Environmental Issues – Contaminated Property Transactions

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Environmental Issues in Real Estate Transactions

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I. INTRODUCTION

Anyone involved in the use and development of land must ensure that her actions comply with myriad local, state, and federal environmental laws. The challenges of conforming business activities to regulatory guidelines are often compounded by the task of determining exactly what environmental regulations are applicable to a specific property or activity. As the following discussion will demonstrate, a single project may be governed by many different agencies, each having its own deadlines, requirements, and enforcement provisions. Although the details of these differing requirements cannot adequately be addressed within a single paper, the following materials are intended to give a general overview of some of the most important regulatory provisions affecting land use and development projects.

The regulatory climate for development has changed markedly in the past decade. In addition to zoning and subdivision issues, the astute developer must analyze a multitude of environmental issues prior to reducing the project to a blueprint. As recently as ten (10) years ago, most development projects were shelved permanently if an initial investigation revealed existing environmental problems that potentially implicated liabilities under far-reaching federal and state regulatory schemes. Financing for these projects could not be obtained, and no one, including the developer itself, was desirous of inheriting a project laden with potential environmental liabilities.

Times have changed at a pace that is remarkable in the regulatory field. The United States Environmental Protection Agency ("EPA") has itself recognized the

impediment to development that the Superfund, or Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), has imposed on innocent parties. Congress has finally vested lenders with a true "safe harbor," and the advent of brownfields legislation and guidance documents have encouraged, rather than frustrated, the development of environmentally blighted properties. In fact, the regulatory agencies have shifted their focus from an "all-out" remedial effort to a "risk based" response designed to assist developers in placing the property to its highest and best use.

II. SUPERFUND LIABILITY AND COST RECOVERY

A. An Overview of CERCLA

Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")[1] in 1980, in an effort to control further damage to sites contaminated by hazardous substances. Ever since that time, the term "environmental liability" has taken on new meaning for American businesses. CERCLA is unusual - it imposes harsh concepts of liability on responsible and innocent parties alike, notwithstanding the fact that the environmental problems addressed by CERCLA have usually developed over long periods of time with involvement by numerous companies and individuals.

[1] 42.U.S.C. §§ 9601 to 9675.

B. CERCLA Liability

CERCLA is a direct extension of common law principles of strict liability for abnormally hazardous activities.[2] CERCLA responds to the release, or substantial threat of a release, of any hazardous substance. Hazardous substances include: hazardous wastes under Subtitle C of RCRA; toxic water pollutants regulated by the Clean Water Act; and hazardous air pollutants listed in the Clean Air Act.[3] However, the term does not include petroleum, including crude oil or any fraction thereof, unless specifically listed or designated as a hazardous substance.[4]

To establish liability, there must be a release, or threatened release, of a hazardous substance from a facility[5] which caused a government or private plaintiff to incur costs. Four categories of persons are considered potentially responsible parties ("PRPs") who can be held liable for response costs. These PRPs include:[6]

1. Current owners and operators of a contaminated facility;
2. Anyone who owned or operated the facility at the time hazardous substances were disposed of;
3. Anyone who generated the hazardous substances or arranged for the treatment or disposal of a hazardous substance at a facility; and

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[2] It is also important to note that CERCLA does not preclude common law recovery actions.

[3] 42 U.S.C. § 9601(14).

[4] *Id*.

[5] *See* 42 U.S.C. § 9601(9).

[6] *See* 42 U.S.C. § 9607(a).

4. Anyone who transported hazardous a substance to a disposal or treatment facility.

CERCLA imposes joint and several liability on these PRPs so each can be held liable for:

1. all costs of removal or remedial action incurred by the federal government, a state, or an Indian tribe not inconsistent with the National Contingency Plan ("NCP");
2. any other necessary costs of response incurred by any other person consistent with the NCP;
3. damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
4. the costs of any health assessment or health effects study.[7]

The difference between numbers 1 and 2 should be noted. In an action initiated by the EPA, a state, or an Indian tribe, the defendant has the burden of proving that the costs incurred by the cleanup were "inconsistent" with the NCP.[8] However, in a private party cost recovery action, the plaintiff must prove that the necessary costs of response were "consistent" with the NCP.[9]

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[7] 42 U.S.C. § 9607(a)(4).

