United States v. Shell Oil Company:

Is The Decision Too Lenient on the United States Government?

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United States v. Shell Oil Company *sheds new light on the courts' interpretation of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). In this war pollution case, the Ninth Circuit clarified the scope of the statute's sovereign immunity provision. Moreover, the court, for the first time, analyzed the arranger liability provision as applied to the federal government in a war pollution context, and defined the meaning of the act of war defense. Despite its significant contributions to the courts' understanding of CERCLA, however, the court falls short of drawing a bright line for the government's arranger liability, and thus, the ambiguity surrounding this provision remains unresolved after this case.*

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INTRODUCTION

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), enacted in 1980, is the principal federal statute addressing the cleanup of improperly discharged hazardous substances in the United States.[1] The Act is guided by its remedial purpose, and it defines federal authority to respond to disposal of hazardous wastes.[2] It also prescribes the obligations and liability of "potentially responsible parties" for such releases.[3]

1. JOHN P. DWYER & MARIKA F. BERGSUND, FEDERAL ENVIRONMENTAL LAWS ANNOTATED 1748 (2002).
2. *Id.*
3. *Id.*

CERCLA has several provisions that may apply when the federal government is involved in polluting activities. These provisions include: Section 9620(a)(1) ("the sovereign immunity provision"), which waives the federal government's immunity; Section 9607(a)(3) ("the arranger liability provision"), which provides for liability for anyone who "arranges for" disposal of hazardous substances; and Section 9607(b)(2) ("the act of war defense provision"), which provides a defense when the release of a hazardous substance is solely caused by an act of war.

This Note examines the Ninth Circuit's decision in *United States v. Shell Oil Company*,[4] where the court interpreted these three provisions. *Shell Oil* was a significant decision, as it clarified the scope of CERCLA's sovereign immunity and addressed the act of war defense, which was an issue of first impression. This case is also noteworthy because it was the first time that the Ninth Circuit discussed the arranger liability of the government in a war pollution case.

Section I provides background information on past judicial approaches to CERCLA's provisions on sovereign immunity, arranger liability, and the act of war defense. Section II covers the facts and the holding of *Shell Oil*, and Section III concludes with a discussion of the implications of this case. *Shell Oil* confirmed the broad interpretation of CERCLA's waiver of sovereign immunity that other circuits have adopted.[5] The court also properly interpreted the statute's act of war defense narrowly. Unfortunately, however, in its consideration of the government's liability as an "arranger," the Ninth Circuit ruled counter to the remedial purpose of the statute by drawing an artificially lenient line of liability, absolving the United States government of responsibility for wastes over which it had significant control.

I. JUDICIAL TREATMENT OF CERCLA

Many courts have addressed CERCLA's provisions on sovereign immunity and arranger liability, and have discussed the meaning of "act of war" outside the context of that statute. This section of the Note explores other courts interpretations of these provisions. With respect to the Act's sovereign immunity provision, courts have generally agreed that the statute waives the immunity to suit granted to the federal government by the common law. Courts have, however, widely diverged on the interpretation of CERCLA's provision on arranger liability. Some courts have taken a broad view of the statute and emphasized its remedial nature, while others have interpreted it narrowly to require specific intent

4. 294 F.3d 1045 (9th Cir. 2002) [hereinafter *Shell IV*].

5. *See, e.g.*, FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833 (3d Cir. 1994); East Bay Mun. Util. Dist. v. United States Dep't of Commerce, 142 F.3d 479 (D.C. Cir. 1998).

to pollute before finding liability. Still others, including the Ninth Circuit in *Shell Oil*, have followed a middle ground between these two extremes.

A. *Sovereign Immunity under CERCLA*

CERCLA's sovereign immunity provision provides that "[e]ach department, agency, and instrumentality of the United States . . . shall be subject to, and comply with, this chapter in the same manner and to the same extent . . . as any nongovernmental entity, including liability under section 9607 of this title."[6] According to well-established United States Supreme Court precedents, any waiver of the sovereign immunity of the federal government cannot be implied, but rather must be unequivocally expressed in statutory text.[7] Additionally, waivers must be narrowly construed in favor of the government.[8] In 1989, the Court analyzed CERCLA's sovereign immunity waiver under this narrow standard, and declared it "doubtless an 'unequivoca[l] express[ion]' of the Federal Government's waiver of its own sovereign immunity."[9]

Since then, several courts have engaged in a closer analysis of the ambiguity in Section 9620(a)(1), focusing on the clause, "in the same manner and to the same extent. . .as any nongovernmental entity."[10] In many of these cases, the federal government has argued that its polluting activities were "governmental" or "regulatory" in order to avoid the statute's waiver of sovereign immunity.[11] However, these attempts have been unsuccessful since courts have generally looked to the nature of the government's activities, rather than accepting the government's self-interested definition of its activities to determine whether the waiver of sovereign immunity applies.

The Third Circuit, for example, interpreted the statute's sovereign immunity provision broadly. In *FMC Corporation v. United States Department of Commerce*,[12] the United States government argued that its "regulatory" activities are immune from suits since only governmental entities, and not "nongovernmental entities," can engage in such activities.[13] The court rejected this argument, and made it clear that the

6. 42 U.S.C. § 9620(a)(1) (2003).

7. *See* United States v. Nordic Vill., Inc., 503 U.S. 30, 33-34 (1992); U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992); Irwin v. U.S. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990); United States v. Testan, 424 U.S. 392, 399 (1976).

8. United States v. Idaho, 508 U.S. 1, 6-7 (1993); Ardestani v. INS, 502 U.S. 129, 137 (1991).

9. Pennsylvania v. Union Gas Co., 491 U.S. 1, 10 (1989) (citations omitted).

10. 42 U.S.C. §9620(a)(1) (2003).

11. *See, e.g.*, FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833 (3d Cir. 1994); East Bay Mun. Util. Dist. v. U. S. Dep't of Commerce, 142 F.3d 479 (D.C. Cir. 1998).

12. 29 F.3d 833 (3d Cir. 1994).

