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■ A TREND ■

Feds pay in Superfund lawsuits

Most recent example is a $27.5 million settlement in Glen Cove, N.Y.

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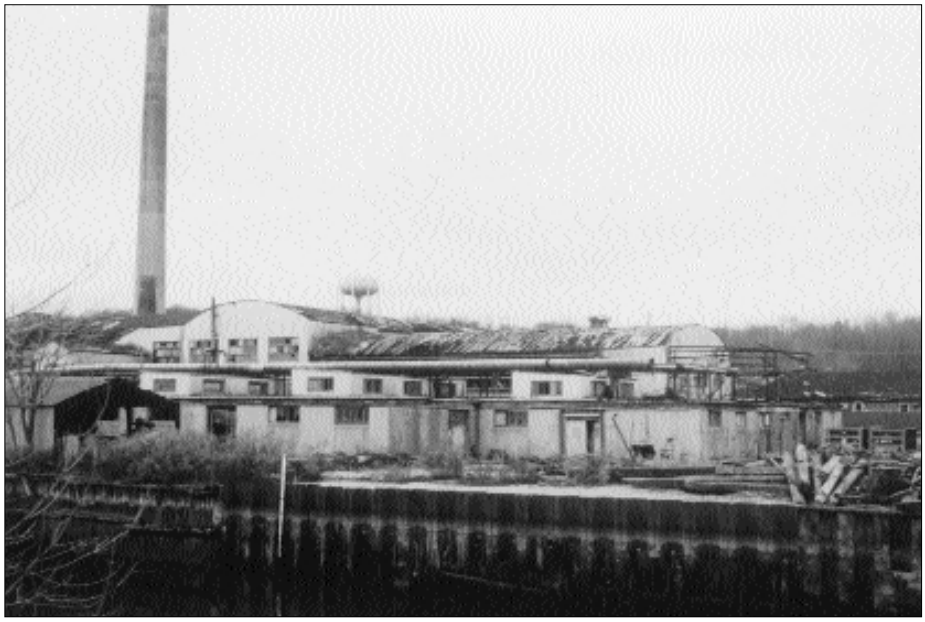
A RECENT SETTLEMENT in which the federal government agreed to pay $27.5 million to help clean up a Superfund toxic waste site in Glen Cove, N.Y., illustrates what defense lawyers see as a growing trend in the government's willingness to settle such cases when the United States shares some liability.

"There's no doubt the government has started to look for innovative, creative solutions" to end the Superfund legal wrangling, said Daniel M. Steinway, the Washington-based chairman of the environmental practice at New York's Kelley Drye & Warren. He said one such solution is an increased willingness to settle cases where the government contributed to the pollution on the Superfund site, usually through World War II-era plants.

Environmental attorney Erich Rapp said the trend began after a 1994 case in which the 3d U.S. Circuit Court of Appeals found the government liable for 26% of a $300 million cleanup because it had operated a rayon/rubber plant on the site during the war. *FMC Corp. v. U.S. Dept. of Commerce*, 29 F.3d 833.



CREATIVE SOLUTIONS: *To clean up Superfund sites like this one in Glen Cove, N.Y., the federal government has agreed to pay millions of dollars for past actions.*

Court criticizes government

Rapp said the trend jumped after a 9th Circuit decision last November in which the court criticized the government for "trying to take money from firms that it conscripted for a critical part of a great war effort." The court assigned 100% of the cleanup costs to the federal government because it built and owned a synthetic rubber facility operated by Dow Chemical during World War II in Torrance, Calif. *Cadillac Fairview/California v. Dow Chemical Corp.*, 299 F.3d 1019.

Rapp, a partner at Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman in Baton Rouge, La., said it is difficult to quantify the increased number of cases because neither the Environmental Protection Agency (EPA) nor its attorneys will discuss the cases with counsel and because details of most settlements, which usually take more than a year to negotiate, are confidential.

"The government has consistently done a good job of quietly settling cases they were not going to win to avoid publicity and an avalanche of new cases," Rapp added. He said he based

his trend statements on calls he receives from both attorneys in the field and potential clients.

A spokesman for the EPA declined comment for this story, and several EPA attorneys refused to discuss settlements or to quantify them.

Rapp said he is involved in several current cases, but declined to discuss numbers or the types of industries involved so as not to alienate negotiating parties nor breach attorney-client privilege.

Neither Rapp nor Steinway was involved in the Glen Cove settlement, in which a consent judgment was filed on Sept. 30 in the U.S. District Court for the Eastern District of New York. *U.S. v. City of Glen Cove*, No. CV-03-4975.

In that case, four federal agencies—the General Services Administration and the departments of Defense, Commerce and Treasury—agreed to pay for the cleanup along with the city of Glen Cove, located on Long Island Sound, and Wah Chang Smelting and Refining Co. of America.

The federal government owned land and buildings on the property, which was used to refine tungsten for military efforts during World War II. None of the settling parties admitted any liability for the lead, arsenic, radioactive material and other hazardous wastes found at the site, according to court documents. The entire cleanup will cost an estimated $54 million.

The city of Glen Cove operated a landfill there, according to court documents, and Wah Chang smelting company was accused of dumping radioactive waste. The attorney for Wah Chang did not return phone calls.

The site includes the inactive, 26-acre Li Tungsten Corp. industrial facility.

EPA begins court action

In 1999, the EPA brought an action under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) against some 28 prior owners and operators of the site, including Glen Cove and Wah Chang. In 2000, some of the parties brought a complaint in U.S. district court alleging that the "United States acted as 'owner,' 'operator' and 'arranger' of disposal or treatment of hazardous substances at the site" through various agencies during World War II. Under CERCLA, a defendant may seek contribution from the government if it owned or operated the site or arranged for disposal of wastes there during World War II.

Stephen Latham, Glen Cove's special counsel who negotiated the deal, said in an interview, "I believe the rationale for the settlement was that the government recognized that a major portion of what happened was due to the war effort." Latham is a partner in the Riverhead, N.Y., firm Twomey, Latham, Shea & Kelley.

Latham agreed that the settlement was part of a growing trend of government settlements in such cases. "What I saw in this case," Latham said, "is the Justice Department and EPA taking a very aggressive posture toward all PRPs [potentially responsible parties], including government parties. I don't think this pressure has been there in the past."

The government has also agreed to protect a developer for the 30-acre waterfront site from any future CERCLA liability. "The government knows there is a tremendous benefit to putting sites like [the one in] Glen Cove back on the tax rolls," Latham said.

Monetary payouts

Under the consent judgment, which, Latham said, is expected to become final in January, Glen Cove will pay $1.6 million and Wah Chang will pay $700,000 to a special cleanup account. The United States will pay the account $20 million and commit another $7.5 million toward future cleanup work.

In general, Rapp said, the easiest area in which to win a CERCLA contribution settlement involves petrochemical plants, including synthetic rubber plants owned and/or operated by the government during the war. He said the courts have also opened the door to shared liability if the government "arranged" for hazardous waste to be dumped on a site during the war.

One dissenter about how much the trend is growing is Craig D. Galli, a partner in the litigation and natural resources departments of Denver-based Holland & Hart's Salt Lake City office. Galli, who previously worked as a senior trial attorney with the Environment and Natural Resources Division of the Justice Department until 10 years ago, said that CERCLA cases began increasing in 1980 and have been generally decreasing in number since the early 1990s.

Galli also said he believed the government began settling "a significant number" of contribution cases even before last year's *Cadillac* decision, and it is too early to tell if *Cadillac* has had an impact.