United States v. Shell Oil Co.: The Tension of CERCLA Arranger Liability for Government Wartime Production Facilities

I. OVERVIEW

The McColl Superfund site in Fullerton, California served as a dump from June 1942 until the end of World War II for the disposal of waste byproducts from aviation gas production—gas produced in enormous quantities by various oil companies and consumed in totality by U.S. military airplanes during the war.[1] This site, once laden with 100,000 cubic yards of hazardous waste, now functions as a wildlife sanctuary and houses community recreational facilities for a nearby residential neighborhood.[2] This transformation was the result of a $100 million government cleanup.[3]

During World War II, high octane aviation gas, commonly called "avgas," was a new technology of great importance to the U.S. military.[4] The government entered into long-term contracts with various oil refineries to purchase avgas and implemented programs to ensure its production.[5] The government granted low-cost loans to construct avgas refineries in order to ensure that avgas was continuously produced in quantities to meet the military's needs.[6] Oil companies voluntarily entered into these contracts, owned and maintained the facilities, and profited from the sale of avgas to the government.[7] However, the oil companies were subject to the directives of government wartime programs.[8]

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1. United States v. Shell Oil Co., 294 F.3d 1045, 1049, 1051 (9th Cir. 2002).
2. *Id.*
3. *Id.* at 1051.
4. *Id.* at 1049.
5. *Id.* at 1049-50.
6. *Id.* at 1050.
7. *Id.*
8. *Id.* at 1049-50.

Several government agencies were involved in the oversight of avgas production.[9] The War Production Board (WPB) prioritized avgas as a product of necessity for the government and took on the role of facilitating its production.[10] The Petroleum Administration for the War (PAW) made final decisions on the construction of any new facilities and controlled the allocation of raw materials.[11] Both government agencies had authority to require increased production of avgas and to seize the refineries if necessary to meet the government's needs during war.[12] The Planned Blending Program (PBP) issued directives to the various refineries on exchanging and blending avgas components to maximize production of avgas.[13] Finally, the Aviation Gas Reimbursement Plan (AGRP) was set up to help oil companies recoup unexpected costs imposed by the PBP.[14]

As the War progressed, the government demanded increasing quantities of avgas from the refineries.[15] With increased production of avgas, the production of the waste byproduct, spent alkylation acid, also greatly increased.[16] The refineries no longer had enough facilities to reprocess the spent alkylation acid and, after unsuccessfully requesting resources from the government for additional reprocessing facilities, began dumping it at the McColl site.[17] While the government was aware of the increased waste generation, there is no evidence that it was aware of any disposal contracts made by the oil companies involving the McColl site itself.[18]

Decades later, after the site was discovered and remedied, the United States and the State of California, who had paid for the cleanup with Superfund money, sued Shell Oil Co., Union Oil Co. of California, Atlantic Richfield Co., and Texaco, Inc. (collectively the Oil Companies) in federal district court to recover the cleanup costs.[19] On the United States' motion for summary judgment, the district court held the Oil

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9. *See id.*
10. *Id.* at 1049.
11. *Id.*
12. *Id.* at 1049-50.
13. *Id.*
14. *Id.* at 1050.
15. *Id.* at 1049.
16. *Id.* at 1051.
17. *Id.* 5.5% of the waste at the site was acid sludge from the treatment of government owned benzol, 12% was spent sulfuric acid from the alkylation process, while 82.5% of the waste dumped by the oil companies was spent alkylation acid from the chemical treatment of nonavgas refinery products, nonbenzol waste. *Id.* The nonbenzol waste resulted from the oil companies' reuse of spent alkylation acid in other nonavgas processes before disposing of it. *Id.*
18. *Id.*
19. *Id.* at 1048.

Companies liable as "arrangers" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), rejecting their argument that they were exempt from liability under the "act of war" exception of CERCLA.[20] On the Oil Companies' cross-motion for summary judgment, the district court also held the United States liable under CERCLA as an "arranger" for nonbenzol waste dumped at the site and denied the United States' argument that it had not waived sovereign immunity under CERCLA.[21] Accordingly, the district court allocated 100% of the cleanup costs to the United States.[22]

The United States appealed the district court's holding that the government waived sovereign immunity under CERCLA and its holding that the government was liable as an arranger for nonbenzol waste.[23] The Oil Companies cross-appealed, contending that the district court's holding denying them an "act of war" exemption under CERCLA was in error.[24]

The United States Court of Appeals for the Ninth Circuit *held* the United States did waive sovereign immunity under CERCLA, the United States was not liable for nonbenzol waste as an arranger, and the Oil Companies were not exempt from liability under the "act of war" provision of CERCLA. *United States v. Shell Oil Co.*, 294 F.3d 1045, 1048-49 (9th Cir. 2002).