13. *Id.* at 839.

government is liable if it engages in *any* activities, even "regulatory" ones, when those activities would make a private party liable under CERCLA.[14] The court based this conclusion both on the remedial nature of CERCLA and on the statute's overall thrust towards making responsible parties bear the costs and liability for cleaning up the wastes they helped create.[15] The court also emphasized that "regulatory" activities are not one of the three explicitly enumerated defenses available to a potentially responsible party under CERCLA, and that therefore the government cannot use the regulatory nature of its activities to seek exemption from liability.[16]

Similarly, the D.C. Circuit rejected the government's attempt to distinguish between "private" and "regulatory" powers in *East Bay Municipal Utility District v. United States Department of Commerce* (EBMUD).[17] There, the government argued that it should be held liable only if it has acted as an "operator" through contract and property arrangements, and not when it has engaged in the very same activities through "coercive, administrative measures."[18] The court dismissed this argument and held that the government is liable regardless of the type of powers it has exercised, whenever it has fallen within the scope of Section 9607, which sets out the categories of potentially responsible parties.[19]

The District Court for the Eastern District of California analyzed CERCLA's sovereign immunity provision in *United States v. Iron Mountain Mines, Inc.*[20] The court there concluded that CERCLA expressly waives any immunity for the United States for liability under the Act.[21] The court reasoned that if Congress thought it necessary to limit the liability of the government, it would have explicitly stated so in the statute.[22] In addition, the court noted that CERCLA identifies the federal government as one of the "persons" who may be sued in its

14. *Id.* at 840-41. As an example, the court stated that, although only the government can own military bases and thus activities relating to military bases might be considered regulatory, the government is still liable for the cleanup costs of the wastes at the bases because a private party *would be* liable if it *did* own a military base. *Id.*

15. *Id.*

16. *Id.* at 841. CERCLA only provides three possible defenses: 1) act of God, 2) act of war, and 3) act of third party. 42 U.S.C. § 9607(b) (2003).

17. 142 F.3d 479, 482 (D.C. Cir. 1998).

18. *Id.*

19. *Id.*

20. 881 F. Supp. 1432 (E.D. Cal. 1995).

21. *Id.* at 1444.

22. *Id.* The court noted that Congress has specifically provided such protection whenever it deemed it appropriate. For example, in Section 9604(j)(3), the Congress stated that "no Federal, State, or local government agency shall be liable under this chapter solely as a result of acquiring an interest in real estate under this subsection." *Id.* (citing 42 U.S.C. § 9604(j)(3) (2003)).

definition section.[23] Thus, the courts have generally agreed that the statute's waiver of sovereign immunity subjects the federal government to suit regardless of the type of activity involved.[24]

B. Background on CERCLA's Arranger Liability

1. What is an "Arranger"?

While courts have generally come to similar conclusions about the scope of CERCLA's waiver of sovereign immunity, they have not been so uniform in their judgment about the scope of the statute's "arranger liability" provision. Section 9607(a)(3) provides that "any person who by contract, agreement, or otherwise *arranged* for disposal or treatment, or *arranged* with a transporter for transport for disposal or treatment, of hazardous substances. . .at any facility. . .owned or operated by another party or entity and containing such hazardous substances. . .shall be liable" for the cleanup costs.[25] Since CERCLA does not define the meaning of "arranged for" and its legislative history provides little help, courts have engaged in widely divergent interpretations of this term.[26]

The Eighth Circuit, for instance, broadly interpreted the term "arranged for" in *United States v. Aceto Agricultural Chemicals Corp.*, so that a party could be subject to arranger liability under CERCLA even when that party lacked knowledge or intent to dispose of hazardous materials at a particular site.[27] In that case, the court held pesticide manufacturers liable for cleanup, where the manufacturers had hired

23. *Id.* at 1442-43 (citing 42 U.S.C. § 9601(21)). Section 9601(21) defines "person" as "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."

24. *Id.* at 1445. At least one judge has disagreed with the majority of courts which interpret CERCLA's sovereign immunity provision as broadly waiving immunity. In her dissent opinion in *FMC*, Judge Sloviter argued that the waiver provision should be interpreted narrowly and be applied only to government conduct that a private party could also engage in. FMC Corp. v. U.S. Dep't of Commerce, 29 F.3d 833, 846-47 (3d Cir. 1994).

25. 42 U.S.C. § 9607(a)(3) (2003) (emphasis added). Three other types of potentially responsible parties under Section 9607(a) are "1) the owner and operator of a vessel or a facility, 2) any person who . . . owned or operated any facility at which . . . hazardous substances were disposed of . . . and 4) any person who accepts or accepted any hazardous substances."

26. Mark J. Mathews, *New Definitions for "Operator" and "Arranger" Liability Under CERCLA*, COLO. LAW., Nov. 1997 at 101-02.

27. 872 F.2d 1373, 1380-81 (8th Cir. 1989). Other courts have also ignored the intent of alleged "arrangers." *See, e.g.*, United States v. Ward, 618 F. Supp. 884, 895 (E.D.N.C. 1985); Missouri v. Indep. Petrochemical Corp., 610 F. Supp. 4, 5 (E.D. Mo. 1985); *see also* New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir.1985); United States v. Ward, 618 F. Supp. 884, 893 (E.D.N.C. 1985).

another company to produce pesticide for them.[28] The Eighth Circuit relied on three factors to find arranger liability: 1) the manufacturers supplied raw materials to be used in making a finished product; 2) they retained ownership or control of the work in process; and 3) the generation of hazardous wastes was inherent in the production process.[29] The court viewed this "liberal judicial interpretation" of the term "arranged for" as consistent with CERCLA's "overwhelmingly remedial" statutory framework.[30]

In contrast, the Seventh Circuit in *Amcast Industrial Corp. v. Detrex Corp.* narrowly construed the term "arranged for" to require specific "intent to cause spillage" to hold a party liable.[31] There, the defendant company had arranged for a common carrier to transport a hazardous substance, and that carrier caused the spillage.[32] In requiring specific intent, the court excused the defendant company from arranger liability because it did not hire the transporter for the purpose of spilling the hazardous substance, but instead for delivering the material.[33]

Other courts have followed a middle ground between *Aceto* and *Amcast*, and required that there be a sufficient nexus between the potentially responsible party and the disposal of hazardous substances before imposing arranger liability on the party.[34] For example, the Second Circuit in *General Electric Co. v. AAMCO Transmissions, Inc.* (AAMCO), exempted from arranger liability oil companies whose waste

28. *Aceto*, 872 F.2d at 1382.

29. *Id.* at 1379-83.

30. *Id.* at 1380 (citing United States v. N.E. Pharm. & Chem. Co., 810 F.2d 726, 733 (NEPACCO) (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987)); *see also* Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982).

