PROGRAM MATERIALS
Program #29142
September 5, 2019

CERCLA Arranger Liability: Latest Decisions and Mitigating Risks

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September 23, 2019

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Defining Arranger

Liability attaches to: "any person 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, . . . ,"

- CERCLA § 107(a)(3)

Burlington Northern & Santa Fe Railway Co. v. United States

- "It is plain from the language of the statute that CERCLA liability would attach under § 9607(a)(3) if an entity were to enter into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance. It is similarly clear that an entity could not be held liable as an arranger merely for selling a new and useful product if the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination."
  - 556 U.S. 599, 609-610 (2009)
- "Less clear is the liability attaching to the many permutations of 'arrangements' that fall between these two extremes—cases in which the seller has some knowledge of the buyers' planned disposal or whose motives for the 'sale' of a hazardous substance are less than clear."
  - 556 U.S. 599, 610 (2009)

"[T]he determination whether an entity is an arranger is a fact-intensive inquiry that looks beyond the parties' characterization of the transaction as a 'disposal' or a 'sale' and seeks to discern whether an arrangement was one Congress intended to fall within the scope of CERCLA's strict-liability provisions."

- *Burlington Northern*, 556 U.S. 599, 610 (2009).

Burlington Northern Requisite Intent

- "[T]he word 'arrange' implies action directed to a specific purpose…. Consequently, under the plain language of the statute, an entity may qualify as an arranger under § 9607(a)(3) when it takes intentional steps to dispose of a hazardous substance."
  - 556 U.S. 599, 611 (2009).

- To establish intent to dispose, more is required than mere knowledge that a product will be leaked, spilled, dumped, or otherwise discarded, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product.
  - See 556 U.S. 599, 611-612 (2009)

Liability from the Sale of a Property
United States v. Dico, Inc. et al

- Dico owned multiple buildings contaminated by PCBs.
- In 1994, the Environmental Protection Agency (EPA) issued an administrative order that required Dico to address the PCB contamination.
- Dico sold the buildings to Southern Iowa Mechanical (SIM). Dico did not inform SIM that the buildings were contaminated with PCBs and subject to an EPA order.
- SIM dismantled the buildings and disposed of all of the building materials except for steel beams, to which PCB-laden insulation was attached. The steel beams were stored in an open field, where EPA later found PCBs.

Liability from the Sale of a Property
United States v. Dico, Inc. et al

- Acknowledging that the commercial usefulness of the beams "weigh[s] slightly in favor of concluding Defendants did not intend to arrange for the disposal of hazardous substances by selling the contaminated buildings to SIM," the court found that this factor was substantially outweighed by the evidence that Defendants intended to dispose of the PCB contamination through the sale.
  - 920 F.3d 1174, 1179 (8th Cir. 2019).

- The usefulness of a product does not dispositively show the character of the transaction or the seller's intent as to preclude arranger liability under CERCLA.

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Arranger Liability of Military Contractors
TDY Holdings, LLC v. United States

- TDY manufactured aircrafts and aircraft parts at a 44-acre Site in San Diego primarily to fulfill military contracts for the Government during World War II.
- Government specifications required the use of chromium solutions in the manufacture of certain parts and recommended the use of chlorinated solvents to degrease parts as a step in the production process.
- The Government also owned some of the equipment used at the Site.
- The Site was later found to be contaminated with chromium compounds, chlorinated solvents, and PCBs.

Arranger Liability of Military Contractors
TDY Holdings, LLC v. United States

- Factors to consider when military contractors incur liability producing products for U.S. military efforts:
  - Evidence that operational or disposal decisions were made by the government;
  - The government directed or allowed the contamination because of an urgent or critical demand for wartime essentials; or
  - There was a lack of resources to provide alternative disposal practices
- The government is not liable as an arranger simply because contamination resulted from the production of products essential to U.S. military efforts.
- BUT the government can be liable as an arranger depending on the level of influence they had over the production and disposal practices that caused the contamination.
- Even though the Court did not specifically find the government to be an arranger, it did allocate a small portion of the costs to it on equitable grounds.

Arranger Liability of Military Contractors
El Paso Natural Gas Company, LLC v. United States

- 19 uranium mines located on the Navajo Reservation
- El Paso operated the mines in the 1950s and 1960s as part of the U.S. Atomic Energy Commission's ("AEC") Domestic Uranium Procurement Program at the outset of the Cold War.
  - AEC published circulars that provided a grade cut-off for the uranium ore they would purchase.
  - At the time, the federal government was the only authorized purchaser of uranium in the United States.
- The Department of Interior and the Bureau of Indian Affairs, as part of their tribal trust responsibilities, oversaw some aspects of the mining permits and leases for the Navajo Nation.