II. BACKGROUND

CERCLA was enacted to remedy the alarming problem of hazardous waste sites.[25] Its strategy was to hold responsible parties liable, targeting present and past owners and operators of the facilities, arrangers of the waste disposal, and transporters of the waste.[26] CERCLA imposes strict liability and joint and several liability on these

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20. *Id.*; *see* CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3) (2001); CERCLA § 107(b)(2), 42 U.S.C. § 9607(b)(2).

21. *Shell Oil*, 294 F.3d at 1048. The United States conceded its liability for benzol waste. *Id.*; *see* CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3); CERCLA § 120(a)(1), 42 U.S.C. § 9620 (a)(1).

22. *Shell Oil*, 294 F.3d at 1048. The allocation of cleanup costs was decided after trial. *Id.*

23. *Id.*; CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3); CERCLA § 120(a)(1), 42 U.S.C. § 9620 (a)(1).

24. *Shell Oil*, 294 F.3d at 1048; *see* CERCLA, § 107(b)(2), 42 U.S.C. § 9607(b)(2).

25. *See* United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1377 (8th Cir. 1989).

26. *See id.*

parties in order to ensure that those responsible for the waste site pay the cost of cleanup.[27]

The sovereign immunity waiver of CERCLA is codified in section 120(a)(1) and states: "Each department, agency, and instrumentality of the United States . . . shall be subject to, and comply with CERCLA in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity . . . ."[28] Because the guiding principle of sovereign immunity is that the government is immune from suit except as it consents to be sued, a waiver of immunity must be construed narrowly in favor of the government.[29] However, the CERCLA waiver of immunity has consistently been construed to be unambiguous, given the United States Supreme Court's finding in *Pennsylvania v. Union Gas Co.* that a similar provision of CERCLA was an unambiguous waiver of sovereign immunity.[30]

In the cases that have discussed the issue of federal sovereign immunity under CERCLA, the government's argument has consistently hinged on the language: "in the same manner and to the same extent . . . as any nongovernmental entity."[31] In *FMC Corp. v. United States Department of Commerce*, FMC sued the United States for joint liability as an owner, operator, and arranger for high tenacity rayon facilities in which the government was involved during the Vietnam War.[32] The government argued that their activities influencing the production of rayon were regulatory in nature, and that the waiver of sovereign immunity under CERCLA did not apply since a private entity could not perform the regulatory activities that afforded them control over rayon production.[33] However, the United States Court of Appeals for the Third Circuit found that the government could be liable even when engaged in regulatory activities.[34] The court emphasized that the meaning of the

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27. *See id.*; *see also* United States v. Northeastern Pharm. & Chem. Co. (NEPACCO), 810 F.2d 726, 732 n.3 (8th Cir. 1986).

28. CERCLA § 120(a)(1), 42 U.S.C. § 9620(a)(1).

29. *See* FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833, 839 (3d Cir. 1994) (citing United States v. Idaho, 508 U.S. 1,5 (1993), United States v. Nordic Village Inc., 503 U.S. 30, 34 (1992)).

30. *See* 491 U.S. 1, 10 (1989).

31. *FMC Corp.*, 29 F.3d at 839; *accord* Eastbay Mun. Util. Dist. v. United States Dep't of Commerce, 142 F.3d 479, 482 (D.C. Cir. 1998).

32. *See* 29 F.3d at 834-35.

33. *Id.* at 839. The government relied upon a series of cases holding that the EPA had not waived sovereign immunity when cleaning up a hazardous waste site. *See id.* (citing *In re* Paoli R.R. Yard PCB Litig., 790 F. Supp. 94, 97 (E.D. Pa. 1992), *aff'd*, 980 F.2d 724 (3d Cir. 1992); United States v. Atlas Minerals & Chems., Inc., 797 F. Supp. 411, 421 (E.D. Pa. 1992); Reading Co. v. City of Philadelphia, 155 B.R. 890 (E.D. Pa. 1993)).