31. 2 F.3d 746, 751 (7th Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994). Some courts have relied on *Amcast*'s holding as "talismanic precedent." David W. Lannetti, *"Arranger Liability" Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): Judicial Retreat From Legislative Intent*, 40 WM. & MARY L. REV. 279, 298 (1998); *see, e.g.*, Ekotek Site PRP Comm. v. Self, 932 F. Supp. 1328, 1336 (D. Utah 1996) (concluding that a specific intent requirement for arranger liability is compatible with CERCLA's strict liability scheme); G.J Leasing Co. v. Union Elec. Co., 854 F. Supp. 539, 559 (S.D. Ill. 1994) (holding that "the phrase 'arranged for' implies intentional action"). However, *Amcast* is distinguishable from, and therefore inapplicable to, *Shell Oil* because as the Seventh Circuit reasoned, no one could have "arranged for" an *accidental* spillage to occur in *Amcast*. *Amcast*, 2 F.3d at 751. Unlike *Amcast*, *Shell Oil* involved a situation where the government was able to "arrange," albeit indirectly, for the disposal of the wastes. *Shell IV*, *supra* note 4. at 1051; *see* United States v. Tic Inv. Corp., 68 F.3d 1082 (11th Cir. 1996) (distinguishing *Amcast* since, unlike *Amcast*, there was "an arrangement" in that case).

32. *Amcast*, 2 F.3d at 747-48.

33. *Id.* at 751.

34. Gen. Elec. Co. v. AAMCO Transmissions, Inc., 962 F.2d 281, 286 (2d Cir. 1992); *see*, Michael J. Wajda, General Electric Co. v. AAMCO Transmissions, Inc.; *Determining Arranger Liability under CERCLA*, 3 U.BALT. J. ENVTL. L. 134 (1993).

oil was collected and transported to a storage site, where a spillage occurred.[35] Although these oil companies had arranged for the transport of the waste oil, [36] the court held that there was not a sufficient nexus because these companies had "mere ability or opportunity to control" the waste disposal, and not the "obligation" to exercise such control.[37]

United States v. Northeastern Pharmaceutical & Chemical Co. (NEPACCO)[38] is another case that interprets Section 9607(a)(3) arranger liability as falling between the *Aceto* and *Amcast* interpretations. In that case, one of the defendants was held liable as an arranger because he "actually knew about, had immediate supervision over, and was directly responsible for arranging for the transportation and disposal" of the wastes.[39] Another defendant in that case was found liable because he was "in charge of and directly responsible for all of NEPACCO's operations" and had the "ultimate authority" to control the disposal of wastes.[40] The Eighth Circuit therefore concluded that neither ownership nor actual control of the wastes is necessary for arranger liability under Section 9607(a)(3).[41]

The Ninth Circuit has generally adopted a broad interpretation of the statute's arranger liability provision and applied the *Aceto* analysis.[42] At least one district court in the Ninth Circuit has adopted the middle-ground approach of *AAMCO* but treated the *Aceto* and *AAMCO* analysis as analogous.[43] However, as will be discussed *infra*, the Ninth Circuit in *Shell Oil* rejected the district court's reliance on *Aceto* and adopted a narrower interpretation of the provision. Thus, even courts within the Ninth Circuit have widely differed on the proper test for arranger liability under CERCLA.

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35. *AAMCO*, 962 F.2d at 286.

36. *Id.*

37. *Id.* at 287; *see also* Wajda, *supra* note 34, at 136.

38. 810 F.2d 726 (8th Cir. 1986).

39. *Id.* at 743.

40. *Id.* at 745.

41. *Id.* at 743-44.

42. *See, e.g.*, United States v. Iron Mountain Mines, Inc., 881 F. Supp. 1432 (E.D. Cal. 1995); Jones-Hamilton Co. v. Beazer Materials & Servs., 973 F.2d 688, 695 (9th Cir. 1992); Cadillac Fairview/California, Inc. v. United States, 41 F.3d 562, 565 (9th Cir. 1994).

43. The district court for the Northern District of California adopted the *AAMCO* approach in *California v. Verticare Inc.*, 1993 WL 245544 (N.D. Cal. 1993). However, it treated the *AAMCO* analysis and *Aceto* analysis as inquiring about the same thing: 1) whether the defendant knew that the generation of hazardous waste was an inherent part of the production process; and 2) whether the defendant had ownership of the work in process and the final product which was such that it allowed inference that the defendant had the authority to control the "work in process." *Id.* at 8.

2. When is the Federal Government an "Arranger"?

Because of its power over others, the federal government is in a unique position to act as an "arranger" by encouraging or even compelling others to engage in polluting activities. The government's control over these activities becomes especially glaring during wartime, when it requires certain industries to increase the production of particular goods, such as synthetic rubber,[44] rayon,[45] Agent Orange,[46] zinc, and copper[47] that may be necessary for the war effort. This production often entails increased generation of hazardous substances and disposal of greater amounts of waste. Several courts have analyzed the extent to which the federal government was involved in the production of these wastes to determine whether it can be held liable as an arranger.

In *FMC*, for example, the Third Circuit looked at the government's involvement in the production of high tenacity rayon during World War II to decide whether it was acting as an "arranger."[48] There, the government built and retained an acid plant adjacent to the rayon-manufacturing plant to assure adequate supply of sulfuric acid for the production of rayon.[49] Moreover, it *directly controlled* the process by which the rayon was produced, the supply and price of the raw materials, and the price of the rayon produced.[50] Despite these pervasive interventions, the Third Circuit was divided as to whether the government in that case was liable as an "arranger."[51]

The Eighth Circuit in *United States v. Vertac Chemical Corporation* also focused on the scope of the government's activity in its arranger liability analysis.[52] During the Vietnam War, the federal government mandated the production of an herbicide known as Agent Orange. However, the government never owned or directly supplied the raw materials for the production of Agent Orange, nor did it have any financial interest in any of the equipment used to produce the herbicide.[53] Furthermore, it did not participate in designing, performing, or supervising activities related to the disposal of the wastes generated in the

44. *See Cadillac Fairview/California*, 299 F.3d 1019.
45. *See* FMC Corp. v. U.S. Dep't of Commerce, 29 F.3d 833 (3d Cir. 1994).
46. *See Vertac*, 46 F.3d 803.
47. *See Iron Mountain Mines, Inc.*, 881 F. Supp. 1432.
48. FMC, 29 F.3d at 836.
49. *Id.* at 838.
50. *Id.*
51. *Shell IV*, *supra* note 4, at 1058 (explaining that the Third Circuit unanimously found the government an "operator" but the court divided equally for an "arranger liability" issue, and eventually affirmed the district court's holding that the government was an arranger without discussion).
52. 46 F.3d 803 (8th Cir. 1995).
53. *Id.* at 807.

production of Agent Orange.[54] Since the government's intervention in the production of Agent Orange was "sporadic and minimal," the Eighth Circuit held that it was not an "arranger."[55]

The decisions in *FMC* and *Vertac* suggest that the government must have significant, actual, and direct control over the production of the goods that generate wastes to be held liable as an "arranger." However, these cases failed to draw a clear line as to where the government's activities become pervasive enough to implicate arranger liability. As shown *infra*, the Ninth Circuit's decision in *Shell Oil* did not help draw this line any clearer.