Arranger Liability of Military Contractors
El Paso Natural Gas Company, LLC v. United States

- The Court held that while the government cut-off levels may have influenced what waste was left behind, such influence did not amount to an intentional action to dispose of hazardous substances.
  - The Court agreed that the United States knew low-grade uranium bearing material would be left at the mine sites, but concluded that this knowledge alone was insufficient to create arranger liability.
- The United States' "general oversight and funding responsibilities" did not amount to "intentional steps to dispose of a hazardous substance."

Arranger Liability of Military Contractors
MRP Properties LLC, et al. v. United States

- Plaintiffs sought reimbursement of response costs from the investigation and cleanup of contamination at over a dozen refinery sites.
- Refinery sites acquired by Plaintiffs after WWII
- Before and during WWII, the Government, through the Petroleum Administration for War (the "PAW"), was authorized by executive order to control the operations of all oil refineries nationwide, including those on the refinery sites at issue.
  - The Government oversaw all inputs and outputs as well as the amount and type of wastes generated and released by each refinery.
  - For example, the PAW denied approval for several pollution-control projects that were "non-essential to the war effort."

Arranger Liability of Military Contractors
MRP Properties LLC, et al. v. United States

- Plaintiffs failed to allege that the Government owned or possessed the waste, as required for arranger liability under CERCLA.
  - Plaintiffs only alleged that the government controlled the entire petroleum products supply chain, tracked losses from government-directed operations, and took a lead role in wartime refinery reconfiguration.
  - Plaintiffs did not allege that government had any economic interest in their facilities or had intentional control over decision-making concerning waste disposal processes.
- "One may not become an 'arranger,' as a requirement for liability under CERCLA, through inadvertence; the party must have some intent to make preparations for the disposal of hazardous waste, though that intent goes to the matter of disposing waste generally, not to disposing of it in a particular manner or at a particular location."

New Mexico on behalf of New Mexico Environment Dept. v. US EPA

- Plaintiffs—New Mexico and the Navajo Nation—sought cost recovery from EPA and Environmental Restoration, LLC ("ER"), among other Defendants.
- This action stems from a breach in a portal to the Gold King Mine in Colorado that caused the release and travel of over 3 million gallons of acid mine drainage and nearly 900,000 pounds of heavy metals into New Mexico and the Navajo Nation.
- The breach followed EPA's decision to re-open the mine after years of acid mine drainage issues. EPA selected ER as a contractor to manage the project.
- While EPA and a subcontractor were excavating, a backhoe operator hit a "spring" in the passageway into the mine, causing the pollutant release.
  - The Plaintiffs allege that EPA and ER negligently caused the portal collapse, citing "an incomplete safety plan, an inadequate evaluation of the fluid hazard, and lacking any equipment to prevent or mitigate an uncontrolled release of water from the mine."

New Mexico on behalf of New Mexico Environment Dept. v. US EPA

- The Court denied ER's motion to dismiss the arranger-liability claims.
- *Burlington Northern* did not apply, as this was, as contemplated by the Supreme Court, a "plain" case of arranger liability: one involving "transport for the sole purpose of discarding a used and no longer useful hazardous substance."
  - ER agreed to facilitate releases and storage of wastewater, "allowing a reasonable inference that the sole purpose of the agreement . . . was for ER to participate in the disposal and treatment of a no-longer-useful, hazardous substance."
  - The bar to liability in a Seventh Circuit case, *Amcast Industrial Corp. v. Detrex Corp.*, applies only to a spill of a useful product; here, however, the acid mine drainage and heavy metals were waste materials.
- ER contracted with other entities to assist with the disposal, meeting the second element of arranger liability.
- Unlike in other Circuits, "control" over the discharge process is not required to establish arranger liability under Tenth Circuit precedent (binding in this case).

Mitigating Risk
Considerations for Determining Intent

- Does the product have a useful purpose?
  - Does the product serve a productive purpose?
  - Is there a viable market for the product?
  - Is their an actual resale value for the product?
  - What is the value of the product to the purchaser?
  - What is the value of the product (or disposing of the product) to the seller?
  - Has the product reached the end of its useful life?
- Is the sale/transaction legitimate?
  - What was the underlying purpose of the sale/transaction?
- What level of knowledge did the seller have regarding the disposal?
- What level of control/influence did the entity have regarding the disposal?
- Who owned, possessed, or controlled the hazardous substance at the time of disposal?