34. *See id.* at 840.

statute is to hold the government liable for any activities for which a private party would be held liable if it engaged in those same activities; thus, the government is not simply let off the hook because it is carrying out a governmental duty.[35] The court supported its opinion by drawing a parallel between CERCLA's waiver of sovereign immunity and a similar clause in the Federal Tort Claims Act.[36] It cited a Supreme Court holding regarding the Federal Tort Claims Act, which refused to discount an activity from liability solely because it was incapable of being accomplished by a private entity.[37] The court also reasoned that since CERCLA specifically enumerates three defenses to liability, these are the only exceptions intended for liability, and regulatory action in and of itself is not one of them.[38]

In *East Bay Municipal Utility District v. United States Department of Commerce*, East Bay sued the United States alleging that the United States had owner and arranger status with regard to an abandoned mine overseen by the government during World War II for the production of zinc.[39] Here, again, the government argued that it retained immunity for "'inherently sovereign' activities [such] as imposing the price and labor regulations [on the production of zinc]."[40] The court analyzed the phrase, "in the same manner and to the same extent . . . as any nongovernmental entity," from section 120(a)(1) of CERCLA.[41] The court held that the language "does not on its face suggest a distinction between the exercise of private . . . and regulatory powers."[42]

CERCLA's waiver of sovereign immunity is fairly straightforward and narrow as compared to its designation of arranger liability. An arranger under CERCLA is defined as: "[A]ny person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party or entity."[43] Arranger liability under CERCLA has been interpreted broadly, given the remedial purposes of Congress in enacting the

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35. *See id.*
36. *Id.*
37. *Id.* (citing Indian Towing Co. v. United States, 350 U.S. 61, 67 (1955)).
38. *Id.* at 841. Additionally, 42 U.S.C. § 9607(d)(2) immunizes state and local governments from liability for cleanup activities. This shows that Congress intended to treat government cleanup activities differently than other government activities. *See id.*
39. *See* Eastbay Mun. Util. Dist. v. U.S. Dep't of Commerce, 142 F.3d 479, 480-81 (D.C. Cir. 1998).
40. *Id.* at 481.
41. *Id.*; CERCLA § 120(a)(1), 42 U.S.C. § 9620(a)(1) (2001).
42. *Eastbay Mun. Util. Dist.*, 142 F.3d at 482.
43. CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3).

statute.[44] The congressional purpose was to ensure that all parties who produced the hazardous waste and profited from it bore the cost of cleaning it up.[45]

A party who directly arranges for disposal of hazardous waste is clearly liable for cleanup costs under CERCLA.[46] Yet, inevitably, there are scenarios where parties who are somewhat removed from the disposal arrangements should still be held responsible; it is this broader theory of arranger liability that courts have tirelessly attempted to define.[47]

A premise for a broad theory of arranger liability is set out in two cases, *United States v. Northeastern Pharmaceutical & Chemical Co.* (*NEPACCO*) and *United States v. Aceto Agricultural Chemical Corp.*[48] In *NEPACCO*, the United States Court of Appeals for the Eighth Circuit determined that arranger liability did not necessarily depend on an ownership interest in the hazardous material, but rather on the authority to control the hazardous material.[49] Although the facts of the case were in the context of holding an insolvent corporation's president and vice-president liable for the improper disposal of hazardous waste, the Eighth Circuit's decision rested on the broad remedial purposes of CERCLA to determine that proof of actual ownership or possession of the material was not necessary.[50]

The Eighth Circuit further broadened and defined arranger liability in *Aceto*, where the court found that pesticide manufacturers who contracted out the waste-producing step in the pesticide production were liable as arrangers because they exercised sufficient control over the process.[51] *Aceto* established a "control" test that focused on three factors to determine if the party should be liable: (1) if the party supplied raw materials for production, (2) if the party had an ownership interest in or control of the process, and (3) if the generation of hazardous waste was inherent in the process.[52]

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44. *See* United States v. Northeastern Pharm. & Chem. Co. (NEPACCO), 810 F.2d 726, 743 (8th Cir. 1986).

45. *See id.*

46. *See* CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3).

47. *See generally* United States v. Vertac Chem. Corp., 46 F.3d 803 (8th Cir. 1995); United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1379-82 (8th Cir. 1989); *NEPACCO*, 810 F.2d at 743-44; FMC Corp. United States Dep't of Commerce, 29 F.3d 833, 845-46 (3d Cir. 1944).

48. 810 F.2d at 743-44; 872 F.2d at 1379-82.

49. 810 F.2d at 743.

50. *Id.* at 729-30, 743-44.

51. *See Aceto*, 872 F.3d at 1382.

52. *Id.* at 1381-82.