C. *The Act of War Defense in the CERCLA Context*

CERCLA imposes strict liability on potentially responsible parties and gives them only three defenses once liability is established.[56] One such defense is an "act of war," which requires that a person otherwise liable establish "by preponderance of the evidence that the release or threatened release of a hazardous substance and the damages resulting therefrom were caused *solely* by . . . an act of war."[57]

Outside of the CERCLA context, courts have often used the term "act of war" as a conclusory label in cases dealing with "sudden hostile action[s]."[58] The courts have, for example, considered such activities as the torpedoing of a destroyer,[59] the capturing of an enemy-owned patent,[60] and the seizing of enemy vessels "acts of war."[61] However, before *Shell Oil*, no court had addressed the purpose or meaning of

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54. *Id.*

55. *Id.* at 811.

56. 42 U.S.C. § 9607(b) (2002). As mentioned *supra*, the three defenses in CERCLA are: 1) an act of God; 2) an act of war; and 3) an act or omission of a third party. *Id.* Courts have strictly construed these statutory defenses, emphasizing the remedial purpose of CERCLA. Kurt M. Brauer, Acushnet Company v. Coaters, Inc.: *Defining the Role of Causation for CERCLA Response Cost Liability*, 44 WAYNE L. REV. 1465, 1481 (1998). *See, e.g.*, New York v. Shore Realty, 759 F.2d 1032, 1048-49 (2d Cir. 1985); Kelley v. Thomas Solvent Co., 727 F. Supp. 1532, 1540 (W.D. Mich. 1989). The "sole cause" requirement severely restricts the availability of these defenses. *See* 3 THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY LITIGATION §14.01(8)(b) at 14-162.2 (Susan M. Cooke, ed. 1987).

57. *Id.* (emphasis added).

58. John C. Cruden, *CERCLA Overview*, SF97 ALI-ABA 397, 419 (2001).

59. Stankus v. New York Life Ins. Co., 44 N.E. 2d 687 (Mass. 1942).

60. Farbwerke Vormal Meister Lucius & Bruning v. Chem. Found., Inc., 283 U.S. 152 (1931).

61. Hijo v. United States, 194 U.S. 315 (1904); Cruden, *supra* note 58; *see also* Koohi v. United States, 976 F.2d 1328, 1334 (9th Cir. 1992) (concluding that the shooting down of an Iranian passenger jet by the United States was an act of war); Agee v. Muskie, 629 F.2d 80, 97 (D.C. Cir. 1980) (holding that a seizure by Iranians of United States embassy was an act of war).

CERCLA's act of war provision.[62] The Ninth Circuit in *Shell Oil* narrowly interpreted this provision, and in so doing, restricted the applicability of this provision to only those rare cases where releases of hazardous substances were caused *solely* by an act of war.

II. THE SHELL OIL DECISION

A. *The Factual Background of Shell Oil*

1. *Oil Companies and Avgas Production*

The events that led up to *Shell Oil* began during World War II, when Shell Oil, Union Oil of California, Atlantic Richfield, and Texaco ("oil companies") operated aviation fuel refineries in the Los Angeles area.[63] The primary consumer of this aviation fuel ("avgas") was the United States military for use in military aircraft.[64]

In order to produce avgas, fuel refineries added varying amounts of additives to ordinary gasoline.[65] The necessary additives can be produced with sulfuric acid, through a process called alkylation.[66] The process of alkylation greatly reduces the purity of the sulfuric acid, and consequently, the "spent acid" needs to be either reprocessed, reused in other refinery processes, or simply dumped.[67] If the spent acid is reused, it loses its purity even further, and at some point, must be discarded as "acid sludge."[68]

2. *The United States Government's Role in Avgas Production*

The role that avgas played in the war effort was so critical that the United States government exercised pervasive control over the oil companies' avgas production process. It created several agencies, such as the War Production Board (WPB) and the Petroleum Administration for War (PAW), to supervise the production of petroleum products, including avgas.[69] The WPB prioritized and facilitated avgas production,

62. United States v. Shell Oil Co., 841 F. Supp. 962, 970 (C.D. Cal. 1993) [hereinafter *Shell I*].
63. *Shell IV*, *supra* note 4, at 1047.
64. *Id.* at 1049.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 1050.
69. *Shell IV*, *supra* note 4, at 1049.

and the PAW dictated the quantity and quality of avgas produced.[70] In an attempt to maximize avgas production, the government also implemented the Planned Blending Program, through which it instructed the refineries on how to exchange and blend various avgas components.[71] Moreover, the government encouraged avgas production by entering into long-term contracts with the oil companies, and by reducing the financial risk to these oil companies through the Aviation Gas Reimbursement Plan (AGRP).[72] Under this plan, the government agreed to reimburse the companies for any extraordinary expenditures that occur which could not have been anticipated at the time they executed the supply contracts.[73]

Due to wartime regulations, the oil companies had no choice but to cooperate with these governmental interventions; any act of defiance would have resulted in a government takeover of facilities or even criminal prosecutions.[74] The oil companies did, however, maintain private ownership of their facilities and managed their refinery operations at all times during the war.[75] Nevertheless, the government exercised a significant degree of control over the methods that the oil refineries used to produce the avgas and the rate at which this production occurred. [76]

3. *Disposal of Waste from Avgas Production*

During the war, the demand for avgas rose significantly, as a result, production increased more than twelve-fold, and the corresponding sulfuric acid consumption went up five-fold.[77] This increase in avgas production naturally led to the generation of greater amounts of spent acid. The increase was so great that the oil companies could not reuse all of it in their own refineries.[78] To make matters worse, there were not sufficient facilities to reprocess the spent acid.[79] The government refused to allocate resources necessary to construct new acid reprocessing facilities on two occasions.[80] Moreover, because the government was

70. United States v. Shell Oil Co., 13 F. Supp.2d 1018, 1022 (C.D. Cal. 1998) [hereinafter *Shell III*].

71. *Shell IV*, *supra* note 4, at 1050.

72. *Id.*

73. *Id.*

74. *Shell I*, *supra* note 62, at 966 (noting that "an oil company that refused to cooperate with the government would have been subject to government takeover" and that "individuals who interfered with the government's regulation of industry and acquisition of supplies would have been subject to criminal prosecution.").

75. *Shell IV*, *supra* note 4, at 1050.

76. *Id.*

77. *Id.* at 1049.

78. *Id.* at 1051.