Mitigating Risk
Possible Measures

- Risk of arranger liability under CERCLA can be significantly reduced by inserting certain terms into your agreements that involve (or may involve) the disposal of hazardous substances.
  - Check the terms in all contracts involving the purchase, sale, or distribution of products or properties which contain and/or may be contaminated by hazardous substances.
  - Consider adding language to your agreement that makes your intent in entering into the agreement clear and avoid language which could call your intent into question.
  - Add language requiring the other party to indemnify, defend, and hold you harmless for claims related to the disposal of hazardous substances.
- Conduct careful due diligence for any transaction potentially involving hazardous substances.
  - Research into historical operations involving the use or disposal of hazardous substances when purchasing a company or real property is essential.
  - Only use reputable vendors/contractors when storing or transporting hazardous substances.

Questions?

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CERCLA Arranger Liability: Latest Decisions and Mitigating Risks

By Richard F. Ricci, Esq. and Allison Gabala, Esq.*

Section 107(a)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") defines potentially responsible parties to include "any person 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."[1] The touchstone arranger-liability case is *Burlington Northern & Santa Fe Railway Co. v. United States*, decided by the U.S. Supreme Court in 2009.[2] *Burlington Northern* identified two extremes demonstrating the obvious existence and absence of arranger liability.[3] Recognizing the gray areas that "fall between these two extremes" such as cases where the seller's "motives for the 'sale' of a hazardous substance are less than clear," the Supreme Court found that "the determination whether an entity is an arranger requires a fact-intensive inquiry that looks beyond the parties' characterization of the transaction as a 'disposal' or a 'sale' and seeks to discern whether the arrangement was one Congress intended to fall within the scope of CERCLA's strict-liability provisions."[4]

In evaluating this in-between category, the Supreme Court concluded that a seller's knowledge that a buyer would dispose of a hazardous substance alone is not sufficient to constitute arrangement for disposal.[5] Rather, the central question is the intent of the seller in the particular transaction.[6] More specifically, the Supreme Court held that "[i]n order to qualify as an arranger, [the seller] must have entered into the sale . . . with the intention that at least a portion of the product be disposed of during the transfer process by one or more of the methods described in § 6903(3)."[7]

Several years after the landmark decision in *Burlington Northern*, federal courts continue to struggle to clarify the circumstances in which a person is liable as an "arranger" under CERCLA for arranging for the disposal of hazardous substances. In 2018 and 2019, multiple federal decisions have resulted in case law that both clarifies and confuses what it means to be an arranger. Below are summaries of several of such recent decisions.

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* A special thank you to Zachary L. Berliner, Esq. for helping to prepare this document.

[1] 42 U.S.C. § 9607(a)(3).

[2] 556 U.S. 599, 611 (2009) ("*Burlington Northern*").

[3] *Id.* at 609-10. ("It is plain from the language of the statute that CERCLA [arranger] liability would attach . . . if an entity were to enter into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance. It is similarly clear that an entity could not be held liable as an arranger merely for selling a new and useful product if the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination.").

[4] *Id.* at 610.

[5] *Id.* at 612 ("While it is true in some instances that an entity's knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity's intent to dispose of its hazardous waste, knowledge alone is insufficient to prove that an entity 'planned for' the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product.").

Liability from the Sale of a Property

United States v. Dico, Inc., et al.[8]

Dico, Inc. ("Dico") owned multiple buildings contaminated with polychlorinated biphenyls ("PCBs").[9] In 1994, the Environmental Protection Agency ("EPA") issued an administrative order that required Dico to address the PCB contamination.[10] In 2007, without informing EPA, Dico sold the buildings to Southern Iowa Mechanical ("SIM") through its corporate affiliate, Titan Tire Corporation ("Titan").[11] Dico did not inform SIM that the buildings were contaminated with PCBs and subject to an EPA order.[12] SIM dismantled the buildings and disposed of all building materials except for steel beams, to which PCB-laden insulation was attached.[13] The steel beams were stored in an open field (hereinafter the "SIM site"), where EPA later found PCBs.[14]

Claiming that Dico and Titan (collectively, "Defendants") intended to arrange for the disposal of hazardous substances when they sold PCB-contaminated buildings without disclosing the contamination, EPA sued for response costs incurred addressing the SIM site and penalties for violating the administrative order.[15] The District Court concluded on summary judgment that Defendants were liable as arrangers, but the Eighth Circuit reversed, finding insufficient evidence to demonstrate as a matter of law that Defendants were merely seeking to get rid of hazardous substances.[16] The Court of Appeals remanded for additional fact-finding.[17] After a bench trial, the District Court found Defendants were liable as arrangers and imposed both civil penalties and punitive damages.[18] The Defendants appealed, claiming the District Court "gave insufficient weight to evidence that the transaction was legitimate" and "erred by failing to presume the sale of useful products is a legitimate transaction."[19]

