ProNet Practice Notes

CERCLA "Arranger" Liability:
Emerging Risk for Environmental Consultants

INTRODUCTION

The practice of environmental engineering has evolved from investigation to remediation, creating new realities for the environmental consultant. One of the most significant of these is the increased importance of "arranger " liability.[1]

Under Section 107(a)(3) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA ") liability is imposed on persons:

Who by *contract, agreement or otherwise arranged for disposal or treatment, or arranged with a transporter* for transport 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;...[2] (emphasis added).

This section has two salutary purposes. First, it provides a mechanism for piercing sham disposal transactions. Arrangements which are intended to result in a disposal of hazardous substances create liability regardless of the form of the arrangement.[3] Dressing a disposal as a sale, for instance, does not circumvent CERCLA liability.[4] Second, the language attaches liability to persons who control the disposal of hazardous substances even if they do not engage in the disposal, themselves.[5]Culpable parties have personal liability.

The breadth of the language, however, invites abuse. While it makes little sense to impose strict liability upon persons engaged in contamination abatement, nothing in the statutory language prevents this result. In fact, many of the activities performed by consultants and contractors fall within the plain meaning of the statutory language. Under section 107(a)(3), a court could hold environmental consultants responsible for remediating the very hazardous materials they seek to abate.

Kaiser Aluminum Chemical Corp. v. Catellus Development Corp.[6] is a striking example of this mechanical application of CERCLA. In *Catellus,* a grading contractor unknowingly moved contaminated soil from one area of a site to another. The Ninth Circuit ruled that the grading contractor was an operator of a facility and a transporter of hazardous wastes.[7] While clearly inequitable, this holding demonstrates the ease with which a court can interpret CERCLA liability provisions literally and thereby harm innocent parties. A court which could apply CERCLA so literally would have little difficulty applying "arranger " liability to a consultant who knew of the existence of hazardous materials and participated in decisions regarding its disposal.

Recently courts have begun relying upon *Kaiser Aluminum* to extend CERCLA's reach to remediation contractors. In *Ganton Technologies, Inc. v. Quadion Corporation*,[8] the court held that a remediation contractor and the remediation consultant could be liable under CERCLA as "operators " of the remediation site. The court noted that both were alleged to have control over the remediation site. Amazingly, the court concluded:

"Further, holding clean up contractors liable under CERCLA is consistent with the policies of CERCLA. As stated by Judge Parsons, "CERCLA was intended to tax those who profit or benefit from their disposal. Thus, Congress included within the statute generators, transporters, and dumpsite owners or operators as potential responsible parties. " *Brookfield-North*, slip op. at 23-24. *Clean up contractors fall in this category*. (emphasis added.)[9]

Kaiser Aluminum and *Ganton Technologies* are a "wake-up " call to remediation consultants and contractors. To survive in this new environment, remediation consultants and contractors must understand CERCLA liability. This article focuses on "arranger liability, " the most broadly applicable CERCLA provision. The current status of "arranger " decisions is reviewed and recommendations are made for minimizing liability.

"ARRANGER LIABILITY" ¾ AN EMERGING RISK

Recent trends in environmental consulting practice magnify the importance of "arranger " liability. The following factors imply that "arranger " liability will affect consultants adversely.

The Evolution from Investigation to Remediation

Site assessments are unlikely to lead to "arranger " liability since disposal, treatment and transport are not accomplished within this preliminary phase. Later remediation services, however, enter the area of active involvement necessary for "arranger " liability. As environmental consulting matures, a higher percentage of environmental practice will involve the riskier remediations.

The Expansion of Design/Build Remediation

The design/build project delivery system is uniquely suited to environmental remediation. Design/build reduces the owner's involvement in project management and assigns responsibility to a single entity. Design/build also offers the potential for significant cost savings.

The design/build approach creates a dilemma for consultants. It offers the prospect of greater economic benefit and enhanced control. However, if the consultant is prime, its greater involvement in actual remediation increases its liability for issues, such as job site injuries,[10]warranties and economic damages. Licensing becomes a serious problem.[11] As discussed further below, the consultant's active involvement with remediation also enhances the risk of "arranger" liability. Given the owners' preference for the design/build system, consultants who eschew design/build projects may forfeit business they cannot afford to lose. But they also may not be able to afford the risks of "arranger" liability.