79. *Id.*

80. *Id.*

using railroad tank cars to transport sulfuric acid for avgas production, the oil companies were severely restricted in their means to transport acid sludge for reprocessing or for reuse offsite from the refineries where it was generated.[81] As a result, the oil companies had little practical choice but to enter into a contract for the disposal of the waste at a site in Fullerton, California, known as the McColl Site.[82] The oil companies discarded the wastes at the Site from June 1942 until September 1946.[83]

The government, aware that the oil companies were producing large amounts of waste, attempted to alleviate the problem by facilitating the leasing of a large storage tank to contain the waste.[84] However, it never specifically ordered or approved the dumping of spent acid and acid sludge at the McColl Site, nor is there evidence that it knew of the disposal contracts between the oil companies and McColl.[85]

4. *The Resulting Suit*

The *Shell Oil* lawsuit became inevitable in the 1990s, when the government removed hazardous wastes from the McColl Site and converted it into a wildlife sanctuary and community recreation facility.[86] The cost of this cleanup approached $100 million.[87] The United States and the State of California sued the oil companies under CERCLA to recover these cleanup costs.[88] The oil companies in turn counterclaimed, contending that the United States was in fact solely liable for the cleanup costs.[89]

B. The District Court and Circuit Court Decisions in Shell Oil

In response to the oil companies' counterclaim, the United States argued that it was immune from liability under the doctrine of sovereign immunity and had not waived this immunity through CERCLA. The United States also argued that it did not qualify for liability as an "arranger" under Section 9607(a)(3). The oil companies, on the other hand, contended that their actions were exempt from liability under the statute's act of war defense. These same arguments were raised both at the district court and the court of appeals levels.

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81. *Shell IV*, *supra* note 4, at 1051.
82. *Id.*
83. *Shell III*, *supra* note 70, at 1023.
84. *Shell IV*, *supra* note 4, at 1051.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 1045.
89. *Id.*

1. *Decision of the District Court for the Central District of California*

a. *Sovereign Immunity*

First, the United States argued that it had not waived sovereign immunity through CERCLA for its regulatory activities, as opposed to other, non-regulatory activities.[90] The District Court for the Central District of California adopted the Third Circuit's reasoning in *FMC*, to reject the argument that CERCLA's waiver of sovereign immunity only applied to the government's non-regulatory activities.[91] It concluded that Congress did not draw any distinction between regulatory and proprietary actions and thus held that the United States had waived its sovereign immunity for the purposes of this suit.[92]

b. *Arranger Liability*[93]

The district court then addressed the possible arranger liability of the United States, and ruled that it was liable as an "arranger."[94] The district court based its finding that the United States was an "arranger" on the Eighth Circuit's three factors test in *Aceto* discussed *supra*.[95] First, it found that the United States "supplied the raw materials" within the meaning of *Aceto* since it "dictate[d] . . . the specifications of the raw materials, and provide[d] the transportation for [them]."[96] Second, the

90. United States v. Shell Oil Co., No. 91-0589 at 8 (C.D. Cal. Sept. 18, 1995) [hereinafter *Shell II*].

91. *Id.* at 8-12.

92. *Id.*

93. The court categorized wastes at the McColl Site into two groups: "non-benzol" and "benzol" wastes. Since the government actually conceded that it "arranged" for the benzol waste's disposal, the district court found the United States 100% liable for this waste. Therefore, this Note focuses on the court's non-benzol contamination analysis. All references to the government's arranger liability therefore refer to its liability for the non-benzol waste. *Id.* at 14-19.

94. *Shell I*, *supra* note 62, at 969-70. The district court also addressed the arranger liability of the oil companies. In the summary judgment motion initiated by the United States and the State of California, the district court found the oil companies liable as "arrangers" for the contamination. The court found the oil companies "arrangers" because the records before the court "establish[ed] beyond dispute" that they generated the wastes dumped at the McColl Site, and that they contracted with McColl to transport and dispose of the wastes. *Id.*

95. The court also found arranger liability for the government based on the direct arranger theory. However, since the oil companies did not argue that the United States was a "direct arranger" in their counterclaim, and there was no actual "direct" control by the government over the avgas production, both the district court and the circuit court focused more on the alternate broader theory for liability. *See* Laura Massaro et al., *Recent Developments in Environmental Law*, 15 TUL. ENVTL. L. J. 443, 451 (2002). Therefore, this Note only focuses on the court's analysis of the broader theory.

96. *Shell II*, *supra* note 90, at 21-22 (discussing the analysis of United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373 (8th Cir. 1989)).

court found that the government exercised pervasive control over the avgas production process.[97] Finally, the court found, and the government acknowledged, that the generation of the acid waste was "inherent" in avgas production.[98] Thus, by adopting the Eighth Circuit's broad interpretation of the statute's arranger liability, the district court found the government liable as an "arranger" for its involvement in the oil companies' disposal of spent acid at the McColl Site.[99]

c. *Act of War Defense*

Lastly, the district court considered the issues surrounding the statute's act of war defense. The court easily found the oil companies liable for the avgas wastes, but these companies sought exemption from liability since their avgas production for the United States during World War II was, in their view, caused by an "act of war" within the meaning of Section 9607(b)(2).[100] The court, however, rejected this claim, and concluded that the term "act of war" cannot be interpreted to cover "either the government's wartime contracts to purchase [avgas] from the oil companies or its regulation of the oil companies' production of [avgas]."[101]

The district court based its conclusion that the act of war defense was not applicable on several factors. First, it reasoned that the overall structure of CERCLA, with its sweeping liability, both in terms of language and scope, and its three limited defenses to liability, weigh in favor of a narrow interpretation of the defense.[102] Second, the court adopted the Supreme Court's analysis in *Juragua Iron Co. v. United States*[103] and *United States v. Winchester & Potomac River Co.*,[104] where the Court distinguished between the capturing of an enemy nation's

97. *Id.* at 23.

98. *Id.* at 21.

99. After finding the government liable, the district court analyzed the issue of cost allocation and found that "100% of the cleanup costs for all the waste, [both the benzol and non-benzol wastes,] . . . should be allocated to the United States, and 0% to the [o]il [c]ompanies." *Shell IV*, *supra* note 4, at 1048. Under the authority of 42 U.S.C. § 9613(f)(1) (2000), the district court relied on the following three factors for its cost allocation analysis: 1) any allocation to the government would place the cost of the war on society as a whole; 2) the oil companies could not transport the waste away from their refineries due to the unavailability of tank cars; and 3) the oil companies could not construct new treatment plants because the WPB had refused to issue the required war priorities to do so. *Id.*

100. *Shell I*, *supra* note 62, at 970-72.

101. *Id.*

102. *Id.* at 970 (comparing the language of 42 U.S.C. §9607(a) (2003), which imposes broad liability, with §9607(b), which lists narrow defenses).