Applying the reasoning in *Burlington Northern*, the Eighth Circuit found that Defendants, as the sellers of a contaminated building, were subject to arranger liability, even though (1) the sale at issue mirrored the terms of a prior sale involving defendants and (2) SIM and the buildings' structural-steel beams were reusable if decontaminated. Acknowledging that the District Court found the commercial usefulness of the beams "weigh[s] slightly in favor of concluding Defendants did not intend to arrange for the disposal of hazardous substances by selling the contaminated buildings to SIM," the court found that this factor was substantially outweighed by the evidence that Defendants intended to dispose of the PCB contamination through the sale.[20]

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[8] 920 F.3d 1174 (8th Cir. 2019).
[9] *Id.* at 1177.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 1177-78.
[19] *Id.* at 1178.
[20] *Id.* at 1179.

The Eighth Circuit relied on several of the District Court's findings to conclude that Dico's intent was to avoid environmental liability through the sale of the contaminated buildings.[21] Defendants knew the buildings would be dismantled once sold.[22] They also knew that by selling the buildings, they would avoid remediation costs that would greatly exceed the purchase price.[23] Defendants did not tell the purchaser that the buildings were contaminated and subject to an EPA order.[24]

The court opined that the usefulness of a product does not dispositively show the character of the transaction or the seller's intent so as to preclude arranger liability under CERCLA.[25] The court highlighted the lower court's finding that "[a] party may sell a still 'useful' product . . . with the full intention to rid itself of environmental liability rather than a legitimate sale, for example where the cost of disposal or contamination remediation would greatly exceed its purchase price."[26] The touchstone remains whether the arrangement was one Congress intended to fall within the scope of CERCLA's strict-liability provisions.

Arranger Liability of Military Contractors

TDY Holdings, LLC v. United States[27]

TDY Holdings, LLC and TDY Industries, LLC (collectively, "TDY") filed a complaint against the United States of America, the United States Department of Defense, and the Secretary of Defense (collectively, the "Government") seeking an equitable allocation of the response costs TDY had incurred, and will incur, for the cleanup of a 44-plus acre manufacturing site in San Diego (the "Site").[28] Between 1939 and 1999, TDY and its predecessors manufactured aircrafts and aircraft parts at the Site, primarily to fulfill military contracts for the Government.[29] In some cases, the Government's contracts required the use of chromium compounds and chlorinated solvents.[30]

When TDY ceased its manufacturing operations in 1999, the California EPA Regional Water Quality Control Board ordered a Site-wide investigation of soil, soil gas, and groundwater to identify areas requiring remediation.[31] The investigation found that the Site was contaminated with three hazardous substances: chromium compounds, chlorinated solvents, and polychlorinated biphenyls ("PCBs").[32]

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[21] *Id.* at 1179-80.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 1179.
[25] *Id.* at 1178-79.
[26] *Id.* at 1179.
[27] *TDY Holdings, LLC v. United States*, 372 F. Supp. 3d 1091 (S.D. Cal. 2019).
[28] *TDY Holdings, LLC v. United States*, 122 F. Supp. 3d 998, 1002 (S.D. Cal. 2015).
[29] *Id.* at 1002-03.
[30] *Id.* at 1018.
[31] *Id.* at 1002.
[32] *Id.*

Following a bench trial, the District Court determined that the Government (1) benefitted from TDY's manufacturing at the Site, (2) owned some of the equipment related to the contamination, and (3) observed and knew of TDY's production processes and maintenance practices that released contaminates into the environment.[33] The Court also determined that there was little evidence that TDY personnel acted with knowing disregard for environmental safety and regulations.[34] Acknowledging that the Government was a past owner of the facilities at the Site and that the Government directed TDY to use the chemicals at issue, the Court nevertheless held that the contamination at issue was only attributable to TDY's storage, maintenance, and repair practices, as well as spills and drips that occurred in the manufacturing process.[35] The Court further held that Government specifications requiring the use of chromium solutions in the manufacture of certain parts and the use of chlorinated solvents to degrease parts were insufficient to confer PRP liability on the Government.[36] Accordingly, the Court found TDY, as an owner of the facility and the sole operator of the Site, was the only party responsible for the contamination at the Site and the associated response costs.[37]

On appeal, TDY argued that the Court abused its discretion because it misunderstood CERCLA's strict-liability statutory scheme by giving improper weight to the Government's role as a past owner, thereby erroneously allocating based on "fault."[38] The Ninth Circuit held that the Court did not misconstrue the concept of "fault" or misunderstand CERCLA's strict-liability scheme; however, the Ninth Circuit remanded the case because it determined that the District Court erred in its analysis of the two Ninth Circuit cases involving the allocation of CERCLA cleanup responsibility between military contractors who incurred liability while fabricating products essential to the military's efforts in World War II and the government, *United States v. Shell Oil Co.*[39] and *Cadillac Fairview/California Inc. v. Dow Chemical Co.*[40] [41]