[8] *See* United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726 (8th Cir. 1986).

[9] *See* City of New York v. Exxon Corp., 633 F.Supp. 609 (S.D.N.Y. 1986).

CERCLA's liability is somewhat harsh in that it does not attempt to tie degree of fault to degree of financial liability. Congress intended for those at least partially responsible for pollution to bear the costs of the uncertainty of allocating proportionate responsibility. However, if a defendant can demonstrate that the harm is actually divisible, the court will allow apportionment of liability. The court may consider such equitable factors as:

1. the relative fault of the parties;
2. any contracts between the parties that bear on the allocation of cleanup costs;
3. economic benefits derived from the activities that created the hazards;
4. the benefits of remediation activities to property owners
5. which hazards caused specific response costs; and
6. "Gore factors" such as: the ability of the parties to demonstrate that their contribution can be distinguished; the amount of the hazardous substance involved; the degree of toxicity of the hazardous substance; the degree of involvement by the parties in generation, transportation, treatment, storage, or disposal; the degree of care exercised by the parties taking into account the characteristics of the hazardous substance; and the degree of cooperation by the parties with government officials.

C. The Innocent Purchaser Problem

A purchaser of contaminated property may be able to escape CERCLA liability if he can establish that, prior to purchasing the property, he made all appropriate inquiries about the existence of hazardous substances.[10] To be eligible for this defense, the purchaser must demonstrate that:

1. on or before the date on which the defendant acquired the facility, the defendant carried out all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices; and

2. the defendant took reasonable steps to stop any continuing release; to prevent any threatened future release; and to prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance.[11]

D. Corporate Liability

In 1991, the United States District Court for the Western District of Michigan held that a corporate parent could be liable under CERCLA for contamination at a site owned and operated by a subsidiary.[12] Focusing on the remedial nature of the statute instead of on the traditional corporate doctrine of limited liability, the District Court held that if a corporate parent exercises "power" or influence over its subsidiary by actively

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[10] *See* 42 U.S.C. § 9601(35).

[11] *See id.*

[12] *See* CPC International, Inc. v. Aerojet-General Corp., 777 F. Supp. 549 (W.D. Mich. 1991**).**

participating and exercising control over the subsidiary's business during a period of disposal of hazardous wastes, then the parent is directly liable under CERCLA.[13] After a decision by the Sixth Circuit, the Supreme Court granted certiorari to clarify the issue of corporate parent liability under CERCLA.

In *United States v. Bestfoods*, 524 U.S. 51, 118 S.Ct. 1876 (1998), the Supreme Court reverted to traditional notions of corporate limited liability by holding that a parent corporation that actively participates in and exercises control over the operations of a subsidiary may not be held liable as an operator of a contaminated site owned and operated by the subsidiary, unless the corporate veil is pierced under state law. The Supreme Court expressly found that CERCLA does not authorize a departure from traditional principles of limited liability for a corporate parent: "It is a general principle of corporate law deeply 'engrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries. . . . Although this respect for corporate distinctions when the subsidiary is a polluter has been severely criticized in the literature, . . . nothing in CERCLA purports to reject this bedrock principal, and against this venerable common law backdrop, the congressional silence is audible."[14]

It is important to note that, in *Bestfoods*, the Supreme Court recognized that a parent corporation may be liable directly for its own acts where those acts satisfy the

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[13] *Id.* at 573.

[14] *Id.* at 1884-85.

elements of operator liability under CERCLA.[15] However, the Court refused to sanction a broad interpretation of the statute which would place (i) direct CERCLA liability on a parent under circumstances where the parent is not an "operator" based on its own actions or (ii) vicarious liability under circumstances where the corporate veil could not be pierced by traditional veil–piercing standards.[16] The Court refused to discard the notion that officers employed by both the parent and a subsidiary are presumed to serve the subsidiary when acting on behalf on the subsidiary. The Court explained "there would in essence a relaxed, CERCLA–specific rule of derivative liability that would banish traditional standards and expectations from the law of CERCLA liability."