103. 212 U.S. 297, 308 (1909).

104. 163 U.S. 244, 255 (1896).

property and the possession of other kinds of property through an express or implied agreement to compensate the owner. In those cases, the Court held that the former constituted an act of war, while the latter did not.[105] Since the avgas production in this case occurred through an express contract with the government, the defendant's act of war claim failed.[106] Finally, the district court noted that the term "act of war" may have been borrowed from international law, which defines the term as a "use of force or other action by one state against another."[107] Since there was no such "use of force" in this case, the act of war defense was clearly not available. Therefore, the district court's narrow interpretation of the statute's act of war defense provision made the defense unavailable to the oil companies in this case.

2. *Decision of the Ninth Circuit*

The Court of Appeals for the Ninth Circuit agreed with the district court that the United States had waived its sovereign immunity for the purpose of this case through CERCLA.[108] It also agreed that the act of war defense was not available to the oil companies here.[109] However, it disagreed with the district court's conclusion that the United States was liable as an "arranger."[110] Instead, it found that the federal government's involvement in avgas production was not enough to subject it to arranger liability under the Act.

a. Sovereign Immunity

The Ninth Circuit reviewed the question of sovereign immunity de novo and affirmed the district court's decision that Congress had waived the sovereign immunity of the United States.[111] First, the court rejected the government's argument that the waiver should only apply to federally-owned facilities since the immunity provision appears in the section entitled "Federal facilities."[112] The court rejected this argument because the waiver language of Section 9620(a)(1), enacted in 1980, had been moved in 1986 to the newly added "Federal facilities" portion of the statute for purely "organizational reasons."[113] The court emphasized that

105. *Juragua Iron Co.*, 212 U.S. at 308; *Winchester & Potomac River Co.*, 163 U.S. at 255.
106. *Shell I*, *supra* note 62, at 972.
107. *Id.* (citing JAMES R. FOX, DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW 6 (1992)).
108. *Shell IV*, *supra* note 4, at 1052.
109. *Id.* at 1061.
110. *Id.* at 1056.
111. *Id.* at 1051-53.
112. *Id.* at 1052.
113. *Id.*

this relocation did not limit or change the scope of the waiver in any way.[114]

Second, the Ninth Circuit rejected the government's argument that it should only be liable for its "nongovernmental" activities.[115] In rejecting this contention, the court highlighted the fact that the United States has been held liable under CERCLA for such activities as military installations, which are clearly "governmental" activities that cannot be performed by private individuals.[116] Therefore, the court of appeals agreed with the district court that the government did not enjoy immunity from suit in this case.[117]

b. Arranger Liability

In contrast to the issue of sovereign immunity, the court of appeals disagreed with the district court's decision regarding the CERCLA's arranger liability issue. The Ninth Circuit narrowly construed the language of arranger liability and reversed the district court's conclusion that the United States was an "arranger" for the disposal of hazardous waste at the McColl Site. It held that the United States did not arrange for the disposal of the waste because it did not directly arrange for, nor "exercis[e] actual control, nor had the direct ability to control" the disposal.[118]

The Ninth Circuit also rejected the district court's reliance on the *Aceto* analysis, finding that the case was inapplicable since the United States was in a "materially" different position from the pesticide manufacturers in *Aceto*.[119] The court of appeals emphasized the fact that, unlike *Aceto*, the government in the present case did not own any of the raw materials or intervening products.[120] The Ninth Circuit also rejected *Aceto*'s finding that "mere authority to control," rather than "actual control," was sufficient for arranger liability.[121]

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114. *Shell IV*, *supra* note 4, at 1052; *see* FMC Corp. v. U.S. Dep't of Commerce, 29 F.3d 833, 842 (3d Cir. 1994) for a more detailed explanation behind the relocation of the waiver language.

115. *Shell IV*, *supra* note 4, at 1052-53.

116. *Id.* at 1053. As an example, the court mentioned *United States v. Allied Corp.*, 1990 WL 515976 (N.D. Cal. Apr. 25, 1990), which held the United States Navy liable because it authorized demolition which caused inappropriate release of hazardous substances. *Id.*

117. *Id.* at 1054.

118. *Id.* at 1057. *Contra* Cadillac Fairview/California, Inc. v. United States, 41 F.3d. 562, 562 (9th Cir. 1994) (holding that rubber companies that transferred waste for reprocessing were "arrangers"); Catellus Dev. Corp. v. Untied States, 34 F.3d 748 (9th Cir. 1994) (finding a company that sent used car batteries for lead recovery and disposal was an "arranger").

119. *Shell IV*, *supra* note 4, at 1056.

120. *Id.* at 1056.

121. *Id.* at 1057.

The Ninth Circuit further rejected the oil companies' reliance on *NEPACCO*.[122] In that case, as discussed *supra*, the defendants were found liable as arrangers because, although they did not personally own or possess the waste, they had immediate supervision over and responsibility for the wastes, and had ultimate authority to control their disposal. The oil companies relied on *NEPACCO* for the proposition that "neither ownership nor actual control is necessary for arranger liability."[123] They therefore argued that the federal government should be held liable as an arranger despite the fact that it had neither owned nor controlled the waste.[124] The court rejected this argument, holding that actual control is required.[125] Since, in the court's view, the government had never exercised such control, it could not be held liable as an arranger.[126]

Instead of *Aceto* and *NEPACCO*, the court of appeals relied on two wartime cases, which it considered "more closely on point," to support its own decision to exempt the government from liability.[127] The first case was the Third Circuit's decision in *FMC*, where the degree of the government's actual control over the private company's production process was "substantially greater" than it was in *Shell Oil*.[128] In *FMC*, the government *directly controlled* the rayon production, from supplying its raw materials to setting the prices for the rayon produced.[129] Despite this significant government involvement, the Third Circuit still hesitated to find the government an "arranger" in that case.[130] Hence, lacking such "direct control" in the instant case, the Ninth Circuit found the argument for government liability even less persuasive.[131]

The second case, *Vertac*, had facts resembling the case at bar.[132] In both *Vertac* and *Shell Oil*, products were produced for the government during wartime, the production was carried out under government contract and governmental programs, and the government knew that the production entailed generation of wastes but did not direct their

122. The oil companies first raised their *NEPACCO* argument on appeal, so the district court only applied the *Aceto* standard. *Shell II*, *supra* note 90, at 20.

123. *Shell IV*, *supra* note 4, at 1056.

124. *Id.*

125. *Id.* at 1058.

126. *Id.* at 1058-59.

127. *Id.* at 1058.