On remand, the District Court focused on the similarities and differences between *Shell Oil*, *Cadillac Fairview*, and the current case.[42] In *Shell Oil*, the Ninth Circuit found that despite the "pervasive activity of the government" in the oversight of a program that produced aviation gas used by the U.S. military and the fuel's importance to the war effort, the government was not an arranger regarding the disposal of the acid waste that resulted from the program and the production of the aviation gas.[43] The Ninth Circuit determined that mere "authority to control" was insufficient without actual exercise of said control.[44] In *Cadillac Fairview*, the Ninth Circuit held that the government was liable as an owner, operator, and arranger because even though Dow Chemical operated the facility, the government owned the facility and materials (including products and byproducts), retained complete control over the site, inspected and approved the

[33] *Id.* at 1004.
[34] *Id.*
[35] *Id.* at 1017-20.
[36] *Id.* at 1018.
[37] *TDY Holdings, LLC v. United States*, No. 07-cv-00787-CAB-BGS, 2015 WL 4979011, at *1 (S.D. Cal. July 29, 2015).
[38] *TDY Holdings, LLC v. United States*, 885 F.3d 1142, 1147 (9th Cir. 2018).
[39] 294 F.3d 1045 (9th Cir. 2002). Notably, this case predates the *Burlington Northern* decision on arranger liability.
[40] 299 F.3d 1019 (9th Cir. 2002). Notably, this case predates the *Burlington Northern* decision on arranger liability.
[41] *TDY Holdings*, 885 F.3d at 1148.
[42] *TDY Holdings, LLC*, F. Supp. 3d at 1095-99.
[43] *Shell Oil*, 294 F.3d at 1059.
[44] *Id.* at 1057.

site and its operations, considered Dow Chemical to be an agent, and entered into a "hold harmless" agreement with Dow Chemical that protected Dow Chemical from liability for personal injury and property damage.[45]

After comparing the three cases, the Court determined that the Government exercised less control over TDY than it did over Shell Oil Co. or Dow Chemical.[46] The Court concluded that, unlike in *Shell Oil* and *Cadillac Fairview*, there was no evidence that the Government made any operational or disposal decisions, that it directed or allowed the environmental contamination because of an urgent demand for wartime essentials, or that there was a lack of resources to provide alternative disposal practices.[47] In support of this determination, the Court noted that the Government was neither the Site operator nor an arranger for the disposal of the waste, that the Government-owned equipment was removed from the site 20 years before TDY ceased operations, and that TDY's own practices at the site caused the contamination.[48]

Although the Court concluded that "[t]he unchallenged facts in this case are significantly different than the factual findings in *Shell Oil* and *Cadillac Fairview* and do not support a substantial allocation of cleanup costs to the government," the Court ultimately determined that the contaminants were introduced to the environment in part because the Government recommended or required that TDY use them.[49] From this the Court concluded that it was equitable to allocate to the Government five percent of the cleanup costs associated with the chromium contamination and ten percent of the chlorinated solvent remediation costs.[50] This case demonstrates that not all CERCLA liability for a contaminated site can be attributed to a government entity solely because the environmental contamination resulted from the fabrication of products essential to a U.S. military effort. However, that entity may ultimately be held liable for a portion of the cleanup costs on equitable grounds if it recommended or required that a potentially responsible party employ the contaminant to be cleaned up.

El Paso Natural Gas Co., LLC v. United States[51]

In a suit brought in September 2014, El Paso Natural Gas Company, LLC ("El Paso") claimed that the United States was liable under CERCLA to cover its "fair share" of the cleanup costs of 19 uranium mines located on the Navajo Reservation, which mines El Paso operated in the 1950s and 1960s as part of the U.S. Atomic Energy Commission's ("AEC") Domestic Uranium Procurement Program.[52] The AEC sought to locate and develop domestic sources of uranium through both government-led exploration and private-enterprise incentives.[53] The AEC published circulars that provided a grade cutoff for the uranium ore they would purchase.[54] At

[45] *Cadillac Fairview*, 299 F.3d at 1022-26.
[46] *TDY Holdings, LLC*, 372 F. Supp. 3d at 1099.
[47] *Id.*
[48] *Id.* at 1099-1101.
[49] *Id.*
[50] *Id.*
[51] *El Paso Nat. Gas Co., LLC v. United States*, No. CV14-8165-PCT-DGC, 2019 WL 2137265 (D. Ariz. May 16, 2019) ("*El Paso II*").
[52] *Id.* at *1.
[53] *Id.* at *2.
[54] *Id.*

the time, the federal government was the only authorized purchaser of uranium in the United States.[55] Additionally, the Department of Interior and the Bureau of Indian Affairs, as part of their tribal trust responsibilities, oversaw some aspects of the mining permits and leases for the Nation.[56]