The Effect of Bankruptcy Decisions

Recent bankruptcy decisions[12] have permitted discharge of contingent environmental liabilities. This indirectly increases the consultant's risk as the discharged party will often be the most culpable. Managers in failing organizations will have likely ignored, or even willfully circumvented, proper hazardous waste management practices. Since CERCLA liability is jointly shared, the remaining responsible parties, including the consultant, will necessarily assume the liability of the discharged party. One can anticipate an increase in CERCLA contribution actions.

Tanglewood East Homeowners v. Charles Thomas, Inc.[13] is an example of a contribution action in a construction setting. A homeowner's association instituted an action under CERCLA and RCRA (Resource Conservation and Recovery Act) to recover the costs of abating creosote contamination remaining from the property's prior use as a wood treatment facility. The homeowner's association successfully defeated a motion to dismiss, arguing that grading the site for development "arranged for " the treatment and transport of hazardous materials. Although not discussed in the decision, one assumes that the wood treating entity was not joined because it was insolvent or non-existent. Secondary defendants thus became the target of the CERCLA action.

The Difficulty in Contractually Transferring Risks

In theory, a consultant can contractually transfer its CERCLA liability risks to its client through indemnification or liability limitation provisions. In practice, only limited protection can be obtained.

First, the scope of indemnification will probably be limited by a jurisdiction's anti-indemnity statute.[14] Although the provisions of such statutes vary, most prohibit indemnification for sole negligence or defects in design.[15] A claim will likely have some aspects which are prohibited by the statute.[16] Second, given the long latency of environmental claims, the indemnitor may be unable to provide indemnification when the claim actually arises. Third, clients strenuously resist broad indemnification. Although the federal government can indemnify response action contractors under CERCLA § 119, experience has shown that such indemnification is difficult to obtain. Finally, contractual liability limitations may cap liability to one's client, but have no effect on the third party claims which are a primary source of concern.

While contractual risk allocation should not be ignored, it does not provide a foolproof technique for managing risk.

The Fragility of Errors and Omissions Coverage

Consultants' errors and omissions insurance is only available on a claims made basis. Under this insurance form, claims must be asserted during the policy period. Coverage for past acts is assured only if coverage is continuously maintained. If errors and omissions carriers retreat from the market, consultants face the real possibility that they will be confronted with substantial uninsured claims. During recent discussions with errors and omissions underwriters, this author was advised that underwriters are closely watching the development of environmental claims and that insurance will evaporate if claims become frequent. Given the long latency of environmental claims, a consultant may pay for years of premiums only to discover that the insurance is not available when needed.

These developments heighten concerns about "arranger" liability and environmental remediation, in general.

A CERCLA PRIMER

CERCLA supports cost recovery[17] and contribution[18] actions. Although the statutory bases for these actions are different, courts have not drawn sharp distinctions between them.[19] The essential elements of a CERCLA action are that:

- the defendant is a "person " listed in CERCLA § 107(a)(1-4);
- a release[20] or threatened release of a hazardous substance occurred;
- the release occurred at a ''facility'';[2l] and
- the plaintiff [22] incurred response costs consistent with the national contingency plan.[23]

CERCLA liability is based on a joint and several,[24] strict liability system.[25] Negligence or fault is not required. This is a radical departure from general tort principles which provide that consultants are liable only if their conduct falls below the "standard of care. "[26] The qualitative difference in CERCLA liability, combined with the expansive nature of environmental damages, results in a quantum increase in potential liability.

The strict liability provisions of CERCLA are eased for "response action contractors, " which are only liable for negligence, gross negligence or intentional misconduct.[27]Response action contractors are defined as persons under contract with:

- the President;
- any federal agency;
- any state or political subdivision acting under a cooperative agreement with the federal government;
- a potentially responsible party remediating a facility pursuant to an abatement order, a consent decree, or a settlement.[28]

The narrowness of this definition limits its utility to consultants. Many, if not most private projects would not qualify for "response action contractor " status. The mere existence of this exception reinforces the conclusion that, unless within the terms of the exception, remediation consultants are strictly liable.