E. Defenses

Although CERCLA liability is strict, a PRP still has some potential defenses available to him even if he cannot establish himself as an "innocent" purchaser. For instance, a PRP has some protection if he has already settled with the federal government,[17] if he acquired the facility by inheritance or bequest,[18] or if he purchased the land from the federal government.[19]

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[15] *Id*. at 1886.

[16] *Id*. at 1885-87.

[17] *See* 42 U.S.C. § 9622.

[18] *See* 42 U.S.C. § 9601(35).

F. Contribution Actions

1. The Right to Contribution

Although the early decisions addressing private party contribution rights held that such a right existed under federal common law,[20] the language of section 113 seemingly makes such a common law analysis unnecessary. Section 113 provides that covered parties are liable for costs "incurred by any other person."[21] The 1986 SARA amendments, however, resolved any confusion on this issue. 42 U.S.C. § 9613(f)(1) provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a)."

In the early years of CERCLA, some Courts held that a private party may recover costs from another only if the site was listed on the National Priority List.[22] Other Courts expressed the more rational view that only some form of government approval is necessary before allowing a private party cost recovery action.[23] The better view, however, appears only to require private parties to prove that the costs incurred were "consistent with" the NCP.[24]

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[19] *See* 42 U.S.C. § 9620(h).

[20] *See* United States v. Ward, 1984 WL 15710 (E.D.N.C. 1984).

[21] 42 U.S.C. Section 9607(a)(4)(A). *See* City of Philadelphia v. Stepan Chem. Co., 544 F. Supp 1135, 1141-43 (E.D. Pa. 1982).

[22] *See* Cadillac Fairview v. Dow Chemical Company, 1984 WL 178617 (C.D. Cal. 1984).

[23] *See* Bulk Distributing Centers, Inc. v. Monsanto Co., 589 F. Supp. 1437 (S.D. Fla. 1984); Pinole Point Properties Inc. v. Bethlehem Steel Corp., 596 F. Supp. 283 (N.D. Cal. 1984).

[24] United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984); Amoco

2. The Extent of Contribution

In apportioning liability among private parties for response costs, the Courts may consider a broad range of equitable factors under section 113(f). These factors are set forth in the legislative history of the amendment, and they include (i) the amount of the hazardous substances involved; (ii) the toxicity level of the hazardous substances; (iii) the degree of the parties' involvement in disposing of the hazardous substances; (iv) the level of care exercised; and (v) the degree of the parties' cooperation with federal, state, or local officials.[25]

Because a present owner of a facility is a person who may be liable for response costs under section 107, the issue of contribution often arises where the present owner, who arguably had nothing to do with the disposal of the contaminants, brings suit under CERCLA against the generators and transporters of the hazardous substances. In *Gopher Oil Co. v. Union Oil Company of California*, 757 F. Supp. 988 (D. Minn. 1990), the Court allocated all of the liability for past and future response costs to the previous site owner. In *Gopher*, the present owner neither caused nor contributed to the contamination of the property. In *Weyerhauser Co. v. Koppers Co.*, 771 F. Supp. 1420 (D. Md. 1991), the Court reached a different result on markedly different facts. The owner in

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Oil Co., v. Borden, Inc., 889 F.2d 664 (5th Cir. 1989); Cadillac Fairview/California v. Dow Chemical Co., 840 F.2d 691 (9th Cir. 1988); Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988); Roe v. Wert, 706 F. Supp. 788 (W.D. Okla. 1989) (citizen suit requires 60-day pre-suit notice); Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 890 (9th Cir. 1986); NL Industries, Inc. v. Kaplan, 792 F.2d 896 (9th Cir. 1986).

[25] *See* H. Rep. No. 153, 99 Cong., 1st Sess. 18-19 (1985).

