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— PERSPECTIVE —

Judge calls on Congress to fix CERCLA

By Jeffrey D. Dintzer and Dana Lynn Craig

The recently published 9th U.S. Circuit Court of Appeals opinion for *Whittaker Corp. v. United States*, 2016 DJDAR 5687 (June 13, 2016), seems uncontroversial, in-line with precedent, indeed, preordained. It reads like an environmental treatise, educating its reader on some of the finer points of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). But it's the short partial concurrence that really makes one think. In his final thoughts, Judge John Owens declines to join the opinion on one point, writing that "the case law ... has drifted from what Congress intended when it passed and amended CERCLA in the 1980s." He *urges* (his word) Congress to re-examine CERCLA, stating that his beef with the point at issue means that "[r]ather than dining at the same table for one big CERCLA feast, our holding ... permits adversaries to fight for generations over moldy leftover crumbs." It's a colorful picture, to be sure. But what does it mean and what *might* it mean if Congress listened?

Defense contractor, Whittaker Corporation, acquired a munitions facility in California in the 1960s that would later become known as the Bermite Site. Munitions manufacturing and testing occurred at the Bermite Site and by the 1980s, Whittaker was investigating the release of hazardous substances at that location. By 2000, Whittaker had been sued by water providers because of alleged water contamination from perchlorate and other hazardous substances. Whittaker was found liable in that case — *Castaic Lake Water Agency v. Whittaker Corp.*, 272 F. Supp. 2d 1053 (C.D. Cal. 2003) — for certain expenses related to the water contamination but not ordered to clean up the Site. Whittaker sued the government in a cost recovery action under CERCLA for reimbursement of the costs incurred related to those expenses for which Whittaker had not been found liable. A party's ability to seek such reimbursement is one of CERCLA's tools to help it accomplish Congress' vision for it — "to facilitate the remediation of hazardous waste sites and the resolution of liability for the related costs, especially through negotiated settlements."

The district court dismissed Whittaker's case against the government. On June 13, the 9th Circuit reversed and remanded. The case turns on two separate and distinct ways in which "private

City of Santa Clarita
The Whittaker Bermite Site in Santa Clarita.

parties [may] recover their environmental cleanup expenses from other parties." A cost recovery action is brought under CERCLA Section 107, while a contribution action is brought under CERCLA Section 113(f). In short, "[a] party uses contribution to get reimbursed for being made to pay more than its fair share to someone else, and uses cost recovery to get reimbursed for its own voluntary cleanup costs." Among other differences, a contribution claim has a different statute of limitations than a cost recovery action. The opinion notes that, under 9th Circuit precedent, while contribution is the claim that must be sought when available to a party, because Whittaker had been found liable for some expenses but not others, the question facing the 9th Circuit was "whether Whittaker is limited to seeking contribution from other polluters, or whether Whittaker may instead recover its cleanup expenses in a CERCLA cost recovery action."

In an opinion that carefully walks through statutory sections of CERCLA, as well as Supreme Court precedent and case law from other circuits, the court held that Whittaker need not have brought its claims under the contribution section of CERCLA for expenses for which it had not been found liable (or for which liability was not pending) in Castaic Lake. It is the policy-based excerpt of the opinion that Judge Owens uses as his call to Congress. In that section, the court discusses Congress' intent "to incentivize both environmental cleanup efforts and negotiated settlements of liability." In doing so, however, the court briefly notes the tension between the reimbursement framework established by CERCLA and its encouragement of the statute's identified goals, and the increased alacrity that is forced by requiring contribution claims to the exclusion of potential cost recovery claims. The court writes: "We do not believe that Congress

mandated parties who have been sued in § 107 cost recovery actions to bring all of their own CERCLA claims in the form of a contribution action, on an accelerated timeframe, regardless of the merit or the result of the § 107 cost recovery suit."

Judge Owens, on the other hand, believes that Congress meant for "all related contribution claims to be dealt with in a single action" and he believes the current system needs to change. He condemns the longer, more fragmented procedure as "adversaries ... fight[ing] for generations over moldy leftover crumbs." It is a valid concern, but one which should be weighed against potentially forcing parties into litigation sooner with possibly less thought as to the related merits. The majority implies with caution that mandating cost recovery defendants to bring all potential claims under a contribution action would mean that the merit and result of the cost recovery suit is of less import — if any. Given the potential pitfalls of bringing these distinct remedies together, as well as the clarity within the case law that is taking shape, Judge Owens's call to Congress is thought-provoking, but not likely one that will be answered.

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