128. *Id.* (discussing FMC Corp. v. U.S. Dep't of Commerce, 29 F.3d 833, 833 (3d Cir. 1994)).

129. *Shell IV*, *supra* note 4, at 1058 (citing FMC Corp. v. U.S. Dep't of Commerce, 29 F.3d 833, 838 (3d Cir. 1994)).

130. *Id.* (stating that the Third Circuit had unanimously found the government an "operator" but the court divided equally on the "arranger liability" issue).

131. *Id.*

132. United States v. Vertac Chem. Corp., 46 F.3d, 803 (8th Cir. 1995).

disposal.[133] The court conceded that the government involvement was "somewhat greater" in *Shell Oil* than it was in *Vertac*.[134] Nonetheless, the Ninth Circuit heavily relied on the *Vertac* decision, and held that the United States was not an "arranger."[135] By adopting the approaches of the courts in *FMC* and *Vertac*, the Ninth Circuit in *Shell Oil* moved away from the district court's broad interpretation of the statute's arranger liability provision. The Ninth Circuit found the government not liable for the wastes at the McColl Site because it had not exercised significant, direct control over the avgas production.

c. *Act of War Defense*

Lastly, the circuit court only briefly discussed CERCLA's act of war defense provision. Like the district court, it noted that the term "act of war" is not defined in the statute or the case law.[136] It nonetheless affirmed the district court's analysis and decision to reject the oil companies' act of war defense.[137] The Ninth Circuit reasoned that the oil companies were not entitled to the benefit of the defense because their disposal of avgas waste was not "solely" caused by an act of war.[138] They chose the means of disposing of their avgas waste and the government did not dictate any disposal methods.[139]

III. IMPLICATIONS OF THE DECISION IN SHELL OIL

Shell Oil generally confirmed existing precedent on CERCLA's waiver of sovereign immunity by adopting a broad interpretation of this provision. Also, given the plain language of the statute's act of war defense, it is not surprising that the Ninth Circuit rejected the applicability of that defense to the facts of this case.

What is remarkable about this decision, however, is the court's effort to clarify where arranger liability begins for the United States government. Unfortunately, the court failed in establishing a well-reasoned standard. Its rejection of the government liability in this case ignored CERCLA's remedial purpose, and imposed an arbitrary and needlessly narrow definition of arranger that will allow the federal government to escape its financial responsibilities under this statute.

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133. *Shell IV*, *supra* note 4, at 1059 (comparing *Vertac* and *Shell Oil*).
134. *Id.*
135. *Id.*
136. *Id.* at 1061.
137. *Id.*
138. *Id.* at 1062.
139. *Shell IV*, *supra* note 4, at 1062.

A. *Ninth Circuit's Consistent Interpretation of the Sovereign Immunity Provision*

The Ninth Circuit affirmed other courts' interpretations of CERCLA's sovereign immunity provision. As many other courts have noted, CERCLA has a broad remedial scope and, where necessary, Congress has specifically provided for exemptions from liability.[140] Therefore, since Congress did not "unequivocally express" that the government's regulatory activities are exempt from liability, courts should not introduce their own arbitrary interpretations into the statute and exempt the government from liability.

This conclusion is especially true in cases like *Shell Oil*. As discussed *supra*, the government here played a significant role in the avgas production, coercing the oil companies to produce massive quantities of fuel, which resulted in the generation of much waste.[141] The government was aware of the waste production, but chose to ignore the disposal problem and ordered continued avgas production. This government mandate left the oil companies with little practical choice but to dispose of these wastes at the McColl Site. If a "nongovernmental entity" had exercised this kind of pervasive control over another entity's production and disposal methods, the court would likely have found that entity liable under CERCLA.[142]

As noted above, CERCLA's waiver of sovereign immunity provides that the United States "shall be subject to, and comply with, this chapter in the same manner and to the same extent . . . as any nongovernmental entity . . . "[143] Since a "nongovernmental entity" would have been held liable if it had exercised the kind of control that the government did in *Shell Oil*, the United States should also at least be subject to suit, if not held liable, under Section 9620(a)(1). Thus, the Ninth Circuit was correct in looking at the extent of the government's participation in the polluting activity when it concluded that the government did not enjoy immunity from suit in this case.

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140. *Supra* section IA, "Sovereign Immunity Under CERCLA."

141. *See supra* section II.A.3, "Disposal of Waste From Avgas Production."

142. *See, e.g.*, United States v. Aceto Agric.Chems. Corp., 872 F.2d.1373 (8th Cir. 1989) (finding liability for pesticide manufacturers who had hired another company to produce pesticide for them); United States v. N.E. Pharm. & Chem. Co., 810 F.2d 726 (8th Cir. 1986) (holding defendants liable for their immediate supervision over, and responsibility for, the wastes).

143. 42 U.S.C. § 9620(a)(1) (2003).

B. *Significance of the Ninth Circuit's Act of War Defense Analysis*

This case was the first time that a court dealt squarely with the extent of the act of war defense to CERCLA liability.[144] The Ninth Circuit in *Shell Oil* clarified what constitutes an "act of war" and severely, but appropriately, restricted the availability of the defense by its "sole cause" requirement.

The limited availability of the defense as enunciated by the court in *Shell Oil* is consistent with CERCLA's overall remedial purpose. If the court had granted the act of war defense to the oil companies in this case, it would have placed all the responsibilities and costs on the United States. This reasoning would apply to all wastes created through wartime activities, even in cases such as *Vertac*, where the government had only minimally and indirectly contributed to the waste generation.[145] Placing such a burden on one potentially responsible party is contrary to CERCLA's purpose, which is to hold liable all those who are involved in the treatment or disposal of hazardous wastes.

C. *Arranger Liability Analysis That is Too Lenient on the Government*

The court's discussion of arranger liability in *Shell Oil* was significant because, among other reasons, it was the first time that the Ninth Circuit discussed arranger liability for the government in a war pollution case.[146] Unfortunately, however, the Ninth Circuit failed to consider the intrusiveness of governmental involvement in the avgas production in its arranger liability analysis, and thereby reached a holding that is too lenient on the United States government. In fact, the Ninth Circuit deemphasized the governmental intervention in the avgas production to such a degree that it depicted a picture of governmental liability substantially removed from the reality described by the district court.

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144. *See Brauer, supra* note 57, at 1483.

145. As discussed *supra* section II.B.2.b, the court in *Vertac* found the government not liable because its involvement in Agent Orange production was too "sporadic and minimal." United States v. Vertac Chem. Corp., 46 F.3d, 803, 811 (8th Cir. 1995). As also mentioned *supra*, although the Ninth Circuit attempted to analogize *Vertac* and *Shell Oil*, the governmental interference was much greater in *Shell Oil* than it was in *Vertac*.