"ARRANGER" LIABILITY

CERCLA does not define the term "arranged for, " but courts broadly interpret the phrase to effectuate CERCLA's remedial goals.[29] "Arranger " liability has three elements.[30] First, the person held responsible must own or possess hazardous substances. Second, the person must arrange for the transport, treatment or disposal of the hazardous substances. Third, the transport, treatment or disposal must be by another party or at a facility owned or operated by another party. One cannot "arrange for " disposal at one's own facility.[3l]

Four principles may be distilled from "arranger" liability decisions. First, parties can be personally liable for arranging disposal, transportation or treatment. Second, responsible parties need not legally own the hazardous wastes. Third, independent parties, such as brokers and contractors, may assume "arranger" liability. Finally, courts are imposing an ill-defined limit to "arranger" liability by imposing a "nexus" requirement on the statutory scheme. The key decisions establishing these four principles are discussed below.

Personal Liability

Northeastern Pharmaceutical & Chemical Co. (NEPACCO) produced dioxin and TCP as by-products of hexaclorophene manufacture. The dioxin and TCP were removed from the site or stored in drums which a

shift supervisor (Mills) suggested be disposed of at a neighboring farm. NEPACCO's president (Michaels) and the vice-president (Lee) were aware of the method of disposal.

The government sued Michaels, Mills and Lee alleging that they had "arranged for" the transportation and disposal of the hazardous substances.[32] The court held that they were personally liable stating:

Construction of CERCLA to impose liability upon only the corporation and not the individual corporate officers and employees who are responsible for making corporate decisions about the handling and disposal of hazardous substances would open an enormous, and clearly unintended, loophole in the statutory scheme.[33]

The liability imposed upon Lee, however, was not derivative but personal. Liability was not premised solely upon Lee's status as a corporate officer or employee. Rather, Lee is individually liable under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), because he personally arranged for the transportation and disposal of hazardous substances on behalf of NEPACCO and thus actually participated in NEPACCO's CERCLA violations.[34]

Personal liability arises when there is active involvement with the decision to transport or dispose of the waste. In *United States v. Mottolo*,[35] the court held that a corporate president could be liable for arranging for disposal to the extent he personally participated in the arrangement decision.[36]Active participation was also a factor in *United States v. Bliss*.[37] The court held that a plant supervisor and the chief executive officer were both personally liable because they had the authority for disposal decisions and actually met with the transportation broker to arrange for disposal of the waste.[38]

Personal liability is a significant concern. It is almost impossible for a consultant to perform its services without active involvement in the decisions concerning treatment, disposal or transportation of hazardous substances. If the other elements of CERCLA liability exist, personal liability will likely follow.

Constructive Possession or Ownership of Waste

In most instances, an environmental consultant will not possess or own the hazardous substances. "Arranger " decisions, however, have developed a concept of constructive possession based upon the authority to control disposal.

The defendants in *United States v. NEPACCO* also argued that "arranger" liability was not appropriate because they did not own or possess the hazardous substances being transported and disposed. The court, however, disagreed, stating:

The government argues Lee "possessed" the hazardous substances within the meaning of CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), because, as NEPACCO's plant supervisor, Lee had actual "control" over the NEPACCO plant's hazardous substances. We agree. It is the *authority to control* the handling and disposal of hazardous substances that is critical under the statutory scheme. The district court found that Lee, as plant supervisor, actually knew about, had immediate supervision over, and was directly responsible for arranging for the transportation and disposal of the NEPACCO plant's hazardous substances at the Denney farm site. We believe requiring proof of personal ownership or actual physical

possession of hazardous substances as a precondition for liability under CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3), would be inconsistent with the broad remedial purposes of CERCLA.[39] (emphasis supplied.)