Weyerhauser not only knew of and acquiesced in the disposal activities, but also had required them as a condition of the lease with the operator. Consequently, the Court reasoned that the owner had received some benefit from the operations, and apportioned the liability 40% to the owner and 60% to the operator.[26]

3. Conditions Precedent to Private Action.

Before initiating a claim under CERCLA, the party seeking cost reimbursement must have incurred at least one cognizable response cost.[27]

G. Cost Recovery vs. Contribution

During the early years of CERCLA, PRPs, such as a present landowner, often brought Section 107 actions against those who were culpable for the disposal of hazardous substances. These actions were based on the express language of Section 107, which clearly authorizes private parties to bring actions to recover response costs.[28] In a private cost recovery action, the land owner assumed the position of the government and sought to hold arrangers, transporters, and past operators jointly and severally liable for all response costs incurred.[29]

Judicial reception to private cost recovery actions has changed dramatically in recent years. The question presented is whether a PRP may maintain a Section 107 "cost

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[26] *See, e.g.,* United States v. A&F Materials Co., 578 F. Supp. at 1256; Amoco Oil Co. v. Borden, Inc., 889 F.2d at 672-73; United States v. Monsanto, 858 F.2d at 168 n.13.

[27] *See* Trimble v. Asarco, 232 F.3d 946, 951 (8th Cir. 2000); Cook v. Rockwell International Corp., 755 F. Supp. 1468 (D. Colo. 1991). *See also* Alloy Briquetting Corp. v. Niagara Vest, Inc., 756 F. Supp. 713 (W.D.N.Y. 1991).

[28] *See* 42 U.S.C. Section 9607(a)(4)(B).

recovery" action, or whether the PRP must proceed with a "contribution" action under Section 113. Although there is a split of authority in the lower Courts, "every Court of Appeals that has examined this issue has come to the same conclusion: a section 107 action brought for recovery of costs may be brought only by innocent parties that have undertaken clean-ups," and a non-innocent PRP may only bring a section 113 action for contribution."[30] The Tenth Circuit adopted this position in *United States v. Colorado Eastern R.R. Co.*, 50 F.3d 1530 (10th Cir. 1995). The First, Third, Seventh, Ninth, and the Eleventh Circuits have reached the same conclusion.[31] These Courts have found that the 1986 enactment of Section 113 indicates that Congress intended contribution to be an exclusive remedy for PRPs, that to allow PRPs to recover clean up costs under Section 107 would render Section 113 meaningless, and that the availability of Section 107 actions should be limited to governmental or "innocent PRP's for public policy reasons."[32]

Despite the apparent trend to limit Section 107 actions by private parties, the claim has not been entirely extinguished. Section 107 historically has been used by the government to recoup the costs incurred in investigating and responding to hazardous

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[29] *See Key Tronic Corp,*. 511 U.S. at 812 n 7.

[30] New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1120 (3rd Cir. 1997) (emphasis in original).

[31] *See* Bedford Affiliates v. Sills, 156 F.3d 416 (2nd Cir. 1998); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298 (9th Cir. 1997); United Technologies Corp., v. Browning-Ferris Industries, Inc., 33 F.3d 96 (1st Cir. 1994), *cert. denied.*, 513 U.S. 1183 (1995); Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761 (7th Cir. 1994).

[32] *See, e.g., United Technologies*, 33 F.3d at 100; Colorado Eastern R.R. Co., 50 F.3d at 1536.

substances. Some courts have noted that allowing "any other person" – including a PRP – to bring a 107 action is consistent with the plain language and expressed goals of CERCLA because it provides PRPs with an incentive to effectuate a prompt clean-up.[33] Thus, several district courts have held that PRPs that are "innocent" may maintain a direct 107 action.[34]

"Innocent" in the context of CERCLA, appears to mean "parties who [are not] themselves liable" under CERCLA, *i.e*., those who can establish "innocent landowner" defense under Section 101 (35) and Section 107 (b).[35] The Fifth Circuit has taken a more expansive view, recognizing that "it is possible that, although falling outside of the statutory parameters" of innocence, "a PRP who spontaneously initiates a clean-up without government prodding" may maintain a direct claim under section 107 (b).[36]

The distinction between a section 113 and section 107 is of paramount importance. In a section 107 action, the plaintiff must establish a *prima facie* case, which includes only satisfying the four elements of section 107 (a). Those elements are that: (1) the defendant falls in one of the four categories of "responsible parties;" (2) hazardous

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[33] *See, e.g.,* Companies for Fair Allocation v. Axil Corp., 853 F. Supp. 575 (D. Conn. 1994); United States v. Kramer, 757 F. Supp. 397, 416-17 (D.N.J. 1991).

[34] *See* Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc., 107 F.3d 1235, 1239-42 (7th Cir. 1997); Boyce v. Bumb, 944 F. Supp. 807, 812 (N.D. Cal. 1996).

