

INTRODUCTION TO NRD & FEDERAL FACILITIES

WHEN THE FEDS WEAR ALL THE HATS

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Federal Facilities Overview

- What are federal facilities?
- Who is responsible for federal facilities?
- For what are they responsible?
 - Who are the Trustees?
- What kinds of damages?

Federal Facilities



Primary federal agencies

- Primarily two federal agencies associated with federal facilities
 - Department of Defense (DOD)
 - Department of Energy (DOE)



DOD

- Charged with
 - Providing sustainable installations
 - Providing training and testing
 - Secure environment
- More than 25 million acres of land under its trusteeship (39,000+ square miles)
- Includes wide variety of terrestrial and aquatic ecosystems (AK to TX; ME to Guam)
- Involve more than 220 endangered or protected species
- Active military bases
- BRAC (1988, 1991, 1993, 1995, 2005, 2021?)

DOE

- Historically charged with development of nuclear weapons dating back to 1943 and the Manhattan Project
- Currently “cleaning up” 107 nuclear-related sites nationwide
- Those sites combined are equal in size to the states of Rhode Island and Delaware combined (more than 3,700 square miles)
- Major sites include Idaho National Labs (890 square miles), Washington Hanford Nuclear Site (586 square miles) & Nevada National Security Site (1,360 square miles)

Remediation vs. Restoration

- Remediation
 - Primary response
 - Risk based
 - Look at human health and ecological factors
- Restoration
 - Secondary response / Residual to remediation
 - Focus on natural resources
 - Look at baseline (pre-discharge condition)
 - In addition to, not included in, remediation

Hanford, Washington



Hanford, Washington



Who is responsible?

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CERCLA Responsible Parties

- Owner and operator of a facility
- Any person who owned or operated a facility at the time of disposal of a hazardous substance
- Any person who arranged for disposal or treatment of a hazardous substance
- Any person who transported hazardous substance for treatment or disposal

42 U.S.C. § 9607(a).

CERCLA Responsible Parties

- “Person” means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body

42 U.S.C. § 9601(21).

- What about federal agencies like DOD & DOE?

Federal Agency Liability

“Application of chapter to Federal Government, in general:

Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) ***shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability*** under section 9607 of this title.”

42 U.S.C. § 9620(a)(1) (emphasis added).

Federal Agency Liability

Chevron Mining, Inc. v. United States, No. 15-2209 (10th Cir., July 19, 2017) (underlying case in the U.S. District Court for the District of New Mexico, NO. 1:13-CV-00328-MCA-KK)

Previously, US not liable for mere title ownership in lands. *U.S. v. Friedland*, 152 F. Supp. 2d 1234 (D. Colo. 2001) (“indicia of ownership” analysis)

Court held “the term “owner” covers fee title holders for purposes of CERCLA liability, irrespective of any additional indicia of ownership.” *Chevron*, at 27.

Responsible for what?

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CERCLA Liability – Remediation

- Who is the Responsible Party?
 - Typical case, private industry
 - Federal facility:
 - ◆ DOD
 - ◆ DOE
- Who is the Regulator overseeing remediation?
 - Typical case, US EPA
 - Federal facility:
 - ◆ DOD
 - ◆ DOE

CERCLA Liability – Restoration

- Who is the Trustee overseeing restoration?
 - Typical case, federal Trustees:
 - ◆ Fish & Wildlife
 - ◆ NOAA
 - Federal facility:
 - ◆ DOD
 - ◆ DOE

CERCLA Liability – All 3 Hats

CERCLA Role	Typical CERCLA Case	Federal Facility Case
Responsible Party	Private Industry	DOD / DOE
Regulator (Remediation)	US EPA	DOD / DOE
Trustee (Restoration)	US Fish & Wildlife US NOAA States Tribes	DOD / DOE

Federal Facilities - Trustees

- Most sites will have multiple Trustees
- Most sites will have a “cooperative” Trustee Council
- Pursuant to DOI regulations and Executive Order, DOD / DOE is **NOT** supposed to be lead Trustee for sites at which DOD / DOE is the Responsible Party [But what about Regulator in charge of cleanup?]
- What does it mean to NOT be lead Trustee?

Playing out at Hanford

- RP = DOE
- Regulator = DOE (with input from US EPA)
- Trustees
 - DOE
 - US Fish & Wildlife & NOAA
 - Washington
 - Multiple Tribes

Playing out at Hanford

- 1987 – Shut down last reactor (N-reactor)
- 1989 – Decision to cleanup Hanford
- 1996 – Original MOA between Trustees
 - DOE refused to engage in NRDA (cleanup enough?)
- 2007 – Two Tribes conduct own Pre-Assessment Screen (first step in NRDA process)
- 2016 – Trustees execute new MOA wherein NOAA is designated lead trustee
- 2017 – In “initial assessment phase” (2007?)

NRD at Federal Facilities



Natural Resource Damages

- Cleanup at Hanford is primarily focused on exposure (human health & environment)
- Will try to make waste safe
 - Make it inert
 - Contain it in appropriate manner
 - Dispose of it pursuant to current best practices
- Restoration will be monumental task, likely in the billions of dollars

Who pays for NRD at Federal Facilities?

- DOE / DOD?
 - Line item in budget unlikely
- US EPA?
 - Same
- Superfund?
 - No money; would arguably take away from other cleanups
- Taxpayers?

QUESTIONS?

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