Authority can be shown by the ability to direct disposal. In *Burlington Northern v. Woods Industries*,[40]defendant Hansen Fruit contracted for an enlargement of its existing lease. A portion of the newly acquired leasehold contained a shed where pesticides had been stored. When demolition was proceeding slowly, Hansen ordered the prior lessee's crews to demolish the shed and push the debris into a hole which was backfilled and paved. The court disposed of Hansen's arguments that it could not be responsible for disposing of waste it did not own or bring onto the site, by stating:

Hansen submits that it cannot be held liable as an "arranger" since it did not own the building materials which were buried. However, ownership is not an essential element of liability under §9607(a)(3). *United States v. Aceto Agr. Chemicals Corp*., 872 F.2d 1373, 1382 (8th Cir. 1989). *The critical question under that section is whether the defendant had authority to control the handling and disposal of hazardous substances*.[41] (emphasis added.)

However, authority to direct disposal does not exist solely because the defendant has the economic power to do so. Thus, in *General Electric Co. v. Aamco Transmissions, Inc*.,[42] defendant oil companies were not liable for their lessee's disposal of waste oil where there was no evidence that the oil companies actually directed or participated in the disposal decisions.[43] Similarly, in *Levin Metals v. Parr-Richmond Terminal*,[44] an absentee landlord could not be liable for illegal disposal. To find constructive possession, the defendant must exercise control over disposal of the waste.[45]

In traditional consulting, the engineering firm is not authorized to make key construction decisions. The engineer's role is to advise the decision-making client.

The importance of maintaining a traditional engineering role is exemplified by *City of North Miami, Fla. v. Berger*.[46] In *North Miami*, an engineering firm designed a landfill, assisted with permits, and provided consultation regarding its maintenance and operation. Holding that the engineer was not liable under CERCLA, the court stated:

The crucial point is that PBS&J had no authority to make the final operational decisions. It could inspect the site, render advice relating to the placement of wastes and the like, but the ultimate authority whether to implement such advice resided with Hadad and Kaufman. Accordingly, PBS&J's role as an independent engineering contractor for the Munisport site does not render it an operator under CERCLA. Indeed, imposing CERCLA liability on independent contractors such as PBS&J would mean that operator liability could be extended to ensnare virtually all consultants and contractors who provide advice relating to the operation of a waste site.[47]

The *North Miami* court did hold that the contractor which constructed the landfill was liable under CERCLA.

Environmental firms, however, are being asked to assume broad responsibilities. Clients are often uncomfortable with environmental issues and rely upon their consultants to make decisions for them. Potentially responsible party (PRP) committees, which are organized to direct investigation and remediation efforts, may be unable to effectively make decisions. Clients want their consultant to fill this

void. These and other factors have led to an increased use of turnkey or design/build project delivery systems.

But the control inherent in turnkey and design/build remediation increases the risk that a consultant will "constructively possess " the hazardous substances. Design/build and turnkey projects are thus more likely to result in CERCLA liability. Similarly, the services performed by construction or project managers involve enhanced risks related to the increased authority granted the consultant.

Liability of Third Parties

In most instances, the focus of "arranger" liability is to assure that an owner or operator of a facility cannot circumvent liability by giving the hazardous substances to another for transportation, treatment or disposal. However, a third party can assume "arranger" liability by undertaking the transportation, treatment or disposal.

In *CPC International, Inc. v. Aerojet-General Corp.*,[48] the Michigan Department of Natural Resources (MDNR) allegedly agreed to operate purge wells for a payment of $600,000. When it failed to do so, plaintiffs brought a contribution action under CERCLA alleging that MDNR had arranged for treatment of the contaminated groundwater. In discussing "arranger" liability, the court stated:

Other cases have emphasized that liability attaches to the party responsible for deciding the manner in which the substance was disposed. [cit. omit.] Here MDNR constructively took possession of the substances by entering into an agreement with Cordova/California wherein MDNR allegedly undertook the obligation to dispose of wastes on the site and to operate purge wells. Accepting the allegations in the complaint as true, MDNR had full authority to control the disposal of the substances and operation of the wells, and was the sole party responsible for these activities. Failure to operate the wells resulted in significant contamination. I find that this omission is exactly the type of behavior that CERCLA intended to include.[49]

