

ENVIRONS

Ninth Circuit Defines When "Ownership" is Determined for Cost Recovery Purposes

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Breaking Developments In Environmental Law

According to the U.S. Ninth Circuit Court of Appeals, ownership for purposes of cleanup liability under the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA," also known as the "Superfund" law) is determined at the time that cleanup costs are incurred and not when a later cost recovery lawsuit is filed. Although CERCLA is 30 years old and has been amended several times, this is the first time that any court has directly addressed the question of when an owner is liable for cleanup costs, clarifying what had been one of many murky areas in CERCLA.

In *California v. Hearthside Residential Corp.*, the defendant bought undeveloped wetlands in Huntington Beach, Calif. The wetlands were contaminated with polychlorinated biphenyls ("PCBs") and were believed to be the source of PCB contamination that had migrated to adjacent residential properties, which Hearthside did not own. While Hearthside agreed to clean up the wetlands, it denied any responsibility for remediating the residential properties. Hearthside completed the wetlands cleanup and sold the property to the California Lands Commission. Meanwhile, the state paid for the cleanup of the residential parcels and then sued Hearthside under CERCLA to recover the costs.

The statute provides that an "owner or operator of a vessel or facility" is one class of persons who can be held strictly liable for the costs of investigation and cleanup of hazardous substances, as well as natural resources damages. The statute, however, does not specify the date from which ownership is measured and no case before *Hearthside* directly considered that question.

Hearthside claimed that it was not liable under CERCLA because it had sold the property before the lawsuit was filed and, therefore, was not an "owner." The trial court ruled that "owner" status for purposes of CERCLA is determined when the cleanup takes place and not when the lawsuit is filed. The Ninth Circuit agreed.

The Ninth Circuit held that ownership should be measured from the time the cleanup begins because that best aligns with the purpose of CERCLA, which is to encourage responsible parties to remediate hazardous facilities without delay. Most cost recovery lawsuits are not filed until cleanup is complete and the total costs are known. The court said if the date of filing a lawsuit was the determining factor for ownership, then a landowner seeking to avoid liability would have every incentive for delay of cleanup until it could find a buyer.

The court recognized that pinpointing ownership based on cleanup activities might introduce some factual uncertainty because of questions about when cleanup began, when it was completed, and when enough response costs were incurred to give rise to a cost recovery claim. The court, however, ruled that such factual determinations are routine and familiar components of CERCLA actions and can be resolved without difficulty.

An important lesson of *Hearthside* is that property owners cannot avoid cleanup liability by transferring ownership of a property. The decision also points to the importance of making sure other responsible parties are part of the cleanup early in the process.

Hearthside also is likely to be a guide for interpreting owner and operator liability under the Washington Model Toxics Control Act and the Oregon hazardous substances statute. Those two statutes, as well as many other states' similar laws, use identical wording to CERCLA's owner and operator language.

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