CERCLA Cost Recovery: Federal Court Addresses Whether Municipality's Urban Renewal Activities Potentially Constitute Arranger Liability

Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

10/26/2023

A United States District Court (New Hampshire) addressed in an October 13th Order an issue arising out of a Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") cost recovery action. See *Banfield Realty LLC v. William E. Copeland, et al.*, 2023 WL 6796216.

The CERCLA question involved whether a city and housing authority's activities potentially fell within the scope of the arranger liability ("potentially responsible party") category.

Banfield Realty, LLC ("Banfield") purchased property in Portsmouth, New Hampshire. Significant environmental contamination was discovered shortly after purchase.

The property was purchased from the Copelands and an entity (collectively, "Copelands").

The Copelands are alleged to have used the property for various uses such as:

- Solid waste landfill
- Automobile repair shop
- Car crushing facility
- Salvage yard

Therefore, the property is stated to have had a history of environmental issues. This is stated to have included contamination that triggered the New Hampshire Department of Environmental Conservation's involvement in remediation.

The Copelands are stated to have represented to Banfield that the contamination had been entirely remediated. Nevertheless, the Copelands are stated to have known that building materials and automotive parts were buried on the property. Contaminants such as heavy metals, PCBs, and asbestos are stated to have been present at the site.

Banfield discovered that the property was contaminated from multiple sources and releases over the past several decades. Those sources were alleged by Banfield to include the City of Portsmouth and the Portsmouth Housing Authority ("PHA"). Cited by Banfield was a New Hampshire Department of Environmental Services ("DES") landfill registration form in which it was reported that during the 1960s:

. . . building and construction waste was disposed of on the site, as part of the City of Portsmouth's urban renewal.

Banfield further alleged that both the City of Portsmouth and the PHA were involved in the City's urban development. This was premised on the fact that the PHA was created in 1953 and many of its early projects are stated to have involved the urban renewal of Portsmouth.

Banfield had conducted a Limited Subsurface Investigation Report ("Report"). The Report is stated to have identified arsenic, lead, selenium, PCBs, asbestos, and other hazardous substances on the property. These are stated to have also included buried building materials (including burned and partially burned wood, metal, plaster and paint fragments, flooring, etc.)

The claims asserted by Banfield in United States District Court ("Court") against Portsmouth and PHA included recovery of costs and declaratory relief related to future costs under CERCLA.

Portsmouth and PHA argued that the CERCLA claim should be dismissed for two reasons. These included the failure of the Complaint to establish that the building and construction waste were CERCLA "hazardous substances." Second, they argued that Banfield did not sufficiently allege that Portsmouth or PHA fall within the four categories of covered persons (i.e., potentially responsible parties) under CERCLA.

The Court first addressed the argument that the Complaint failed to identify hazardous substances.

Specifically, Portsmouth and PHA alleged that the Complaint failed to identify what the building and construction materials consisted of beyond building and construction waste. Simply referencing those materials was argued to be insufficient to meet CERCLA's definition of hazardous substance since not all such materials involved "hazardous substances."

Banfield responded that the Limited Subsurface Investigation identified CERCLA hazardous substances such as arsenic, lead, and others. This was noted to include the fact that asbestos was detected in three of 17 waste bulk building material samples. Such substances were deemed to be hazardous substances under CERCLA. The reference to these materials was deemed sufficient to survive a Motion to Dismiss.

Portsmouth and PHA also argued that their involvement in urban renewal of the city was insufficient to support a finding that they committed any acts required for liability under CERCLA. They contended that urban renewal of the city was insufficient to support a finding that Portsmouth and/or PHA "contracted, agreed, or arranged" for disposal of hazardous substances (i.e., arranger liability). See 42 U.S.C. § 9607(a)(3).

The Court agreed that the references to the Copeland registration form was meager proof that the urban renewal activities constituted contracting, agreeing, or arranging for the disposal of hazardous substances involving construction materials. It noted that CERCLA liability attaches if an entity enters:

. . . into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance.

Banfield was stated to have not directly alleged that Portsmouth or PHA disposed of building and construction material on the property. However, the Court stated that Banfield does allege that building and construction waste from the urban renewal (waste that contained hazardous substances) was dumped on the property.

Therefore, the Court held it was not unreasonable:

. . . to infer, based on that allegation, that the waste was dumped in accordance with an agreement between Portsmouth/PHA (or its contractors and the Copelands . . .

Consequently, Banfield was held to have sufficiently – but barely – adequately alleged that Portsmouth and PHA are liable as arrangers under Section 9607(a)(3). The Motion to Dismiss the CERCLA claim was denied.

A copy of the Order can be downloaded here.