After a series of motions for summary judgment, in 2017, the United States District Court for the District of Arizona granted El Paso's motion for partial summary judgment, determining that the United States was liable for some of the costs under CERCLA as the "owner" of the site as they owned the property and held it in trust for the benefit of the Navajo Nation.[57] El Paso then asserted that the United States was also liable as an "operator" and "arranger" and requested that the Court make an equitable allocation of past and future response costs under CERCLA § 113.[58]

After an eight-day bench trial in February and March of 2019, the Court determined that the United States was not liable as an arranger for the disposal of hazardous substances generated during the mining process.[59] The Court divided the mining operations into three phases—exploration, mining, and reclamation—and addressed each phase in turn.[60] El Paso claimed that the United States qualified as an arranger during all three phases.[61]

As to the mining phase, El Paso argued that the United States was an arranger because of the circulars' ore grade cutoff level, claiming that the level showed the United States intended mine operators to separate and leave behind materials bearing low-grade uranium.[62] The Court agreed that the United States knew low-grade-uranium-bearing material would be left at the mine sites, but concluded that this knowledge alone was insufficient to create arranger liability.[63] The Court further held that, while the government cutoff levels may have influenced what waste was left behind, such influence did not amount to an intentional action to dispose of hazardous substances.[64]

Regarding the reclamation phase, El Paso claimed the United States qualified as an arranger because federal agencies led by EPA and including DOI coordinated with the Navajo agencies to plan and determine a joint strategy for addressing abandoned Navajo mine sites, and reviewed and approved grant applications, reclamation plans, the comingling of waste from mines operated by third parties, and the importation of offsite material as cover.[65] The Court concluded, however, that the United States's "general oversight and funding responsibilities" did not amount to "intentional steps to dispose of a hazardous substance."[66]

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[55] *Id.*
[56] *Id.*
[57] *El Paso Nat. Gas Co., LLC v. United States*, No. CV-14-08165-PCT-DGC, 2017 WL 3492993, at *7 (D. Ariz. August 15, 2017) ("*El Paso I*").
[58] *El Paso II*, 2019 WL 2137265 at *1.
[59] *Id.* at *16-18.
[60] *Id.* at *4.
[61] *Id.* at *16.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.* (quoting *Burlington Northern*, 556 U.S. at 611).

The Court also compared this case to other Ninth Circuit cases addressing private parties' liability for environmental contamination stemming from wartime efforts, including *Shell Oil*, *Cadillac Fairview*, and *TDY Holdings*. The Court found that the facts here closely paralleled those in *Shell Oil*—uranium ore was mined for purchase by the United States during wartime; the mining was conducted pursuant to government-approved permits and government programs designed to encourage domestic production; El Paso voluntarily entered and profited from the mining business; and "the United States was aware that waste was being produced, but did not direct the manner in which [El Paso] disposed of it."[67] Accordingly, the Court held that the government could not be liable as an arranger even under the "broader arranger theory" presented in *Shell Oil*.[68] This case thus serves as another example of *Burlington Northern* being applied to relieve an entity from arranger liability for a lack of intentional steps to dispose of waste.

MRP Properties LLC, et al. v. United States[69]

Plaintiffs brought an action under CERCLA against the United States of America (the "Government") seeking reimbursement of response costs for the investigation and cleanup of contamination at over a dozen refinery sites collectively owned by Plaintiffs (the "Sites").[70] Plaintiffs acquired the refineries after WWII.[71] Before and during WWII, the Government, through the Petroleum Administration for War (the "PAW"), was authorized by executive order to control the operations of all oil refineries nationwide, including those on the Sites.[72]

Plaintiffs alleged in their Amended Complaint that the Government was liable under CERCLA as an arranger because of the PAW's expansive control over the refineries.[73] They pointed to the Government's overseeing all inputs and outputs as well as the amount and type of wastes generated and released by each refinery.[74] For instance, Plaintiffs averred that the Government allocated highly corrosive "sour" crude for eight of the refineries despite their only being equipped for "sweet" crude, knowingly creating a risk for leaks.[75] They also highlighted the PAW's denial of approval for pollution-control projects that were "non-essential to the war effort."[76] Put differently, Plaintiffs argued that the Government was an arranger due to its "constructive possession" of waste it controlled.[77] They asserted that the Government's "final review, approval, and authorization of plans submitted by the Refineries for equipment and process designs that necessarily included waste disposal" led to the "inference that the Government intended and planned for the disposal of wastes."[78]

