

The "Arranger" – Helping the Owner Deal with its Contaminants While Minimizing Your Risk of Being Contaminated with CERCLA Liability

By Rick Reed

The "Comprehensive Environmental Response, Compensation and Liability Act" (known as "CERCLA") imposes joint and several, strict liability on various categories of potentially responsible parties ("PRP's") for the remediation, disposal and/or treatment of hazardous substances. Strict liability of a PRP requires no showing of negligence or fault. It is immaterial whether a PRP acted reasonably or within a standard of care.

An "arranger" is someone who contracts or otherwise "arranges" for the disposal or treatment of hazardous substances owned or possessed by any other party or entity. Generally, an arranger is considered a PRP and is exposed to joint and several, strict liability if: (1) the arranger either owned or came into possession of the hazardous substances; (2) the arranger made arrangements for the transport, treatment, or disposal of the hazardous substances; and (3) the arrangements made were for the transport treatment, or disposal services of a third party, with respect to hazardous substances encountered at a facility owned or operated by another party. It does not matter whether the arranger legally owned the hazardous substances. Liability arises if there is any active involvement or participation in the handling or transportation of the substances, or the decision to transport or dispose the hazardous substances.

In the construction industry, contractors, design professionals and environmental consultants, and their corporate officers and parent corporations, can all unwittingly become liable as arrangers. Courts can impose liability on a corporate officer who exercises actual or substantial control, directly or indirectly, over the arrangement for remediation, disposal or treatment of another's hazardous substances.

Contractors and consultants can take certain administrative and contracting steps to reduce the risk of arranger liability. The consultant or contractor should leave with the owner/operator of the facility involved in the project all decisions relating to the selection, engagement and direction of a transporter/disposer/remediation contractor for the hazardous wastes encountered on the site. The owner or operator already has legal liability and the primary responsibility for any hazardous substances found on its site, and if remediation, treatment and disposal services become necessary the consultant or contractor can provide the owner/operator a choice as to the selection of the remediation contractor, and the disposal and treatment options. By providing a choice, the consultant or contractor avoids final decision making authority.

In negotiating their services contracts, consultants and contractors should seek terms clearly defining the authority of each party as to all aspects of dealing with the owner/operator's hazardous substances, including their remediation and/or disposal. The consultant or contractor should also seek their customers' agreements to provide a defense and indemnity for liability to others who could be damaged or injured by the release of the contaminants of an owner/operator. Obtaining a limitation of liability will provide a monetary cap to hazardous substances risks. However, it should be noted that these contractual provisions are not bulletproof. Given long latency of environmental claims, the owner/operator may be financially incapable of fulfilling its defense and indemnity obligations when the claim arises. Also, while a limitation of liability may cap hazardous substances liability as to the owner/operator, it does not cap liability to third parties.

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