United States v. Bliss,[50] provides another example of assumed "arranger" liability. IPC, a chemical supplier, learned that NEPACCO needed to dispose of accumulated dioxin and TCP by-products. IPC contacted Bliss and arranged for his company to remove dioxin and TCP contaminated oil. Bliss billed IPC, and IPC billed NEPACCO for an amount in excess of Bliss' bills. The court found IPC liable as an "arranger" stating:

Essentially, IPC acted as a broker between a chemical manufacturer and a disposal company. Under its arrangement with NEPACCO, IPC had authority to control the place and manner of disposal; for example, IPC could have chosen Bliss or any other party to dispose of the waste. Thus, this Court finds IPC liable under section 107(a)(3) of CERCLA.[51]

As part of the "solution," many consultants believe they cannot, or will not, be sued for the "problem." This is clearly not the case. As stated in *Burlington Northern*:

Although Hansen may not be responsible for bringing hazardous waste to the facility, Hansen allegedly caused the waste to be dispersed across the site. That amounts to arranging for disposal. See, *Kaiser*

Aluminum, 976 F.2d at 1342 (applying principle in the context of § 9607(a)(2); *Tanglewood East Homeowners v. Charles-Thomas, Inc*., 849 F.21d 1568,1573.[52]

CPC International, Bliss and *Burlington Northern* clearly indicate that "arranger" liability can be assumed by third parties. The actions of IPC and the alleged agreements of MDNR are not dissimilar from activities of contractors and consultants. IPC, for a fee, contacted a transporter and arranged for disposal. MDNR allegedly agreed to operate groundwater purge wells. Consultants are regularly installing and operating vapor extraction and similar remediation systems. If a release or a threatened release occurs, the consultant may find itself with "arranger " liability.

The "Nexus" Requirement

Nothing in the CERCLA statutory language precludes consultants being liable as "arrangers " of treatment, disposal or transport of hazardous substances. Several cases, however, have judicially imposed a "nexus" requirement. Simply stated, these cases refuse to apply "arranger" liability unless there is some relationship between the defendant and the hazardous substances.

In *Lincoln v. Republic Ecology Corp*.,[53] auto salvage companies sought contribution from the City of Pasadena for its involvement in determining the disposition of abandoned vehicles. In granting the City's motion for summary judgment, the court discussed the purposes behind CERCLA liability stating:

Thus, an unmistakable purpose behind CERCLA's strict liability standard was to force the parties who *profit* from the use and generation of hazardous wastes, or directly cause or contribute to their release, to account, in the pricing of their products for the environmental externalities associated with improper disposal.

This rationale simply does not apply to the City's abatement of public nuisances.[54]

Citing State of *New York v. City of Johnstown*,[55] and *United States v. New Castle County*,[56] the court found that there was not a sufficient "nexus " between the City of Pasadena and the generators of the hazardous waste.[57]

In *Johnstown*, the State of New York sued the City of Johnstown and others for the cost of remediating a landfill owned and operated by Johnstown. Johnstown cross-complained against the state arguing that the state, because of its regulation of the site, "arranged for" disposal under CERCLA 107(a)(3). The court disagreed, stating:

Liability for release is not endless; it ends with that party who both owned the hazardous waste and made the crucial decision how it would be disposed of or treated, and by whom.[58]

The *Johnstown* court distinguished the constructive possession cases stating:

The above situations [NEPACCO, Bliss and similar decisions] are much different from the one before the Court. The cases clearly show that there has to be some nexus between the allegedly responsible person and the owner of the hazardous substances before a party can be held liable under 42 U.S.C. § 9607 (a)(3).

