and present this combined package of evidence to DOJ for consideration of a global settlement for all potential company claims. In settlement negotiations with DOJ, successful settlements with the government are a realistic expectation in cases in which the government has been a wartime owner of a facility or equipment in a private facility.

OTHER STRATEGIES TO CONSIDER

In addition to seeking government contribution claims under CERCLA, you should also consider other strategies to reduce your company's environmental liability for remediations associated with facilities that operated during World War II. The following legal strategies offer some additional possibilities in this context.

Recoupment

In common law, recoupment or "set-off" is an equitable doctrine asserted by defendant to defeat or diminish plaintiff's recovery because of some breach of duty owed by plaintiff arising out of the same set of facts and circumstances as plaintiff's principal claim against defendant. The more recent version of recoupment occurs in the form of a compulsory counterclaim under Rule 13(b) of the

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- Heritage Research Center, at www.heritagereserach.com.
- History Associates, Inc., at www.historyassociates.com.
- National Archives, at www.nara.gov.

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Federal Rules of Civil Procedure. Recoupment requires that the liability being offset arise from the "same transaction or occurrence." Although recoupment does not permit affirmative recovery, recoupment claims enjoy two distinct advantages over other defenses in that recoupment claims are not barred by either statutes of limitation or sovereign immunity.

In the hypothetical, the DPC deposited hazardous waste from the manufacturing facility into the lagoons. The government's liability to the neighboring landowner arose from the escape of hazardous substances from these lagoons. The CERCLA liability for the contamination in the riverbed also came from the escape of the same hazardous substances from the same lagoons and likely occurred during the same high-water event or events. These facts meet the same transaction or occurrence test. Thus, Moderna Corp. may seek to offset any liability that it owes in a CERCLA cost recovery action for the riverbed contamination against the responsibility that the government had for the contamination of the neighboring property.

RCRA

In the future, you may see a private company file a claim against the federal government for future costs in corrective actions under the Resource Conservation and Recovery Act of 1976 ("RCRA"),[24] which contains a federal waiver of sovereign immunity. The U.S. Supreme Court has suggested in dicta that a company may be able to use the citizen's suit provi-

sion in RCRA to seek an injunction compelling the payment of future corrective action costs.[25] A 2002 Seventh Circuit opinion also supports this concept.[26]

In order to state a claim under the RCRA citizen's suit provision, you must allege the following elements: (1) defendant has generated solid or hazardous waste, (2) defendant is contributing or has contributed to the handling of the waste, and (3) this waste may present an imminent and substantial danger to people's health or to the environment. Imminence does not require an existing harm, but only an ongoing threat of future harm.[27] In some circumstances, a citizen's suit compelling the federal government to pay future RCRA costs, traceable to its wartime ownership of a facility, may be appropriate.

"THANK GOD FOR AMERICAN INDUSTRY—LABOR AND MANAGEMENT—WHICH HAS GIVEN US THE WEAPONS AND THE EQUIPMENT WITH WHICH TO CONDUCT OUR NORTH AFRICAN CAMPAIGN. MORE POWER TO YOU."

State Environmental Statutes

You eventually may see a successful claim against the federal government under a state environmental protection statute. Some courts interpreting the CERCLA waiver of sovereign immunity have suggested that the federal government must currently own the facility in question before the state can use the waiver to assert a state law action. Nevertheless, one federal district court has held that the waiver of sovereign immunity in RCRA is broad enough to cover state environmental statute claims, whether the federal government currently owns the facility or not.[28]

ASSERTING CLAIMS AGAINST THE GOVERNMENT DURING THE WAR ON TERRORISM

One of the concerns that your company may have when considering whether to pursue a contribution claim against the federal government along the lines that this article has recommended is how an action against the United States will be perceived by the public in the nation's increasingly patriotic climate. Your company may wonder whether it would be perceived as a greedy, unpatriotic monolith at a time when the country is waging a war on terrorism. The answer does not require a public relations spin-doctor, but merely an assertion of an historical truth: private industry, like most of the rest of the men and women in the nation at the time, answered the government's call to arms and made sacrifices to defeat aggression against the nation during World War II. Private industry, however, is now being called upon to bear alone the environmental costs of that war. America's industrial infrastructure was a key factor in winning the war. The environmental consequences of that unprecedented effort often occurred at the direction and command of the federal government. Praising industry's contribution to the war effort, General Dwight D. Eisenhower stated on a widely distributed morale poster: "Thank God for American industry—labor and management—which has given us the weapons and the equipment with which to conduct our North African campaign. More power to you." A sense of fair play suggests that the government that took temporary emergency control over industrial production should bear some of the cost of the environmental consequences that neither government nor industry fully understood at the time.