[35] *See, e.g., United Technologies*, 33 F.3d at 100; Redwing Carriers v. Saraland Apts., 94 F.3d 1489, 1513 (11th Cir. 1996) ("parties who are not themselves liable or potentially liable for response costs under Section 107 (a) of CERCLA can bring a cost recovery action directly under Section 107 (a) against potentially responsible parties").

[36] *See United Technologies*, 33 F.3d at 99 note 8.

substances were disposed of at a "facility;" (3) there was a "release" of hazardous substances into the environment; and (4) the release caused "response costs to be incurred."[37] The burden then shifts to the defendant of proving that the harm at the site is divisible, and there is a reasonable basis for portioning liability for response costs.[38] The practical consequence of placing this burden on defendants is that it becomes difficult to escape the joint and several liability.

In contrast, in a typical section 113 contribution action, the plaintiff must not only demonstrate that the defendant is a "covered person" under section 107, but also has the additional burden of proving each defendant's allocable share of damages.[39] A PRP's "defense" to a section 113 claim also differs from a defense to a section 107 claim. Under section 107, the defendant must prove a reasonable "apportionate of harm" to establish a divisibility defense to the imposition of joint and several liability. In section 113, a defendant simply cannot be "allocated" more than its "equitable share" of several liabilities for the harm at a site.[40] Thus, even if a defendant cannot show a reasonable basis for apportioning the harm (which is a defense to a section 107 claim) a defendant in a section 113 contribution proceeding can rely on any number of "equitable factors" to allocate that defendant's proportionate share of response costs.

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[37] *See* 42 U.S.C. § 9607.

[38] *See, e.g.,* Kelley v. Thomas Solvent Co., 727 F. Supp. 1532, 1552 (W.D. Mich 1989).

[39] *See* United States v. Taylor, 909 F. Supp. 355, 361 (M.D.N.C. 1995); United States v. Atlas Minerals and Chemicals, Inc., 1995 WL 510304 at *188 (E.D. Pa. 1995).

[40] *See* United States v. Western Processing Co., 734 F. Supp. 930, 938 (W.D. Wash. 1990).

H. Recovery Under §107(a) vs. §113(f) – *United States v. Atlantic Research Corp*.

A recent decision by the U.S. Supreme Court clarifies whether and how potentially responsible parties ("PRPs") may recoup CERCLA-related costs from other PRPs. In the Court's unanimous ruling in *United States v. Atlantic Research Corp*., 127 S. Ct. 1144 (June 11, 2007), the Court held that Section 107(a) allows PRPs to recover costs of voluntary Superfund Cleanups from other PRPs.

The case involved a company that contracted with the U.S. government to retrofit rocket motors. Atlantic Research Corp. leased property at the Shumaker Naval Ammunition Depot, a facility operated by the Department of Defense. Atlantic voluntarily cleaned up pollution from rocket propellant that seeped into the soil and groundwater as a result of the company's operations. Thereafter, Atlantic sought to recover some of its costs by suing the United States under §107(a).[41] The United States moved to dismiss, arguing that §107(a) did not allow PRPs such as Atlantic to recover costs. The trial court granted the motion to dismiss, but the decision was reversed by the Eighth Circuit. The appellate court held that §113(f) did not provide the "exclusive route by which [PRPs] may recover clean up costs" and that §107(a)(4)(B) authorized suit by any person other than persons permitted to sue under §107(a)(4)(A). Accordingly, the

[41] Atlantic had initially filed suit under §§107(a) and 113(f). But after the Supreme Court's decision in ***Cooper Industries, Inc. v. Aviall Services, Inc***., 543 U.S. 157 (2004) foreclosed relief for PRPs under §113(f), Atlantic amended its complaint seeking relief solely under §107(a) and federal common law. In Cooper Industries the Court held that a private party could seek contribution from other liable parties only after having been sued under §106 or §107(a). ***See id***. **at 161**.

Eighth Circuit held that §107(a)(4)(B) provided Atlantic with a cause of action against the United States.

