

9th Circ. Reverses Gov't Win In Work Site Cleanup Suit

By Adam Lidgett

Law360, New York (October 4, 2017, 2:06 PM EDT) -- A Ninth Circuit panel on Wednesday reversed a decision that let the federal government off the hook for cleanup costs at a San Diego site where a defense contractor produced equipment for the military for several decades, saying the lower court sharply deviated from the appellate court's prior case law.

The panel vacated a decision in favor of the federal government in TDY Industries Inc.'s Comprehensive Environmental Response, Compensation and Liability Act suit that sought contribution from the government for its share of the cleanup costs at the contractor's San Diego aeronautical manufacturing plant. The panel remanded the decision back to the lower court for further proceedings.

The appellate decision said the lower court was wrong in its analysis of what the panel said were the two most "on-point" decisions in the case that considered how CERCLA cleanup costs should be allocated between the government and military contractors. The district court erred in finding that the cases — *United States v. Shell Oil Co* and *Cadillac Fairview/California Inc. v. Dow Chem. Co* — weren't "comparable" and in allocating zero percent of the cleanup costs to the government, adding that the government required TDY to use two hazardous chemicals at issue.

"Nevertheless, encumbering a military contractor with 100 percent of CERCLA cleanup costs that were largely incurred during war effort production was a 180 degree departure from our prior case law, and the out-of-circuit authority that the district court relied upon does not warrant such a sharp deviation," the panel said.

The site, which TDY's predecessor Ryan Aeronautical Co. began using in 1939, housed facilities that produced defense equipment used during World War II and later periods, according to court documents.

During the 60-year period in which TDY operated the manufacturing plant, the panel said the United States was the company's primary customer. Certain hazardous substances were released during the course of operations, the panel said, contaminating soil and groundwater.

TDY contended in a 2007 complaint that under CERCLA, the government should help cover the substantial costs of cleaning up the site in San Diego. The district court eventually allocated 100 percent of past and future response costs for the remediation of chromium, chlorinated solvents and polychlorinated biphenyls, or PCBs, to TDY, the panel said.

Randall M. Levine of Morgan Lewis & Bockius LLP, an attorney for TDY, told Law360 on Wednesday that now the trial court will have to determine the appropriate allocation of costs between his client and the federal government.

“We’re very pleased with the panel’s opinion reversing the trial court’s allocation of 100 percent of the cost to TDY and zero percent of the cost to the government,” he said. “The panel correctly remanded the matter to the trial court for reallocation.”

A representative for the federal government declined to comment on Wednesday.

Circuit Judges J. Clifford Wallace, Morgan Christen and Paul J. Watford sat on the panel for the Ninth Circuit.

TDY is represented by Randall M. Levine, Douglas A. Hastings, Bryan M. Killian and James J. Dragna of Morgan Lewis & Bockius LLP.

The federal government is represented by Rachel E. Heron, Dustin J. Maghamfar, Mark A. Rigau, Lewis M. Barr, Ellen J. Durkee and Aaron P. Avila of the U.S. Department of Justice.

The case is TDY Holdings LLC et al. v. USA et al., case number 15-56483, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Adam Sege. Editing by Stephen Berg.