The specific scenario of arranger liability of the government with respect to contractor owned and operated facilities during war has been addressed by two circuits.[53] In *United States v. Vertac Chemical Corp.*, the Eighth Circuit dealt with facts similar to that of the noted case.[54] During the Vietnam War, the United States exercised direction and control over the supply of raw materials necessary to make Agent Orange, a herbicide used as a defoliant in Vietnam.[55] The manufacturing was carried out under government contracts and guided by government programs.[56] The companies voluntarily entered into the contracts and profited from them.[57] The government was aware that waste was being produced, but did not give directives on disposal.[58] The court held that the United States was not an arranger because the government contract did not involve sufficient coercion, regulation, or intervention to hold the United States liable as an arranger.[59]

In *FMC Corp.*, the Third Circuit considered government liability for hazardous waste generated in connection with high tenacity rayon production during World War II.[60] The extent of the government's involvement in the process included: installation of equipment in the rayon plants, construction and ownership of a sulfuric acid plant connected to the rayon plant by a pipeline, obtainment of draft deferments for plant workers, control of the manufacturing process and the supply of raw materials, and control of the price of the rayon produced.[61] The court actually opted not to enter into a discussion of arranger liability, noting that since it was equally split on the issue, it would simply affirm the ruling of the district court in holding the government liable.[62]

Strict liability under CERCLA is excepted only in three narrowly mandated defenses, one of which is the "act of war" defense.[63] The "act of war" defense excuses from liability "a person otherwise liable who can establish by a preponderance of the evidence that the release or threat

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53. *See* FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833, 834 (3d Cir. 1994); United States v. Vertac Chem. Corp., 46 F.3d 803, 810-11 (8th Cir. 1955).

54. *See* 46 F.3d at 806-07.

55. *See id.* at 806.

56. *See id.*

57. *See id.* at 807.

58. *See id.*

59. *See id.* at 811.

60. *See* FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833, 835 (3d Cir. 1994).

61. *Id.* at 836-38.

62. *See id.* at 845-46. The court had already found the government liable under CERCLA as an operator. *See id.* at 845.

63. CERCLA § 107(b)(2), 42 U.S.C. § 9607(b)(2) (2001).

of release of a hazardous substance and the damages resulting therefrom were caused solely by an act of war."[64] CERCLA contains no definition of "act of war," and there is minimal case law that offers guidance as to its meaning.[65]

The Supreme Court has commented on activities that constitute "acts of war" only in scenarios unrelated to CERCLA liability.[66] Each of these cases involved a government seizure of an enemy's property and did not involve any negotiations or contracts.[67] *Farbwerke v. Chemical Foundation* addressed the U.S. government's seizure of patents belonging to German companies during World War II.[68] The Court spoke of the seizure being an act of war because it was involuntary on the part of the German companies, stating that the patents were, in effect, "captured" by the U.S. government.[69] In *Ribas y Hijo v. United States*, the Court defined an army seizure of a Spanish merchant vessel during war with Spain as an act of war and released the United States from paying the merchant for the ship's use since there was no contractual agreement creating an obligation to pay.[70] Similarly, in *United States v. Winchester & Potomac Railroad Co.*, the Union's seizure of Confederate railroad materials during the Civil War was defined as an act of war because the seizure was not a contractual transaction.[71]

III. THE COURT'S DECISION

In the noted case, the Ninth Circuit discusses the issue of sovereign immunity before determining whether the United States is liable as an arranger; finally, the court addresses the Oil Companies' defense of the "act of war" exception to CERCLA liability.[72] The court begins its analysis of the waiver of sovereign immunity with the premise that the Supreme Court has construed section 120(a)(1) of CERCLA as an unambiguous waiver of sovereign immunity.[73] The court then echoes the rationale of the Third Circuit in *FMC Corp.* and the District of Columbia

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64. *Id.*
65. *See* United States v. Shell Oil Co., 294 F.3d 1045, 1049, 1061 (9th Cir. 2002).
66. *See* Farbwerke Vormals Meister Lucius & Bruning v. Chem. Found., 283 U.S. 152, 161-62 (1931); Ribas y Hijo v. United States, 194 U.S. 315, 323 (1904); United States v. Winchester & Potomac R.R. Co., 163 U.S. 244, 256-58 (1896).
67. *See Farbwerke*, 283 U.S. at 161-62; *Ribas*, 194 U.S. at 322-23; *Winchester*, 163 U.S. at 257-58.
68. 283 U.S. at 156-57.
69. *Id.* at 161.
70. 194 U.S. at 322-24.
71. 163 U.S. at 257-58.
72. *See* United States v. Shell Oil Co., 294 F.3d 1045, 1051-54, 1061 (9th Cir. 2002).
73. *See id.* at 1052.