There is no such nexus between the State and defendant here. The State was attempting to remediate the hazardous waste problems at both sites and cannot be considered in the class of liable parties along with Milligan & Higgins [generators of waste].[59]

In *New Castle County*, the County argued that the State of Delaware had arranged for disposal by its regulation of disposal sites. The court followed *Johnstown* and denied the County's cross-complaint. In a footnote, the court discussed the *Aceto*[60] line of cases which imposed "arranged for liability, " stating:

In each of the cases cited by the [*U.S. v. Aceto*] court, interestingly enough, the party potentially liable as an arranger was a person or entity that had, to some degree, a commercial, financial or proprietary relationship to the hazardous waste disposal.[61]

Republic Ecology, Johnstown and *New Castle County* focus on a qualitative distinction between remediators and generators of waste. None of the defendants were entities which gained financially by release of the hazardous materials. The trial decision in *CPC International, Inc. v. Aerojet-General Corp*., used the term "nexus" in a different context. The court found that " ... a nexus of control or possession is lacking in the case against MDNR ... "[62] Logically, if control or possession is lacking, then one need not determine whether a sufficient nexus exists. The use of the term "nexus" encapsulates the court's conclusion that the elements of arranger liability were not present. This imprecise use of the "nexus" requirement reflects its uncertain theoretical basis.

The "nexus" decisions indicate that a court can create judicial exceptions to CERCLA liability based on public policy. This provides an opportunity to argue that public policy is not served by applying CERCLA liability to consultants remediating hazardous wastes. Given the existence of a "response action contractor" exception to strict liability, however, it may be difficult to apply the "nexus" cases beyond the public regulation context.

RECOMMENDATIONS

The essence of "arranger" liability is constructive possession and control over the disposition of hazardous wastes. To reduce the risk of "arranger" liability, the consultant must confine its services to consultation and advice. Management of a remediation project, or actual installation and operation of remediation equipment, will significantly increase CERCLA risks. Where clients' needs, or market forces, preclude the consultant from limiting its authority, the consultant should attempt to allocate the risk by indemnification or liability limitation.

Given the diversity of environmental projects, strategies for limiting "arranger" liability must be tailored to specific situations. Appropriate solutions will vary. Some issues, however, are common to many remediation projects. The following paragraphs outline potential solutions for several problems which arise on a recurrent basis.

Contractual arrangements between client, consultant and contractor should clearly state the authority of each party. The consultant should avoid engaging the contractor directly. Even if the contract is signed by the consultant as "agent," the insertion of the consultant between client and contractor implies a high level of control. If the consultant must enter into such agreements, it should require the client's written

approval on all such agreements. The contractual provisions should also specify that the contractor will receive all recommendations from the client's representative and not from the consultant.

Consultants will rarely have title to the hazardous substances. However, clients will often request that the consultant execute transportation manifests. This practice should be avoided as it implies ownership or the authority to direct disposition of the wastes. Manifests may also be signed "on behalf of " a generator.[63] However, a discussion of this authority in the Federal Register implies that this form of execution exists to permit employees to sign on behalf of corporate generators.[64] Although consultants are signing manifests under a power of attorney, it is preferable for the generator to execute manifests on its own behalf.

Possession may also be proven constructively. Here, authority over the disposal decision is determinative. It follows that the consultant must avoid final decision-making authority. Where technically feasible, the consultant should provide the client with a choice of disposal or treatment options. If, for example, hazardous wastes are being transported to a landfill, the client should be provided with a selection of disposal sites and transporters.

If the consultant cannot reduce its authority and involvement, it must look to other risk allocation mechanisms. First, the services should be priced to reflect the actual risks. Second, the consultant should seek contractual indemnification, although the effectiveness of indemnification may be reduced by local anti-indemnity statutes. If the consultant is a "response action contractor," it may seek indemnification from the EPA under section 119 of CERCLA.[65] Recent experience indicates, however, that obtaining governmental indemnification is quite difficult. Finally, one can protect against client initiated actions by obtaining an express limit on liability. [66]

CONCLUSION

The court in *U.S. v New Castle County* succinctly summarized the state of "arranger" liability as follows:

Congress did not, to say the least, leave the floodlights on to illuminate the trail to the intended meaning of arranger status and liability. [cit. omit.] It is fairly well settled, however, that the term should be given a liberal interpretation.[67]

In the final analysis, "arranger" liability remains an intangible risk of remediation consulting. Liberal interpretation, uncertainty and astronomical damages are an explosive mix. Remediation consultants cannot ignore the dangers of "arranger" liability. Unless and until legislative or judicial relief is obtained, environmental consultants must tread carefully through the "arranger" liability mine field.