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[67] *Id.* at *18 (quoting *Shell Oil*, 294 F.3d at 1059).
[68] *Id.*
[69] 308 F. Supp. 3d 916 (E.D. Mich. 2018).
[70] *Id.* at 919-20.
[71] *Id.* at 920.
[72] *Id.*
[73] *Id.* at 921.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.* at 922.
[78] *Id.*

The United States District Court for the Eastern District of Michigan granted Defendant's motion to dismiss as to the arranger-liability claim.[79] In so holding, the Court principally relied on the holding of the Sixth Circuit in *GenCorp, Inc. v. Olin Corp.* that an arranger must "own or possess the hazardous waste in question" and "take intentional steps" to dispose of that waste.[80] It found that Plaintiffs "simply [did] not allege that Defendant made any arrangements with respect to waste disposal" or that the Government "owned or possessed the hazardous waste" at issue.[81] Nor did the allegations in the Amended Complaint suggest any intentional steps by the Government to dispose of waste, in the Court's view.[82]

As to intent, the Court rejected Plaintiffs' comparison to *GenCorp*. *GenCorp* held that "[o]ne may not become an 'arranger,' as a requirement for liability under CERCLA, through inadvertence; the party must have some intent to make preparations for the disposal of hazardous waste, though that intent goes to the matter of disposing waste generally, not to disposing of it in a particular manner or at a particular location."[83] The Court noted the *GenCorp* court's finding that GenCorp was "intimately involved in decisions relating to specific waste disposal processes"—namely, it or its representatives recommended waste disposal locations, as well as funded research and approved methods to reduce offsite waste disposal.[84] In this case, however, the Court found that Plaintiffs relied solely on the Government's denying approval for pollution-control projects to establish intent.[85] It held that, even when viewed with Defendant's knowledge of the waste generated, this does not rise to the level of intentionality seen in *GenCorp*.[86]

Plaintiffs also drew an unpersuasive comparison to *GenCorp* regarding "possession" or "ownership." The Court noted that the defendant in *GenCorp* had constructive ownership and possession stemming from an "economic interest" in the project at issue: an option to purchase the facility secured by its contribution of one-half of the construction costs.[87] It further pointed to GenCorp's equal representation on the board that oversaw and approved offsite waste disposal.[88] From these facts, the Court then held that Plaintiffs made no such allegations of an economic stake or intentional control over disposal-related decision-making to give rise to an inference of arranger liability.[89] This decision therefore accords with *El Paso II* in that it dismisses the government on arranger-liability grounds due, in part, to insufficient evidence of intentionality.[90]

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[79] *Id.* at 934.
[80] *Id.* (citing *GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433 (6th Cir. 2004)).
[81] *Id.*
[82] *Id.*
[83] *Id.* at 927 (quoting *GenCorp, Inc,* 390 F.3d at 446).
[84] *Id.* at 935.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*

Arranger Liability Implications of Gold King Mine Collapse

New Mexico of Behalf of the New Mexico Environment Department v. U.S. Environmental Protection Agency, et al.[91]

In 2016 the State of New Mexico and the Navajo Nation each filed separate, later consolidated actions in the United States District Court for the District of New Mexico against the Environmental Protection Agency ("EPA"), Environmental Restoration, LLC ("ER"), and other entities for cost recovery under CERCLA, among other forms and theories of relief.[92] Both actions stem from a breach of a collapsed portal abutting the Gold King Mine in Colorado, which resulted in the release of over three million gallons of acid mine drainage and nearly 900,000 pounds of heavy metals into the Animas River watershed.[93] The Plaintiffs allege that the acid mine drainage later traveled into New Mexico and the Navajo Nation via the San Juan River, causing "extensive environmental and economic damage."[94]

After years of acid mine drainage issues at the Gold King Mine, in 2014 the Colorado Division of Reclamation, Mining, and Safety asked EPA to re-open a previously capped pathway into the mine to investigate.[95] Following a competitive-bidding process, EPA selected ER as a contractor to manage the mine re-opening and choose a subcontractor.[96] EPA and a subcontractor began excavation later that year, but "abruptly stopped work" upon finding that the drainage would require larger settling ponds than initially anticipated.[97] After further investigation and planning, excavation resumed in August 2015.[98] During the second day of work, a backhoe operator hit a "spring" below the roof of the passageway into the mine, causing the release of acid mine drainage and heavy metals.[99] The Plaintiffs allege that EPA and ER negligently caused the portal collapse, citing "an incomplete safety plan, an inadequate evaluation of the fluid hazard, and lacking any equipment to prevent or mitigate an uncontrolled release of water from the mine."[100]