Circuit in *East Bay*, dismissing the government's argument that section 120(a)(1) only waives sovereign immunity when the government is acting as a nongovernmental entity.[74] It additionally discusses that precedent case law has held the United States liable under CERCLA for nongovernmental acts, as in *United States v. Allied Corp.*, where the government was held liable for the cleanup of hazardous waste at military facilities.[75] The court finds the waiver of sovereign immunity "coextensive with the scope of liability imposed by 42 U.S.C. § 9607," meaning that the waiver of sovereign immunity applies congruently to the liability imposed by the statute.[76] The court reaches the conclusion that the liability imposed by section 107 of CERCLA is sufficiently narrow to protect the government from undue liability, because the government must first qualify as an owner, operator, arranger, or transporter of hazardous material.[77] The court also notes that there are two defenses built in to section 107 of CERCLA that protect the government; therefore, they are the only two exceptions the legislators intended to allow the government.[78]

Once the court determines that the United States is not immune from CERCLA liability, it turns to the issue of whether the United States is liable as an arranger.[79] While acknowledging that control is the critical element in the determination of arranger liability, the Ninth Circuit rejects the district court's analysis of arranger liability via the "control" test established in *Aceto*, reasoning that the application of the *Aceto* test is insufficient as to the facts of the noted case.[80] The court says that there is no established "bright-line test" for a broad theory of arranger liability and turns to the fact patterns of other cases to compare and contrast the

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74. *See id.* at 1052-53.

75. *See id.* at 1053 (citing United States v. Allied Corp., No. CIV.C.83-5898-FMS, 1990 WL 515976, at *2-*3 (N.D. Cal. Apr. 25, 1990)).

76. *Id.*

77. *See id.*

78. *See id.* Section 107(d)(1) provides a defense for nonnegligent acts causing damage in the course of "rendering care, assistance, or advice in accordance with the National Contingency Plan." CERCLA § 107(d)(1), 42 U.S.C. § 9607(d)(1) (2001). Section 107(d)(2) provides immunity for state and local governments when they are responding to "an emergency created by the release . . . of a hazardous substance." CERCLA § 107(d)(2), 42 U.S.C. § 9607(d)(2).

79. *See Shell Oil*, 294 F.3d at 1054. The court discusses arranger liability in a few different contexts. It discusses the idea of direct arranger liability briefly, dismissing it because the Oil Companies did not argue it and because there were insufficient facts to hold the United States liable for being directly involved in disposal arrangements. *See id.* The court also allocates 100% of the cleanup costs for benzol wastes to the United States, since the government conceded liability for those wastes. *See id.* at 1060. Therefore, this note's discussion of arranger liability pertains only to a broad theory of arranger liability for nonbenzol waste at the McColl site. *See id.* at 1054.

80. *Id.* at 1055.

facts of the noted case in order to determine if oversight can qualify the government for arranger status.[81]

First, the court determines that the rationale of *Aceto* and *NEPACCO* are not appropriate to apply to the noted case because their facts are very dissimilar.[82] *Aceto* applied the control test to a pesticide manufacturer who contracted out the waste-producing formulation step in the pesticide process.[83] The court reasons that *Aceto* does not control the present case because the United States was an end purchaser of avgas and, unlike the pesticide manufacturer, did not own any raw materials or participate in the manufacture of the product.[84]

The court distinguishes *NEPACCO* because it concerns the liability of officers of a bankrupt corporation, one of whom directly controlled the disposal of waste and the other of whom had authority to control the disposal of waste.[85] The court interprets *NEPACCO* to be relevant in determining the liability of a superior who possesses authority to control and whose employee exercised actual control. Because the United States did not have an official or employee who exercised actual control, the analysis is deemed unaccommodating by the court.[86] The court additionally remarks that the waste in the noted case never belonged to the United States; hence the United States did not have the ability to control its disposal.[87]

The Ninth Circuit turns its attention to two cases that are factually more on point with the case before the court; both cases deal with arranger liability of the government for activities with contractor owned and operated facilities during wartime.[88] The court uses the Third Circuit's opinion in *FMC Corp.* to highlight that even when the government had actual control over the production of rayon, the Third Circuit was indecisive as to arranger liability.[89] Actual control over production was evidenced in *FMC Corp.* by the ownership of a sulfuric acid plant connected to the rayon plant by a pipeline, control over employment by obtaining draft deferments for plant workers, control over the supply of raw materials, and control over the price of the rayon