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1. Section 7002 of the Resource Conservation and Recovery Act (42 U.S.C.A. §6972(a)(1)(B)) imposes similar liabilities upon "any person, ... and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present any imminent and substantial endangerment to health or the environment; ... " Although the terms "arranged for " and "contributed to " are distinguishable, courts have construed them similarly and applied them in tandem. (*United States v. Aceto*

Agricultural Chemicals Corp. 872 F.2d 1373, 1384 (8th Cir. 1989); *Tanglewood East Homeowners v. Charles-Thomas, Inc*., 849 F.2d 1568, 1574 (5th Cir. 1988)).

2. 42 U.S.C.A. §9607(a)(3).

3. See, e.g., *Jones-Hamilton v. Beazer Materials Services*, 959 F.2d 126 (9th Cir. 1992); *United States v. Aceto Agricultural Chemicals Corp*., 872 F.2d 1372 (8th Cir. 1989).

4. See, e.g., *Jersey City Redevelopment Authority v. PPG Industries, Inc*., 866 F.2d 1411 (3rd Cir. 1988); *United States v. Conservation Chemical Company*, 619 F.Supp. 162, 240 (W.D.Mo. 1985); *New York v. General Electric Company*, 592 F.Supp. 291 (N.D.N.Y. 1984).

5. See, discussion of personal liability, infra.

6. 976 F.2d 1338 (9th Cir.1992).

7. *id*. at 1342.

8. 834 F.Supp. 1018 (N.D. Ill. 1993)

9. *id*. at 1022.

10. Contrast *Secretary of Labor v. Simpson, Gumpert & Heger* (OSHRC Docket No. 89-1300) [pure design professional not subject to OSHA citation for job site injury] and *Secretary of Labor v. Kulka Construction Management* (OSHRC Docket No. 88-11167) [construction manager subject to OSHA citation]. The cases were decided simultaneously and reflect the increased risk inherent with increased involvement with the actual construction process.

11. Many jurisdictions require that a general contractor be licensed. (See*, Summary of State Regulations and Laws Affecting General Contractors*, American Insurance Association. 1993.) If an engineer acts as an unlicensed contractor, it may be unable to recover its fee and may violate criminal statutes. (See Anno., *Failure of Building and Construction Artisan or Contractor to Procure Business or Occupational License as Affecting Enforceability of Contract or Right of Recovery for Work Done-Modern Cases*, 44 A.L.R. 4th 271 (1986); Ops. S.C. Atty. Gen. 80-94, 148 (1980) [discussing licensing requirements for construction managers])

12. For a good discussion of the "somewhat messy " interaction between environmental remediation statutes and federal bankruptcy laws see, In *re Jensen*, 995 F.2d 925 (9th Cir. 1993).

13. 849 F.2d 1568 (5th Cir. 1988).

14. See, e.g., Cal. Civ. Code §2782.

15. *id*.

16. Cal. Civ. Code §2782.6 provides a partial remedy by expanding the scope of indemnification for certain environmental claims, which exceed a $250,000 "deductible. "

17. 42 U.S.C.A. §9607(a).

18. 42 U.S.C.A. §9613(f).

19. Burlington Northern v. Woods Industries, 815 F.Supp. 1384,1387 (E.D. Wash. 1993).

20. A release is defined to mean "[A]ny spilling, leaking, pumping, purging, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment ... "

21. A "facility " is defined broadly as any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel. (42 U.S.C.A. §9601(9)).

22. If the plaintiff is the United States, this requirement is relaxed such that the response costs incurred are allowable if *not* inconsistent with the national contingency plan. (42 U.S.C.A. §9607(a)(4)(A)).

