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Superfund

Are CERCLA Practitioners Prepared for Climate Change?

CERCLA

CLIMATE CHANGE

Natural disasters triggered by global climate change threaten the release and spread of hazardous waste, environmental attorneys say. This Bloomberg BNA Special Report discusses the potential impact of climate change on Superfund litigation, cleanups and settlements.



By Steven M. Sellers

April 22 — Hurricanes, rising sea levels, floods and other weather events linked to global warming pose an increasing threat to some Superfund sites that may change the calculus of liability under the federal hazardous waste law, environmental lawyers tell Bloomberg BNA.

Attorneys representing companies and others involved with contaminated properties falling under the Comprehensive Environmental Response, Compensation, and Liability Act may have to contend with a number of developing issues caused by climate change, including the scope of liability for releases stemming from natural disasters, due diligence and the availability of the act of God defense.

These legal issues are explored in this Bloomberg BNA Special Report through recent interviews with experienced Superfund litigators and academics who are studying the topic. And some say planning for climate change's impact on the U.S.'s most polluted properties couldn't be coming soon enough.

"In view of the increasingly confident projections of continued sea level rise and associated storm surges, I believe it is incumbent upon parties designing and approving CERCLA remedies to take these potential events into account," Michael Gerrard, a law professor and director of Columbia Law School's Center for Climate Change Law in New York, said recently. A total of 521 of the U.S.'s 1,639 National Priority List hazardous waste sites identified by the Environmental Protection Agency face risks from rising tide levels, according to recent EPA data.

The at-risk sites lie within a 100-year floodplain or 1.5-meter mean sea level rise projected by the EPA.

Many are clustered in densely-populated areas along the Northeast coast, the Gulf Coast and the shores of Lake Michigan.

Flooding from more intense and frequent storms, sea-level rises and melting permafrost may lead to hazardous substance releases from Corrective Action sites, Superfund sites, Brownfield sites and landfills, according to the EPA's 2014 *Climate Change Adaptation Plan*.

The findings mirror those in the National Climate Assessment of the U.S. Global Change Research Program, which links heavier downpours and more powerful hurricanes to global warming.

The challenge of extreme weather events, and EPA's response to them, was evidenced in 2011 when floods caused by Hurricane Irene threatened berms for benzene-laden lagoons at a New Jersey Superfund site, requiring reinforcement of the structures to withstand similar floods (30 TXLR 370, 4/9/15).

How will courts resolve CERCLA liability when an extreme weather event linked to climate change compromises a hazardous waste site—or multiple sites?

What legal barometer gauges a responsible party's duty of care in the face of increasingly frequent extreme weather events caused by global warming?

The answers lie in the accuracy of climate change predictions and the foreseeability of a release of a hazardous substance, the lawyers and professors interviewed say.

Predicting the Risk

The "science of attribution and the law of force majeure are still in early stages of development," Patrick Parenteau, law professor and senior counsel for Vermont Law School's Environmental and Natural Resources Law Clinic in South Royalton, Vt., told Bloomberg BNA in an April 10 e-mail.

"At some point, a court is going to rule that the increased threats of extreme weather and massive economic damage—on the scale of hurricanes Katrina and Sandy—require enhanced contingency plans and stronger protective measures," Parenteau said.

"The finding of gross negligence and willful misconduct on the part of BP in the Deepwater Horizon case is an indication that courts are taking a harder look at what companies engaged in potentially hazardous activities must do to prevent environmental harm," Parenteau said.

Gerrard, of Columbia Law School, said April 7 in an e-mail to Bloomberg BNA that climate change predictions are a call to action at hazardous waste sites.

"Remedies that rely on caps or other methods to contain residual contamination may be especially vulnerable and should be built strong enough to withstand reasonably foreseeable events," he said, adding that rising ground water also should be considered.

Peter Hsiao, an environmental lawyer with Morrison & Foerster in Los Angeles, agreed in an early April e-mail to Bloomberg BNA that precautions at vulnerable sites are warranted, but questioned whether climate change now imposes additional legal responsibilities on owners and operators of hazardous waste sites.

"Precise predictions of the effects of climate change on rising sea levels, or as the proximate cause of droughts, are probably not yet accurate enough to form the basis for a legally enforceable duty," Hsiao said.

But Hsiao added that as the effects of climate change are better understood and the predictive sciences are refined, "the law may likely require such a duty on hazardous waste site owners based upon the threats posed by climate change."

Those duties have urgency in light of the devastation wrought by Hurricane Sandy in 2012, William Ruskin, an environmental lawyer with Gordon Rees Scully Mansukhani in New York City, said April 7.

"It might have been reasonable to say in 1980 that 100-year storms aren't likely, but then climate changes come along and the government tells a PRP [potentially responsible party] that those 100-year storms are becoming a lot more frequent," Ruskin said.