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81. *Id.* at 1055-56.
82. *See id.* at 1056-57.
83. *See id.* at 1055-56.
84. *See id.*
85. *See id.* at 1056-57.
86. *Id.* at 1057.
87. *See id.*
88. *See id.* at 1058-59.
89. *See id.* (citing FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833, 845-46 (3d Cir. 1994)).

produced.[90] Even given this actual control, the Third Circuit was reluctant to find the United States to be an arranger.[91]

The Ninth Circuit finds the facts of *Vertac* significantly similar to the facts of the present case.[92] Both cases concern manufacturers who entered into government contracts and were susceptible to government programs exercising supervision over the status of production.[93] The Ninth Circuit follows the rationale of the Eighth Circuit by holding that the United States was not an arranger, emphasizing that the contracts were voluntarily entered into and profited from by the manufacturers and that while the United States may have been aware that waste was being produced, it did not direct the manufacturer on its disposal.[94] In conclusion, the court holds that even under a theory of broad arranger liability, the United States was not an arranger because the facts of the case do not articulate the level of control found in *FMC Corp.* and are more on point with the facts of *Vertac*, where the government was not found to be an arranger.[95]

Lastly, the Ninth Circuit addresses the Oil Companies' "act of war" defense to liability.[96] Noting the lack of case law on the issue, the court follows the analysis used by the district court.[97] Noting that there is no definition of "act of war" in CERCLA and no explanation of the defense in the legislative history, the court contrasts the broad language of CERCLA for imposing liability with the narrow language used in granting exceptions to liability.[98] The court agrees with a narrow interpretation of the "act of war" defense because it correlates with the strict liability of CERCLA, complementing its purpose of ensuring that responsible parties pay for hazardous waste cleanup with limited exception.[99]

The court then discusses the definition it will apply to "act of war."[100] Two treatises address the term with phrases such as: an act including "massive violence" and a "natural or man-made catastrophe

90. *See id.* (citing *FMC Corp.*, 29 F.3d at 836).
91. *See id.* (citing *FMC Corp.*, 29 F.3d at 845-46).
92. *See id.*
93. *See id.* (citing United States v. Vertac Chem. Corp., 46 F.3d 803, 806 (8th Cir. 1995)).
94. *See id.* at 1059 (citing *Vertac*, 46 F.3d at 807).
95. *See id.* at 1058-59.
96. *Id.* at 1061.
97. *See id.*
98. *See id.*
99. *See id.*
100. *See id.*

beyond the control of any responsible party."[101] The court utilizes the limited case law available on the definition of "act of war" to determine that an act of war must be a unilateral act on the part of the government against another party, such as the government seizure of enemy property addressed by the Supreme Court in *Farbwerke*, *Ribas*, and *Winchester*.[102] Therefore, mutually contracting parties, such as the United States and the Oil Companies, could not fall under an "act of war" exception.[103] The court rejects the Oil Companies' contention that any action taken by the federal government under the War Powers Clause is an act of war.[104] The court says this is too broad a definition of an act of war and mentions as an example that wartime price controls, which are authorized via the War Powers Clause, are not acts of war.[105] The Ninth Circuit next concentrates on the word "solely" in the statute, concluding that even if government involvement in avgas production constituted an act of war, it was not the "sole" cause of the McColl site disposal because the Oil Companies had other options to dispose of the waste.[106]

IV. ANALYSIS

In the noted case, the Ninth Circuit follows the trend in the circuits finding the waiver of sovereign immunity broadly applicable to CERCLA liability.[107] The Supreme Court's ruling in *Union Gas* also supports this broad waiver of sovereign immunity under CERCLA.[108] In line with *FMC Corp.* and *East Bay,* the Ninth Circuit's conclusion that section 107 of CERCLA is narrow enough to protect the government from excess liability is sound policy.[109] Even when the government is not immune because it does not qualify for one of the section 107 defenses of CERCLA, it is still protected because it must further meet the criteria qualifying it as an owner, operator, arranger, or transporter in order to be held liable for cleanup costs.[110] Additionally, there appears to be no need to make an exception to the waiver of sovereign immunity for regulatory

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101. *Id.* (citing WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: HAZARDOUS WASTES AND SUBSTANCES § 8.13(C)(3)(c), at 697 (1992); 3 THE LAW OF HAZARDOUS WASTE § 14.01[8][b], at 14-162.2 (Susan M. Cooke ed., 2001)).