The dispute the Supreme Court resolved focused on the perceived conflict between §§107(a)(4)(B) and §113(f)(1) among various circuit courts. Specifically, the dispute centered on what "other person[s]" may sue under §107(a)(4)(B). The government argued that "any other person" refers to any person not identified as a PRP in §§107(a)(1)-(4) (listing four broad categories of persons as PRPs and by definition liable to other persons for various costs). Atlantic argued that §107(a)(4)(B) provides a cause of action to anyone except the United States, a State, or an Indian tribe – the persons listed in §107(a)(4)(A).

The Court sided with Atlantic and allowed Atlantic's suit to proceed against the government to recover clean up costs under §107(a)(4)(B). The Court stated that "the statute defines PRPs so broadly as to sweep in virtually all persons likely to incur cleanup costs." And with respect to the government's argument that allowing Atlantic's suit to go forward under §107(a)(4)(B) would create friction between §107(a) and §113(f), the Court explained that the two sections provide for two "clearly distinct" remedies. In particular, §107(a) allows for the recovery of costs under certain circumstances and §113(f) allows for separate rights to contribution under other circumstances. In other words, while recovery under §113(f) is contingent upon the establishment of common liability among PRPs (either before or after suit, but in all circumstances once a PRP has

paid more than his own proportionate share), §107(a) provides the right to recover clean up costs independent of whether another PRP has been found liable.

I. Case Law Regarding CERCLA Apportionment of Liability

CERCLA does not state whether liability among liable PRPs can be severed and apportioned. In *United States v. Burlington Northern & Santa Fe Railway Co*., 479 F.3d 1113 (9th Cir. 2007), the Ninth Circuit followed all other circuit courts that have addressed the issue and held that liability under CERCLA's §9607(a) may be joint and several even though the statute does not so expressly provide. In addition to this holding, the case provides a detailed analysis of how courts – at least in the Ninth Circuit –decided to allocate liability based on record evidence.

In *Burlington Northern*, the contaminated site at issue was a 3.8 acre parcel owned by Brown & Bryant, Inc. ("B&B") a now-defunct agricultural chemical storage and distribution company. In 1975, B&B's business outgrew the parcel, located in Arvin, California, and B&B began leasing an adjacent 0.9-acre parcel that was owned by two railroad companies (the "Railroad parcel"). B&B used the Railroad parcel as an integral part of its facility: it purchased, received delivery of, stored, and distributed agricultural chemicals at the site; B&B stored rigs filled with chemicals on the Railroad parcel. The two chemicals at issue were sold and shipped to B&B by Shell Oil Company.

In 1983, after more than 20 years of leakage and dissemination of hazardous materials, state and federal authorities found B&B in violation of several hazardous waste laws and began to remedy the contamination pursuant to their clean up authority under

CERCLA. In 1991 the EPA ordered the Railroads to take specific preventative steps on the Railroad parcel. In 1992, the Railroads filed an action against B&B for contribution for costs incurred in the EPA-ordered cleanup. Four years later, the state and federal authorities filed CERCLA actions against B&B, the Railroads, and Shell for reimbursement of their investigation and cleanup costs.

The U.S. District Court for the Eastern District of California consolidated the cases. *See United States v. Atchison, Topeka & Santa Fe Ry.*, 2003 U.S. Dist. LEXIS 23130 (E.D. Cal., July 14, 2003). The trial court held that the Railroads were liable as owners of the facility under §9607(a)(1),(2). The court found Shell liable as an "arranger" under §9607(a)(3). And as to the question of apportionment of liability among the Railroads and Shell, the court found that the harm to the site was capable of apportionment and went on to apportion the costs among the liable PRPs.

The Ninth Circuit affirmed the district court's decision that the Railroads and Shell were liable, but reversed with respect to the court's apportionment analysis. Although the court followed every circuit court that has faced the issue and held that apportionment is available under CERCLA, the court found that the harm in this particular case could not be apportioned among the liable parties and that the Railroads and Shell were jointly and severally liable for the entire harm at the site. The Ninth Circuit based its holding that the harm was not divisible (and therefore unable to be apportioned) on a very detailed analysis as to whether the harm at the site (the contamination) could be traced to, and quantified, for, each of the PRPs. The trial court's

apportionment of liability to the Railroads was based on their ownership of land area in proportion to the entire site, their period of ownership, and the types of hazardous products that were stored on the Railroad parcel. The Ninth Circuit found that none of these categories, in light of the evidence in the record, could support a conclusion that discrete portions of the contamination were traceable to the Railroad parcel.