CONCLUSION

In every CERCLA action, you should perform an evaluation of the potential for federal environmental liability as a result of its wartime involvement with private industry. The extent of your facility's federal ownership will probably not be difficult for you to uncover. In order to establish operator liability against the federal government for a facility that it did not own, you will have to search for historical evidence concerning all of the government's involvement. You should take particular note of evidence that suggests control of day-to-day operations.

Because the potential costs of environmental cleanups are high and the government's involvement with industry was so pervasive during World War II, you can expect companies to continue to seek imaginative ways to establish the liability of

the federal government. As shown here, some favorable case law has been established. This area of the law continues to evolve. New strategies and new case law will likely continue to appear in the years ahead. To paraphrase Britain's wartime Prime Minister Winston Churchill, we are not at the end of the evolution of environmental claims against the government, but we are instead a little farther than the end of the beginning.[29] ◘

NOTES

1. The EPA states that, since the inception of CERCLA, the cumulative value of private party Superfund settlements is $20.6 billion. Since 1980, the EPA has assessed 44,418 sites, and as of December 31, 2002, 11,312 sites remain active in the site assessment program or are on the National Priorities List ("NPL"). Since 1992, responsible parties have performed 70 percent of nonfederal remediations. Source: official EPA figures. *See* www.epa.gov.
2. *See* CERCLA, 42 U.S.C. § 9601 *et seq.*
3. *See* Cadillac Fairview/California v. Dow Chemical Co., 299 F.3d 1019 (9th Cir. 2002).
4. *See* BUREAU OF DEMOBILIZATION, INDUSTRIAL MOBILIZATION FOR WAR: HISTORY OF THE WAR PRODUCTION BOARD AND PREDECESSOR AGENCIES, 1940–1945, vol. I (1947), 3–13 (New York: Greenwood Press Publishers, 1969).
5. *See* GERALD T. WHITE, BILLIONS FOR DEFENSE: GOVERNMENT FINANCING BY THE DEFENSE PLANT CORPORATION DURING WORLD WAR II 1, 67–82 (University of Alabama Press 1980). In addition to the industries noted in the article, such as metals, minerals, machine tools, aviation equipment, and rubber, the government directly invested in the following products and industries: petroleum production, refining, and transportation; industrial chemicals, such as styrene, butadiene, caustic soda, carbon black, soda ash, toluene, alcohol, ammonia, chlorine, and DDT; radio and communication equipment; ships and shipyards; pipelines; and clothing. This list is merely illustrative and by no means exhaustive.
6. We use the word "private" throughout this article in the sense of nongovernmental. We are not distinguishing between privately held and publicly held companies.
7. *See* BILLIONS FOR DEFENSE, *supra* note 5, at 3–11.
8. The Reconstruction Finance Corporation Act, 47 Stat. 5 (1932).
9. *See* BILLIONS FOR DEFENSE, *supra* note 5, at 11–37. The DPC owned property in all regions of the United States. The top 10 states with the most DPC projects at the end of the war were Ohio, Michigan, Texas, Illinois, Pennsylvania, New York, Indiana, California, New Jersey, and Utah. *See id.*, at 81. It helped to finance wartime production for such leading companies as ALCOA, General Motors, U.S. Steel, Chrysler, Ford, Standard Oil, Goodyear, Dow Chemical, and DuPont. *See id.*, at 49.
10. *See* BILLIONS FOR DEFENSE, *supra* note 5, at 83–87, 50–66.
11. *See* CERCLA, 42 U.S.C. § 9607.
12. *See* 42 U.S.C. §§ 9601, 9620. 42 U.S.C. § 9601(21) defines a "person" under CERCLA as ". . . an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9620(a)(1) states that "[e]ach department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any governmental entity, including liability under section 9607 of this title." *See also* FMC Corp. v. U.S. Department of Commerce, 29 F.3d 833, 840 (3d Cir. 1994).
13. 299 F.3d 1019 (9th Cir. 2002).
14. *Id.* at 1028.
15. *See* CERCLA, 42 U.S.C. § 9613(f)(1), under which "Contribution" means that "[a]ny person may seek contribution from any other person who is liable or is potentially liable under section 9607(a) of this title, during or following any civil action under 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."
16. The Tucker Act is originally contained in ch. 359, 24 Stat. 505 (1887). Its substantive provisions are in 28 U.S.C. § 1346. The Anti-Deficiency Act is in 31 U.S.C. § 1341 (2002).
17. *See* Cadillac Fairview, 299 F.3d at 1026–28. The government had argued that Dow had benefited from its operation of the plant in the form of the reimbursement of expenses, management fees, and acquisition of knowledge and experience useful to postwar commercial pursuits. The Ninth Circuit reasoned that any reimbursement was not a benefit, but a recompense or "squaring-up" by the government. The court further stated that any postwar development by Dow into the plastic industry as a result of knowledge and experience garnered at the facility was "overwhelmed in magnitude" by the government's benefits at the facility.
18. *See* CERCLA, 42 U.S.C. § 9607.
19. 29 F.3d 833 (3d Cir. 1994).
20. *See* Elf Atochem North America v. United States, 914 F. Supp. 1166 (E.D. Pa. 1996), in which the court held that, although the government had an onsite presence at the contractor's World War II arsenic production facility, that presence did not affect production decisions; Rospatch Jessco Corp. v. Chrysler Corp., 962 F. Supp. 998 (W.D. Mich. 1995), in which the court denied a