102. *Id.*

103. *See id.*

104. *Id.* The War Powers Clause grants Congress the power "to declare war." U.S. CONST. art. I, § 8, cl. 11.

105. *Shell Oil*, 294 F.3d at 1062.

106. *See id.*

107. *See id.* at 1053.

108. *See id.* at 1052.

109. *See id.* at 1052-53.

110. *See id.*

actions of the government, because, as the cited cases have illustrated, when the government is participating in regulatory actions, it is very difficult to classify those actions as those of an owner, operator, arranger, or transporter of hazardous waste.[111]

The Supreme Court has not addressed arranger liability of the government with respect to contractor owned and operated facilities during war, leaving the issue open to interpretation and definition by the various circuits.[112] The Ninth Circuit follows the precedent of the Eighth Circuit in *Vertac* and uses the limited mention of arranger liability in *FMC Corp.* to bolster its opinion.[113]

The Ninth Circuit bases its decision regarding the arranger liability of the government in the noted case on an analysis of fact patterns, drawing a contrast of facts from one set of cases to reject the application of control analysis and drawing a comparison of facts from another case to short-handedly reach a final conclusion.[114] Yet, the Ninth Circuit offers no concrete rule and does not take advantage of the opportunity to define this wide-open issue.[115] The court begins its discussion of the broad theory of arranger liability by saying, "[t]here is no bright-line test, either in the statute or in the case law."[116] Yet, by the end of the discussion, it remains that there is no test at all, and the court proffers that factual comparison is the answer.[117]

The court does not enter into the "authority to control" analysis of *NEPACCO* simply because the United States did not have an actual employee who could have exercised actual control.[118] But the Ninth Circuit still could have analyzed the United States' authority to control the Oil Companies as suggested by *NEPACCO*.[119] There were plenty of facts available to the court given the level of government oversight through wartime agencies.[120] Additionally, an *Aceto* control analysis would have been helpful in defining government arranger liability.[121] A

111. *See id.* at 1059; United States v. Vertac Chem. Corp., 46 F.3d 803, 811 (8th Cir. 1995).

112. *See Vertac*, 46 F.3d at 810-11; FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833, 845-46 (3d Cir. 1994).

113. *See Shell Oil*, 294 F.3d at 1058-59.

114. *See id.* at 1056-59.

115. *See id.*

116. *Id.* at 1055.

117. *See id.* at 1059.

118. *See id.* at 1057.

119. *See* United States v. Northeastern Pharm. & Chem. Co. (NEPACCO), 810 F.2d 726, 743-44 (8th Cir. 1986).

120. *See Shell Oil*, 294 F.3d at 1049-50.

121. *See* United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1381-82 (8th Cir. 1989).

parallel could have been drawn between the three factors and the scenario of the noted case.[122] For instance, the Ninth Circuit could have answered questions regarding the extent of government involvement in the supply of raw materials, the extent of the government's financial interest in the success of avgas production, and the government's knowledge that the generation of hazardous waste was inherent in the production process.[123]

However, the court skips such an analysis to favor a comparison of fact patterns that, while likely reaching an appropriate solution to the noted case, does not add anything to this body of jurisprudence. Yet, even this factual comparison passes over a recommended analysis in the studied cases. For instance, the Eighth Circuit in *Vertac* goes so far as to say, "*NEPACCO* certainly suggests that circumstances may exist where a government contract involves sufficient coercion or governmental regulation and intervention to justify United States' liability as an arranger under CERCLA."[124] The Eighth Circuit goes on to conclude that the facts in *Vertac* do not evidence the requisite coercion, regulation, and intervention necessary to hold the government liable as an arranger.[125] It considers the level of coercion involved in the government contracts by recognizing that since the Agent Orange manufacturers negotiated and altered terms of the contract, there was no coercion.[126] The *Vertac* court also enters into an *Aceto* analysis to determine the extent of government involvement.[127] In the noted case, the Ninth Circuit, while relying heavily on the similarity of *Vertac*'s facts to support its final conclusion, does not follow its methodology.[128] It does not enter into a discussion of the level of coercion and intervention involved in the government programs to which avgas production was subject.