"What wasn't foreseeable in 1980 is foreseeable now, so we don't have that argument anymore," he said.

Act of God?

CERCLA exempts from liability any person "otherwise liable" who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance was caused solely by an act of war, an act of God, an act of a third party or any combination of the three (42 U.S.C. §9607(b)).

An act of God is defined in the law as "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight" (42 U.S.C. §9601(1)).

Whether an extreme weather event linked to climate change may trump CERCLA liability is subject to debate, but the notion was raised by the U.S. Court of Appeals for the Second Circuit in 2014 (*In re September 11 Litig. (Cedar & Wash. Assocs. v. Port Auth. of N.Y.C. & N.J.)*, 751 F.3d 86(2d Cir. 2014) (29 TXLR 407, 5/8/14)).

The court held that World Trade Center owners and lessees had no CERCLA liability for toxic dust resulting from the 9-11 terrorist attacks, which it said were an act of war under CERCLA.

The court, in dicta, likened the attacks to a tornado—an act of God—over which the defendants had no control.

"It would be absurd to impose CERCLA liability on owners of property that is demolished and dispersed by a tornado," the court said, suggesting a parallel argument for extreme weather events linked to global warming.

But the court's analogy may go only so far.

"Whether the act of God or third-party defenses are available will depend in part on whether adequate precautions were taken against foreseeable risks."

Prof. Michael Gerrard, director of Columbia Law School's Center for Climate Change Law

"Whether the act of God or third-party defenses are available will depend in part on whether adequate precautions were taken against foreseeable risks," Gerrard said.

That may make an advocate's comparison of climate change to a terrorist attack—or a tornado—dubious, he said.

"A tornado or a terrorist attack in a particular location is not foreseeable; not so with sea level rise and the associated coastal flooding," Gerrard said.

Hsiao concurred, adding that courts may also look to whether the act was the sole proximate cause of the injury, or whether there was contributory negligence by the actor by failing to take precautions or by placing the hazardous substance in a location that would be in harm's way.

"The act of God defense is difficult to establish," Hsiao said, adding that it has been "disfavored" by the courts.

The defense failed in *United States v. Sterling Centrecorp, Inc.*, 2011 BL 309718, E.D. Cal., No. 08-cv-02556, 12/8/11, where a mining company argued it was exempt from liability because a winter storm caused the collapse of a dam, spreading contamination from the mines.

The U.S. District Court for the Eastern District of California held the weather event was insufficient to establish the "exceptional, inevitable, and irresistible" nature of a viable act of God defense, citing *United States v. Stringfellow*, 661 F. Supp. 1053(C.D. Cal. 1987), in which a similar claim was rejected for an excessively heavy rainfall.

The dam was in precarious condition, the court said, and therefore its owner was "hard pressed to argue that the collapse was so utterly unforeseeable to qualify for treatment as an act of God."

Due Diligence

Climate change predictions may have their strongest impact on preparations at hazardous waste sites before severe weather hits—and before the effect of climate change on liability is argued in court.

"The emphasis needs to be on site assessments and the use of what I call reverse environmental impact studies," Ruskin said, explaining that the focus should be on the foreseeability of changes caused by global warming.

"It used to be that we would only ask what effect a project will have on the environment," Ruskin said. "Now, a regulator may ask how the environment may affect the project."

Many hazardous waste site owners in potentially exposed areas likely have taken precautions to protect against reasonably foreseeable weather events, Hsiao said, but that might not be enough.

"Companies should do more to prepare for the unexpected release of hazardous substances by reviewing and updating their emergency response plans, and having those plans reviewed by outside experts."

Attorney Peter Hsiao, Morrison & Foerster.

"Companies should do more to prepare for the unexpected release of hazardous substances by reviewing and updating their emergency response plans, and having those plans reviewed by outside experts," Hsiao said. "When an emergency happens, an unworkable, incomplete or out-of-date plan can sink an otherwise responsible company."

That review should include insurance coverages, risk allocation and reserve policies to take climate change into account, Hsiao said.

CERCLA Changes Ahead?

Is the scope of CERCLA—a law conceived long before recent global warming events—broad enough to accommodate the issues posed by climate change?

Gerrard said he didn't think changes in the law or EPA regulations are needed, but said "it would be helpful for EPA to issue more detailed protocols concerning how future climate events should be taken into account in remedy selection and operation."

Hsiao suggested that Congress and the EPA study changes in the law that clarify the scope of liability for hazardous waste releases resulting from climate change.

"The application of CERCLA principles involving strict, joint and several, and retroactive liability was not intended to apply to situations involving grave natural disasters," Hsiao said.

To contact the reporter on this story: Steven M. Sellers in Washington at ssellers@bna.com

To contact the editor responsible for this story: Peter Hayes at phayes@bna.com