In its most important environmental opinion in years, the Supreme Court reversed the Ninth Circuit's determination that Shell was liable as an arranger under CERCLA and that the harm could not be apportioned among the liable parties. The Supreme Court reasoned that the definition of "arranger" was not as broad as that advocated by the government. The government had asserted that by including unintentional acts such as "spilling" and "leaking" in the definition of disposal, "Congress intended to impose liability on entities not only when they directly dispose of waste products but also when they engage in legitimate sales of hazardous substances knowing that some disposal may occur as a collateral consequence of the sale itself." In the instant case, the court concluded that Shell sold D-D as a useful product, and that Shell's "state of mind" must play an important role in determining whether a party has "otherwise arranged for disposal of [hazardous substances]."

The evidence adduced at trial indicated that Shell was aware that minor, accidental spills occurred during the transfer of D-D from the common carrier to the bulk storage tanks, but that no evidence supported an inference that Shell intended such a spill to occur. The Court paid particular attention to the evidence demonstrating that Shell

actually took affirmative steps to encourage its distributors to reduce the likelihood of such spills, and provided them with detailed safety manuals and instructions concerning the maintenance of adequate storage facilities. Based on this evidence, the Court concluded that Shell could not be liable as an arranger for the contamination that occurred at the facility, as a result of a sale of useful products.

The Court then analyzed the apportionment issues resolved by the Ninth Circuit, and reached a result that has received widespread criticism in the environmental literature. Although the parties did not present any evidence concerning apportionment at trial, the district court took it upon itself to "independently perform the equitable apportionment analysis demanded by the circumstances of the case." Thus, the district court's calculations, arguably more equitable than scientific, resulted in an apportionment that has been criticized as contrary to *Daubert vs. Merrell Dow Pharmaceuticals Inc.* Nonetheless, the Supreme Court noted that the district court properly relied on three factors in determining apportionment: (i) the percentage of the total area of the facility that was owned the railroads; (ii) the duration of B&B's business divided by the term of the railroads' lease; and (iii) a determination that only two of three polluting chemicals spilled in the lease parcel required remediation and that those two chemicals were responsible for roughly two-thirds of the overall site contamination. The Court also noted that although the railroads did not produce precise figures regarding the exact quantity of chemical spills on each parcel in each year of their operation, the district court found it "indisputable that the overwhelming majority of hazardous substances were

released from the B&B parcel." Based on these equitable factors, the Supreme Court concluded that the district court did not err in apportioning the railroads' liability as nine percent (9%) of the government's total response costs.

Justice Ginsberg dissented, noting that the arranger question for Shell was "close", but that the facts presented showed that Shell qualified as an arranger within the definition of CERCLA. Justice Ginsberg noted the record evidence indicating that Shell controlled all aspects of delivery of B&B to the storage tanks and that Shell knew spills were inherent in that delivery process. The fact that Shell had sold the useful products, according to Justice Ginsberg, did not exonerate Shell from CERCLA liability because the sales "necessarily and immediately resulted in the leakage of hazardous substances."

With respect to the apportionment analysis, Justice Ginsberg noted that the district court undertook a "heroic labor", but that none of the parties below offered any helpful arguments to apportion liability. Justice Ginsberg argued in favor of returning the cases to the District Court to provide all parties with an opportunity to address the cost allocation issue, but that the majority's exoneration of Shell as an arranger had precluded that opportunity.

III. OBLIGATIONS OF BUYER AND SELLER: ENVIRONMENTAL AUDITS AND DUE DILIGENCE

The EPA defines "brownfields" as "abandoned, idled, under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or

perceived environmental contamination."[42] Brownfields can be empty warehouses and factories or contaminated, junk-filled lots. While many factors have caused investors to shy away from brownfields properties, CERCLA created the essential risk associated with ownership of previously contaminated sites. As discussed in the prior section, CERCLA's liability scheme imposed harsh liability for the costs of clean-ups on a number of "responsible parties," including current owners and operators of a contaminated site who arguably had nothing to do with the contamination. Against this backdrop, the unattractiveness of an old industrial or commercial site is readily understandable.