The Court denied a motion by ER to dismiss both Complaints. One of the grounds for ER's motion was that there were insufficient allegations to establish arranger liability under CERCLA. ER first argued that the discharge was accidental, triggering the bar to arranger liability articulated by the U.S. Supreme Court in *Burlington Northern* when the entity has mere knowledge that some disposal may occur during transport.[101] The District Court held that *Burlington Northern* was inapplicable here. That case stated that its holding does not apply to "transport for the sole purpose of discarding a used and no longer useful hazardous substance"—

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[91] 310 F. Supp. 3d 1230 (D.N.M. 2018) ("*New Mexico v. EPA*").
[92] *Id.* at 1237.
[93] *Id.*
[94] *Id.*
[95] *Id.* at 1240.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.* at 1247.

cases in which the Supreme Court posited that arranger liability is "plain."[102] Here, conversely, the Court found that the materials in question—acid mine drainage and heavy metals—surely constituted "used and no longer useful hazardous substance," circumventing the *Burlington Northern* exception.[103]

The Court also noted that the 2014 Statement of Work agreement between ER and EPA specified that ER was to facilitate controlled releases of the wastewater and construction of retention ponds for its storage.[104] This "allow[ed] a reasonable inference that the sole purpose of the agreement . . . was for ER to participate in the disposal and treatment of a no-longer-useful, hazardous substance."[105] The Court concluded that these facts constituted a "plain" case of arranger liability as contemplated in *Burlington Northern*.[106]

Moreover, the Court rejected ER's argument that a Seventh Circuit case, *Amcast Industrial Corp. v. Detrex Corp.*,[107] precludes arranger liability when the spill is accidental.[108] The Court concluded that the bar to arranger liability in *Amcast* applies only when there is an accidental spill before the delivery of a useful product.[109] The acid mine drainage and heavy metals here were not "useful products" to be delivered, but rather waste products to be disposed.[110] Therefore, as with *Burlington Northern*, the Court held that *Amcast* did not apply.[111]

ER also challenged the assertion that it arranged for disposal "by any other party or entity," as is required for arranger liability under *Chevron Mining, Inc. v. United States*.[112] [113] The Court concluded otherwise. It noted that the Action/Work Plan prescribed joint tasks for ER and its subcontractors, including the pumping of impounded waste to a water management and treatment system.[114] From this the Court found that, assuming the truth of the allegations in the Complaint, ER contracted with other entities to assist with the disposal of waste, thereby meeting the second element of arranger liability under CERCLA.[115]

The Court likewise discarded ER's final argument that the Plaintiffs asserted no facts establishing that ER controlled the treatment or discharge process.[116] ER cited cases from other Circuits in support of its argument as to this element.[117] The Court highlighted this and stated

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[102] *Id.* at 1248 (quoting *Burlington Northern*, 556 U.S. at 610-13).
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] 2 F.3d 746 (7th Cir. 1993).
[108] *New Mexico v. EPA*, 310 F. Supp. 3d at 1248-49.
[109] *Id.* (quoting *Amcast*, 2 F.3d at 751) ("[W]hen the shipper is not trying to arrange for the disposal of hazardous wastes, but is arranging for the delivery of a useful product, he is not a responsible person within the meaning of the statute . . . .").
[110] *Id.* at 1249.
[111] *Id.*
[112] 863 F.3d 1261, 1282-83 (10th Cir. 2017) ("[T]he clause 'by any other party or entity' . . . most naturally reads as the arrangement 'for disposal or treatment . . . by any other party or entity, at any facility or incineration vessel.'").
[113] *New Mexico v. EPA*, 310 F. Supp. 3d at 1249.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 1249-50.
[117] *Id.* at 1250.

that "control" is not required to establish arranger liability under *Chevron Mining, Inc.*, a binding Tenth Circuit case.[118] It pointed to the three-element test for arranger liability enunciated in *Chevron Mining, Inc.*—and the lack of any reference to control in that test.[119] Instead, the Court observed that the standard only requires the following: "(1) the party must be a 'person' as defined in CERCLA; (2) the party must 'own' or 'possess' the hazardous substance prior to the disposal; and (3) the party must, 'by contract, agreement or otherwise,' arrange for the transport or disposal of such hazardous substances."[120] Accordingly, the Court concluded that it would not dismiss the Complaint on grounds of a lack of control or authority to control.[121] This decision illustrates a potential limit on the reach of the *Burlington Northern* exception to arranger liability even in the event of an accidental spill.

[118] *Id.*
[119] *Id.*
[120] *Id.* (quoting *Chevron Mining, Inc.*, 863 F.3d at 1279).
[121] *Id.*