23. 42 U.S.C.A. §9607(a); *United States v. Aceto Agricultural Chemicals Corp*., 872 F.2d 1373, 1378-9; *Environmental Transportation Systems, Inc. v. ENSCO, Inc*., 763 F.Supp. 384, 387 (C.D.Ill. 1991) *United States v. Bliss*, 667 F.Supp. 1298-1304 (E.D.Mo. 1987).

24. New York v. Shore Realty Corp., 759 F.2d 1032, 1042, fn. 13 (2nd Cir. 1985); *United States v.* Aceto Agricultural Chemicals Corp., 872 F.2d 1373, 1377 (8th Cir. 1989).

25. 42 U.S.C.A. §9607.

26. See, *Gagne v. Bertam*, 43 Cal.2d 481, 489 (1954); *Swett v. Gribaldo, Jones & Associates*, 40 Cal.App.3d 573, 576 (1974); *Allied Properties v. John A. Blume Associates, Engineers*, 25 Cal.App.3d 848, 855-56 (1972) [doctrines of implied warranty and strict liability not applicable to consulting engineers].

27. 42 U.S.C.A. §9619(a)(1-2).

28. 42 U.S.C.A. §9619(e)(1-2).

29. Florida Power Light Co. v. Allis Chalmers Corp., 893 F.2d 1313,1318 (llth Cir. 1990*); United States v. Northeastern Pharmaceutical & Chem. Co*., 810 F.2d 726, 733 (8th Cir. 1986), cert. den., 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987).

30. 42 U.S.C.A. §9607(a)(3).

31. Unites States v. Fleet Factors Corp., 821 F.Supp. 707, 725-26(S.D. Ga. 1993).

32. United States v. Northeastern Pharmaceutical & Chemical Co., 810F.2d 726, 729 (8th Cir. 1986).

33. *id*. at 743.

34. 810 F.2d. 726, at 744.

35. 629 F.Supp. 56 (D.N.H. 1984).

36. *id*. at 60.

37. 667 F.Supp. 1298 (E.D.Mo. 1987).

38. *id*. at 1306.

39. *id*.

40. 815 F.Supp. 1384 (E.D. Wash. 1993).

41. *id*. at 1392.

42. 962 F.2d 281 (2nd Cir. 1992).

43. *id*. at 286.

44. 781 F.Supp. 1454, 1458 (N.D. Cal. 1991) [decided under 42 U.S.C.A. §9607(a)(2)].

45. Hassayampa Steering Committee vs. State of Arizona, 768 F.Supp. 697, 701 (D.Ariz. 1991).

46. 828 F.Supp. 401 (E.D. Va. 1993).

47. *id*. at 413.

48. 731 F.Supp. 783, 786 (W.D. MI. 1989).

49. 731 F.Supp. at 790. These allegations were not proven at trial. Thus, the action was eventually dismissed as to MDNR, although the court reiterated that the allegations, if proven would have established arranger liability. (777 F.Supp. 549, 577 (W.D.Mich. 1991).

50. 667 F.Supp. 1298 (E.D.Mo. 1987).

51. *id*. at 1307.

52. 815 F.Supp. at 1392.

53. 765 F.Supp. 633 (C.D.Cal. 1991.

54. *id*. at 635-636.

55. 701 F.Supp. 33 (N.D.N.Y 1988).

56. 727 F.Supp. 854 (D.Del. 1989).

57. 765 F.Supp. at 639.

58. 701 F.Supp. at 36.

59. *id*.

60. United States v. Aceto Agricultural Chemicals Corp., 872 F.2d 1373 (8th Cir. 1989).

61. 727 F.Supp. at 873, n. 40.

62. 777 F.Supp. 549, 577 (W.D.Mich. 1991).

63. The appendix to 40 C.F.R. Part 262 contains the following directive: "Generators may preprint the words, 'On behalf of' in the signature block or may handwrite this statement in the signature block prior to signing the generator certifications. "

64. Federal Register 35190, II.C (October 1,1986).

65. 42 U.S.C.A. §9619.

66. For further discussion on limitation of liability provisions, see, H. Ashcraft, *Limitation of Liability-The View After Markborough*, 11 The Construction Lawyers 3 (August 1991).

67. 727 F.Supp. 854, 871.

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