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ENVIRONMENTAL LAW

Southern District of Texas Finds US Liable to Exxon for \$20.3 Million

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Special to the Legal

At the end of August, the U.S. District Court for the Southern District of Texas issued what it hoped would be the final opinion in a decade's long litigation between Exxon Mobil Corp. and the U.S. government over past and future cleanup costs incurred under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) to remediate Exxon's Baytown, Texas, and Baton Rouge, Louisiana, refineries and nearby chemical plants. See *Exxon Mobil v. United States*, Nos. H-10-2386 & H-11-1814, slip op. at 1 (S.D. Tex. Aug. 19, 2020). The facilities and chemical plants were contaminated by, among other activities, the production of war materials during World War II and the Korean War. The 113-page order and opinion following a lengthy bench trial found the United States liable to Exxon for \$20.3 million. Because CERCLA allocations rarely proceed to trial, the decision has captured the attention of the legal community for the rare opportunity to observe what is most often a confidential process. In addition, the *Exxon* decision provides potentially responsible parties (PRPs) litigating against the government with food for thought in how to approach



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these complicated and fact-intensive CERCLA cost recovery actions.

BACKGROUND

During the 1940s, Exxon's refineries in Baytown and Baton Rouge were converted into aviation gas (avgas) and synthetic rubber production sites, which was imperative to the country's World War II efforts. The refineries operated under wartime contracts with the United States. In 2010, Exxon sued the United States under CERCLA for claims relating to remediation of contamination at the Baytown refinery (citing *Exxon Mobil v. United States*, No. 4:10-cv-2386 (S.D. Tex. July 6, 2010)). The following year Exxon brought suit against the United States to recover cleanup costs relating to the Baton Rouge refinery (citing *Exxon Mobil v. United States*, No. 4:11-cv-1814 (S.D. Tex. May 12, 2011)). The cases were consolidated in August 2011.

The case was litigated in three phases. In June 2015, the court concluded

that Exxon and the government were liable under CERCLA, meaning that both were responsible for a share of the liability for the cleanup costs at the Baytown and Baton Rouge facilities. Then in August 2018, the court determined how it would allocate the parties' shares of the remediation costs and ruled on what allocation method it would apply. The third and final phase involved a bench trial to "resolve the factual disputes and conflicting inferences, and to fix the relative shares

The decision underscores the important role that forensic experts can play in creating an expansive evidentiary record for allocation.

of responsibility and the amounts of past costs and shares of future costs that each party must pay."

ALLOCATION RULING

The bench trial began in March 2020 and proceeded in two parts—in person and then virtually—because of the COVID-19 pandemic and stay-at-home orders. In its opinion, the court stressed the important role that forensic historians played in the case for both sides and explained that "this relatively

new discipline is primarily used for litigating disputes like this one. The historians helped assemble and explain records bearing on such questions as what wastes were produced, when, and by whom, and who should bear the costs of remediating what remains.”

The court followed the “production-based” allocation method that was designed by Richard White, Exxon’s allocation expert, which used the crude-processing rate of the refineries as a way to measure the amount of hazardous waste generated. In doing so, it rejected the “time-on-the-risk” approach advocated for by the government, which operated on the assumption that each facility generated the same amount of waste each year. The court acknowledged that while both methods are imprecise because of their reliance on “scanty records and no percipient witnesses,” the production-based method “is more accurate, and more precise,” than the government’s time-on-the-risk approach. The court then applied the “Gore” factors, “Torres” factors, and the following five factors of the court’s choosing: the knowledge and acquiescence of the parties in the contamination-causing activities; the value of the activities to the national defense efforts; the parties’ roles at the refineries and chemical plants; the parties’ intent to allocate liability; and postwar waste-handling improvements.

Applying Exxon’s production-based allocation method and aforementioned factors, the court found that the products Exxon produced in connection with making avgas during World War II and the Korean war were essential war products. Moreover, the court concluded that “the government exerted substantial control over the refineries’ actions, including decisions on how to use raw materials and labor. This control makes the government responsible for a share of the remediation costs,

including costs related to the refineries’ delays in implementing certain waste-management improvements.” Although the government argued that Exxon’s predecessors should have taken swifter action to limit and process wastes from the refineries, the court found persuasive Exxon’s response that there was no incentive to implement such improvements prior to World War II and during the war Exxon lacked the “practical ability to divert the resources or to access the materials and labor necessary to do so.” Ultimately the court concluded that the United States was liable under CERCLA for 24.67% of response costs incurred at the Baytown refinery, 36.54% for response costs incurred at the Baytown Ordinance Works/Tankfarm 3000 Area, and 14.4% at the Baton Rouge refinery. Thus, the court awarded damages to Exxon in the amount of \$20,328,670. The court clarified that the judgment did not preclude “future claims by Exxon for land-based units, areas of contamination, or waterbodies at or adjacent to the Baytown or Baton Rouge facilities for which costs have not yet been incurred by Exxon, but will be incurred in the future.”

The court also found that the \$20.3 million damage award was not subject to an offset for Exxon’s insurance recovery because there was no double recovery. Exxon filed suit against its insurers in the 1990s to recover its environmental cleanup costs, ultimately settling the case for \$269 million. The government argued that Exxon should be required to offset the settlement money it received, but Exxon countered that it was not going to get a double recovery by receiving both the settlement payment and the amounts allocated to the government under CERCLA, and that the collateral source rule bars the government’s insurance offset claim. The Southern

District of Texas found that “Exxon’s insurance proceeds relating to the two facilities at issue, when combined with the award against the government, do not approach a double recovery, as Exxon still bears the vast majority of expenses associated with the cleanups at these two sites.” Because the court found that there was no double recovery, it did not address whether the collateral source rule applies to CERCLA cases where there is also a contractual right to indemnification. Accordingly, the court dismissed the government’s insurance offset claim as a matter of law.

IMPACT

The Exxon decision highlights how very complex CERCLA allocations are, and precisely why they do not typically proceed to trial. Parties engaging in such fact-intensive litigation may decide to employ some of the approaches used by the parties in the case. The decision, for example, underscores the important role that forensic experts can play in creating an expansive evidentiary record for allocation. Moreover, the separation of the litigation into three phases, and in particular the selection of the allocation methodology during Phase 2, not only helped to streamline the case but allowed the court an opportunity to compare the two proposed allocation models. The *Exxon* decision serves as an important resource for PRPs litigating against the government. •

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