146. Before this decision, the court had only dealt with cases involving individual or corporate arranger liability. *See, e.g.*, United States v. Cadillac Fairview/California, Inc., 41 F.3d 562 (9th Cir. 1994) (discussing arranger liability for rubber companies that disposed of contaminated waste); Catellus Dev. Corp. v. United States, 34 F.3d 748 (9th Cir. 1994) (deciding arranger liability for a seller of waste batteries); Jones-Hamilton Co. v. Beazer Materials & Servs., Inc., 973 F.2d 688 (9th Cir. 1992) (involving arranger liability for a supplier and owner of raw materials).

1. The Government Met the Aceto Three-Factor Test for Arranger Liability

A careful review of the facts reveals that the district court was correct in its decision to find arranger liability for the government. Contrary to the circuit court's finding, the government could be found an "arranger" under *Aceto*'s three-factor analysis.[147] As discussed *supra*, the *Aceto*'s three-factor test imposes liability on a defendant as an "arranger" if: 1) the defendant supplied the raw materials to be used in making a finished product; 2) the defendant retained ownership or control of the work in process; and 3) the generation of hazardous wastes was inherent in the production process.[148]

The government's activities in this case met all three factors listed in *Aceto*. First, the government supplied the raw materials for avgas production by providing transportation for fresh sulfuric acid, which was essential to avgas production.[149] In fact, the district court noted the irony of the government's use of tank cars to transport fresh sulfuric acid to the oil companies for avgas production, which deprived the companies of the tank cars to transport their wastes off their refineries.[150] This shortage, in turn, forced the oil companies to dump the wastes at the McColl Site.[151] Although the circuit court noted that the government did not own the raw materials, ownership of raw materials was not required by *Aceto*.

Secondly, the government's oversight over avgas production in this case was so intrusive that it became constructive ownership or possession of the work in process that generated the waste. As discussed *supra,* examples of the government's pervasive control include the creation of agencies to supervise avgas production, implementation of programs to instruct the oil companies on how to exchange and blend avgas components so as to maximize production, and the imposition of threats that an act of defiance would result in government takeover or criminal prosecution.[152]

Lastly, the generation of the spent acid that the oil companies dumped in this case was inherent in the avgas production that they were undertaking for the government. Thus, the government's activities in *Shell Oil* met all of three factors of the *Aceto* test for arranger liability. The government should therefore have been found liable in this case.

147. The district court adopted the Aceto's three-factor analysis.

148. United States v. Aceto Agric. Chems. Corp., 872 F.2d.1373, 1379-80, 82 (8th Cir. 1989).

149. *Shell III*, *supra* note 70, at 1027-28.

150. *Id.*

151. *Id.*

152. *Contra* United States v. Vertac Chem. Corp., 46 F.3d, 811 (8th Cir. 1995) (holding that there was no constructive ownership or possession because the government's involvement in the operations of Agent Orange production was "sporadic" and "minimal").

2. *FMC and Vertac Support the District Court's Finding of Arranger Liability in This Case*

Although the Ninth Circuit based its decision on two other wartime cases, these cases actually support the district court's finding of arranger liability for the government. First, the circuit court emphasized the fact that the Third Circuit in *FMC* was "equally divided" as to the government's arranger liability despite its "direct" and "actual" control over the private company's production process in that case. However, it failed to note that the Third Circuit did eventually hold the government liable as an arranger, rather than remanding the case.[153] If the Third Circuit was truly divided, as the Ninth Circuit claimed, then it would have remanded the case to the district court for further analysis.

Second, the Ninth Circuit analogized the current case to *Vertac*, but in so doing, highlighted the pervasiveness of the governmental intervention in the current case. For example, the government in the instant case maintained significant actual control over the production of avgas through various programs that dictated the manner in which avgas was to be produced.[154] However, there was no evidence of such control in *Vertac*; the government in that case did not implement any programs to oversee the production of Agent Orange. The Ninth Circuit, in fact, admitted that the government's involvement in *Shell Oil* was "somewhat greater" than it was in *Vertac*.[155] This greater governmental involvement supports the district court's finding of arranger liability for the government.

By deemphasizing the pervasive role that the government played in avgas production and by not holding it liable for the waste contamination, the Ninth Circuit effectively closed the door on arranger liability suits against the government. The Ninth Circuit seemed to suggest that arranger liability exists only when the government exercises "actual control," such as leasing its equipment and machinery for manufacturing products, or controlling the supply and price of raw materials as was the case in *FMC*.[156] Restricting the government's liability to those few cases where the government intervention was extreme is counter to the broad remedial purpose of CERCLA, however. The Ninth Circuit's decision in this case regrettably sends the wrong message that the government is exempt from liability even when it exercises pervasive and coercive

153. FMC Corp. v. U.S. Dep't of Commerce, 29 F.3d 833, 845-46 (3d Cir. 1994) (holding the government liable as an arranger without discussion).

154. *See supra* section II.A.2, "The United States Government's Role in Avgas Production."

155. *Shell IV*, *supra* note 4, at 1059.

156. *See FMC*, 29 F.3d at 843-45.

control over a private entity's activity that results in hazardous contamination.

CONCLUSION

Shell Oil has significantly contributed to the courts' understanding of CERCLA by clarifying the broad scope of the statute's waiver of federal sovereign immunity. Moreover, it defined for the first time the scope of the act of war defense in the CERCLA context. However, the case was most important for its analysis of the statute's arranger liability provision since it was the first time that the Ninth Circuit engaged in such an analysis for the government in a war pollution case. After *Shell Oil*, courts in the Ninth Circuit should find arranger liability at least whenever the government has exercised direct and actual control over the production process.[157] However, *Shell Oil* left unanswered the crucial question of at which point the government's control becomes pervasive enough as to find this liability. Without defining this point, the Ninth Circuit has allowed the government to escape from liability in war pollution cases even where it plays a significant, but not "actual" or "direct" role.

157. *See e.g.*, Cadillac Fairview/California, Inc. v. Dow Chem. Comp., 299 F.3d 1019, 1025, 1029 (9th Cir. 2002). Only two months after the *Shell Oil* decision, the Ninth Circuit held in *Cadillac Fairview* that the United States government was liable for 100% of the cleanup costs for wastes created through synthetic rubber production during World War II because of its significant control over that production. The government in that case owned the plant, the land, the raw materials, the byproducts, the wastes, and the final product, rubber. *Id.* Furthermore, the government not only had an agency relationship with the defendant, which required it to indemnify the defendant for what it did, but also an express written promise with the defendant, which held the defendant harmless for whatever it did. *Id.*