The Ninth Circuit was presented with many relevant facts it could have considered in defining the level of coercion and intervention required to hold the government liable as an arranger. Facts in the present case that are relevant to coercion, but which the court did not discuss, include: the long-term nature of the contracts between the United States and the Oil Companies, the role of the United States as a creditor in financing avgas plant construction, the shortage of railroad tanks to transport hazardous waste for reprocessing combined with a lack of functioning reprocessing facilities, and the government's refusal to

122. *See id.*
123. *See id.*
124. United States v. Vertac Chem. Corp., 46 F.3d 803, 811 (8th Cir. 1995).
125. *See id.*
126. *See id.*
127. *See id.*
128. *See* United States v. Shell Oil Co., 294 F.3d 1045, 1058-59 (9th Cir. 2002).

allocate resources to build more reprocessing facilities.[129] The level of government involvement was dependent on a determination of the pervasiveness of the government agencies set up to oversee avgas production during the War. The roles of each government agency were known to the court, yet it did not incorporate them into its analysis.[130]

The Ninth Circuit does not outline any elements that do or do not create the substantial government intervention necessary to hold the government liable as an arranger. The reader is left craving a concrete example of where the government crosses the line. The court sends the message that there is a line where government oversight morphs into the requisite control of an arranger; the court is prepared to say that the noted case has not crossed this elusive line, but it is not prepared to define it.[131]

Finally, the "act of war" defense to CERCLA liability is open to less interpretation by the courts than the issue of arranger liability.[132] In contrast to the broad language of arranger liability that is meant to encompass all responsible parties, the language of a defense to liability is narrowly delineated so as only to release a party under circumstances so specific that the party can be deemed blameless for the harm.[133] The Ninth Circuit's analysis of the act of war defense is consistent with this rationale.[134] The court chooses a narrow definition for "act of war" that does not allow the Oil Companies to take refuge in the defense.[135] In analyzing the limited case law offered by the Supreme Court in defining an "act of war," the Ninth Circuit rightly concludes that the Court considers a lack of opportunity to negotiate as a prerequisite for an act of war.[136] An opportunity to negotiate contractual terms was available to the Oil Companies, suggesting that they possessed at least some level of control that should bar them from single-handedly escaping responsibility for hazardous waste through the act of war defense.[137]

The Ninth Circuit also rightly dismissed the Oil Companies' argument that any action taken pursuant to the War Powers Clause is an act of war.[138] From a policy perspective, the results of such an interpretation would be inequitable. Private companies acting under

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129. *See id.* at 1049-51.
130. *See id.* at 1049-50, 1059.
131. *See id.* at 1059.
132. *See* CERCLA § 107(b)(2), 42 U.S.C. § 9607(b)(2) (2001).
133. *Compare* United States v. Northeastern Pharm. & Chem. Co. (NEPACCO), 810 F.2d 726, 743(8th Cir. 1986), *with Shell Oil*, 294 F.3d at 1061.
134. *See Shell Oil*, 294 F.3d at 1061.
135. *See id.*
136. *See id.*
137. *See id.*
138. *See id.*

government war programs would effectively be given carte blanche to act recklessly in their disposal and treatment of hazardous waste. Citizens would be left to bear the injury and the government's cleanup would in essence be funded by innocent parties. The court's holding that an act of war must be a purely unilateral act on the part of the government avoids this problem.[139]

The rejection of the act of war defense combined with an in-depth control analysis to determine arranger liability, if properly applied, could eliminate some of the tension present in the contractor owned and operated facility scenario. In both analyses, control emerges as a critical element. The private entity's ability to control the production process is what precludes it from taking advantage of the act of war defense, while a control analysis determining that the government had sufficient control over the production process would hold the government liable. In both instances, parties exercising essential control over the hazardous waste disposal would be held liable, and the purpose of CERCLA would be achieved. The Ninth Circuit succeeded in recognizing the importance of a narrow "act of war" defense, but glossed over the importance of a thorough study of control to determine arranger liability.

V. CONCLUSION

The Ninth Circuit's holding in *United States v. Shell Oil Co.* does not alleviate the liability problems associated with hazardous waste generated by contractor owned and operated facilities during times of war. The most poignant problem is that there is no clear directive given to the government on when it is liable under CERCLA, or when it has entered this realm of pervasive involvement to become a constructive arranger of hazardous waste. Although the Ninth Circuit has passed on its opportunity to define this area of law that remains largely ambiguous, it has clearly reinforced that the government has waived sovereign immunity under CERCLA, even for regulatory activities. Further, private facilities are warned that their entrance into a contract with the government, even during times of war, does not shelter them from CERCLA liability.

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139. *See id.*