summary judgment motion asserting government operator liability because the company had actively pursued a Korean War-era contract with the government, private sources had furnished the supplies and raw materials used to fulfill the contract, and the government had not made any production decisions; United States v. Iron Mountain Mines Inc., 881 F. Supp. 1432 (E.D. Ca. 1995), in which the court refused to find the government liable as an operator under CERCLA because the facts did not establish that the government had exercised substantial control over the daily operations of a mine during World War II; Mead Corp. v. United States, 1994 WL 733567 (S.D. Ohio 1994), in which the court found that a company had failed to produce any evidence of the government's involvement in the production process other than a copy of a munitions contract; United States v. Vertac Chemical Corp., 841 F. Supp. 884 (E.D. Ark. 1993), in which the court held that the federal government was not liable as an operator or an arranger for hazardous substances arising from the production of Agent Orange because the government had not exercised substantial control over the daily operations of the facility.

21. *See* CERCLA, 42 U.S.C. § 9607(3), in which an "arranger" is defined as "any person who by contract, agreement, or otherwise arranged for disposal or treatment of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances."
22. *See* CERCLA, 42 U.S.C. § 6901 *et seq*.
23. *See* Amoco Chemical Co. v. United States, Div. A No. 96-272, filed in the U.S. District Court for the Southern District of Texas.
24. *See* CERCLA, 42 U.S.C. § 6901 *et seq*.
25. *See* Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996).
26. Albany Bank & Trust Co. v. Exxon-Mobil Corp., 310 F.3d 969, 975 (7th Cir. 2002). The citizen's suit provision is in RCRA, 42 U.S.C.A. § 6972(a).
27. *See* Cox v. City of Dallas, 256 F.3d 281, 299–300 (5th Cir. 2001).
28. *See* Charter Int'l Oil v. United States, 925 F. Supp. 104 (D.R.I. 1996).
29. On November 10, 1942, in a speech at the Lord Mayor's Day Luncheon, Prime Minister Winston S. Churchill, speaking about recent British victories in North Africa stated: "Now this is not the end. It is not even the beginning of the end. But it is, perhaps the end of the beginning."