Federal Government Held Liable for Environmental Cleanup Costs ExxonMobil Incurred Under Government Contract

On October 31, 2011, the United States Court of Federal Claims held the United States liable for environmental cleanup costs ExxonMobil incurred for the remediation of two refineries in Texas and Louisiana that manufactured aviation gasoline ("avgas") for the military during World War II. Granting ExxonMobil's motion for partial summary judgment, the court found that the contracts between the United States and the refineries cover ExxonMobil's cleanup costs. This decision follows one year after the court's similar holding in *Shell Oil Co. v. United States*, 93 Fed. Cl. 153 (Fed. Cl. 2010), after which the court ultimately ordered the United States to reimburse Shell and the other oil company plaintiffs US$69.8 million for cleanup costs incurred in connection with government contracts for the production of avgas. In the *Shell* decision, the court found that, under the terms of the government contracts for avgas production, the government was responsible for the cost of environmental cleanup required as a result of production under the contracts. Together, the *ExxonMobil* and *Shell* decisions significantly narrow the bases upon which the United States may resist liability for environmental cleanup costs occasioned by WWII-era production contracts. Companies facing cleanup liabilities relating to WWII-era production wastes should examine whether a government contract may provide a basis for a contract claim or support an independent cost recovery action under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").

During World War II, the United States entered into numerous long-term contracts with oil refineries for the production of high-octane aviation gasoline for use in jet engines. Considered a critical component of the war effort, avgas was produced in massive quantities at refineries owned by private companies, including predecessors to ExxonMobil. The production of avgas resulted in petroleum and non-petroleum byproducts that have subsequently required environmental cleanup pursuant to state and federal law. Decades after production ceased, ExxonMobil was ordered by the Louisiana Department of Environmental Quality (LDEQ) and the Texas Commission on Environmental Quality (TCEQ) to clean up contamination at its Baton Rouge and Baytown refineries. In 2009, ExxonMobil filed suit against the United States, alleging *inter alia* that avgas contracts between the United States and the two refineries required the United States to indemnify ExxonMobil for cleanup costs that it incurred under state law for contamination caused by avgas production.

Contacts

Paul E. Pompeo
+1 202.942.5723

Peggy O. Otum
+1 202.942.5965

ExxonMobil contended that its cleanup costs were reimbursable "charges" under the "Taxes" clause of its government contracts. The Taxes clause provided that the government would reimburse the companies for "any new or additional taxes, fees, or charges… which the Seller may be required by any municipal, state, or federal law in the United States or any foreign country to collect or pay by reason of the production, manufacture, sale or delivery of the [avgas]." The "Taxes" clause in the contract at issue in the case does not reflect the various taxes clauses in Federal Acquisition Regulation part 52.229. ExxonMobil further argued that its cleanup costs were "charges" regardless of whether they were incurred long after production under the contract had ceased. In response, the government recited many of the same arguments it offered in the *Shell* case, including that it was not liable for cleanup costs under the "Taxes" clause and, even if it were, the Anti-Deficiency Act (ADA) prohibits it from indemnifying ExxonMobil. It also sought to distinguish the *Shell* case on the basis that the amount of waste resulting from avgas production at the Baton Rouge and Baytown refineries was unknown, whereas the parties in *Shell* had stipulated to all of the facts.

Rejecting these arguments, the *ExxonMobil* court found that the "facts of the case follow in the footsteps of *Shell*, in which [the] Court previously decided the issues now raised again by the Defendant." Specifically, the *Shell* court concluded that the plain meaning of "charges" encompasses cleanup costs and that the "charges" reimbursable under the "Taxes" clause were not limited to those incurred during the performance of the contract, provided they were incurred because of avgas production. The court also found that the ADA did not apply because the ability to make reimbursement promises, such as those in the "Taxes" clause, was authorized by legislation and executive orders. Although the court in *Shell* addressed the government's liability under CERCLA and not under state law, the court in *ExxonMobil* held that the facts and analysis were sufficiently similar to warrant following its holding in *Shell*. Indeed, the *ExxonMobil* court concluded that the "very purpose" of the "Taxes" clause "was to remove the potential risks any reasonable producer would be reluctant to take on" and that the government's arguments were inconsistent with this purpose and the clause's plain language. Accordingly, the court granted ExxonMobil's motion for partial summary judgment, holding the government liable for ExxonMobil's cleanup costs.

Current and former government contractors facing liability for environmental contamination occasioned by production pursuant to a government contract should note the *ExxonMobil* decision and consider possible claims for reimbursement under the contract or through a CERCLA cost recovery action. Furthermore, the case also has broader implications for government contractors to the extent it rejects the Antideficiency Act as a defense for government liability.

We hope you have found this Advisory useful. If you would like more information or assistance in addressing the issues raised in this Advisory, please feel free to contact:

Paul E. Pompeo
+1 202.942.5723
Paul.Pompeo@aporter.com

Peggy O. Otum
+1 202.942.5965
Peggy.Otum@aporter.com

Eric Rey
+1 202.942.5285
Eric.Rey@aporter.com