The EPA has responded to CERCLA's significant impediment to the development of brownfield properties, which are often located in low income or other depressed areas. In 1995, the EPA began its Brownfields Program to change the way people think about contaminated properties. The Program was designed to be flexible so that communities could tailor approaches to meet their unique local needs. The heart of the EPA's Brownfields Program[43] is its investment in Brownfields Pilots, three types of programs that provide "seed" money to state and local entities for the assessment, cleanup, and redevelopment of brownfields. These programs include: (1) Brownfields Assessment

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[42] *See* Brownfields Economic Redevelopment Initiative (September of 1995). The term "brownfield" is also defined by statute in Section 101 of the CERCLA, as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." See 42 U.S.C. § 9601(39) (also identifying nine specific types of properties that are excluded from this definitions).

[43] Under the Brownfields Program, the EPA also partnered with states to develop Memoranda of Agreement that clarified the roles and responsibilities of agencies and encouraged the cleanup of

Demonstration Pilots that fund environmental assessments of brownfields as well as local planning and community education regarding their clean up and redevelopment; (2) Brownfields Cleanup Revolving Loan Fund Pilots that provide state, local, and tribal governments with capital to make low or no interest loans to finance brownfields cleanups; and (3) Brownfields Job Training and Development Demonstration Pilots that train local residents for jobs related to brownfields cleanups.

The main focus of the EPA and of the states has been to encourage development without the risk of incurring unnecessary liability. The EPA has two primary mechanisms for the clarification and liquidation of potential liability, both of which are discussed below:

A. Comfort letters

The purpose of comfort letters is to provide prospective purchasers and others with the best, most current information about the EPA's interest, or lack thereof, in a given site. These letters summarize data available to the EPA regarding a site and, importantly, summarize the federal government's past actions and future expectations with respect to response actions at the site. The EPA will not issue a comfort letter for any property unless there is a realistic perception or a probability of a prospective new owner incurring CERCLA liability. The EPA policy, which may be found on the EPA website, sets out four types of sample comfort/status letters:

a. A "no previous federal Superfund interest" letter which advises party

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contaminated properties. New Mexico is one of these states.

that there is no evidence of past Superfund interest or involvement with the site (in other words, the site is not in the CERCLIS database).

b. A "no current federal Superfund interest" which advises a prospective purchaser that this site has been deleted from CERCLIS or from the National Priorities List.

c. A "federal interest" letter which advises the prospective purchaser that the EPA is responding, or plans to respond, to contamination at a site.

d. A "State Action" letter which indicates that the State has primary responsibility for any activities at this site.

B. Prospective Purchaser Agreements ("PPAs")

In contrast to a comfort letter, a PPA provides actual resolution or liquidation of any legal liability that the prospective purchaser might incur. EPA issued its guidance on agreements with prospective purchasers of contaminated property on May 24, 1995, which states that PPAs are available only for sites where there has been, or where there realistically will be, a CERCLA response action. This standard is more restrictive than that which governs the issuance of comfort letters. The essence of a PPA is a covenant not to sue the new owner for pre-existing contamination, which is generally granted in exchange for appropriate consideration. The covenant not to sue also qualifies, pursuant to section 113 (f) (2) of CERCLA, to protect the new owner from possible contribution actions by other PRPs. The EPA guidance states that in consideration of granting the covenant not to sue, the EPA should receive a substantial benefit either in the form of a

cleanup, or an indirect public benefit in combination with a reduced direct benefit to EPA. Prior versions of the guidance restricted the consideration to direct benefits of cash or cleanup work. However, the current guidance recognizes the considerable indirect benefit that can be realized from brownfields redevelopment, including the creation or retention of jobs, the development of abandoned or blighted property, the creation of conservation or recreation areas, or the improvement of public transportation or infrastructure.

C. Brownfields Revitalization Act of 2002 and New Mexico Voluntary Remediation Act

On January 11, 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act44 to bring new clarity to brownfields regulation and provide government funding to assist in restoration efforts. Most significantly, the 2002 law authorizes up to $250 million in funds annually for Brownfields' grants. The grants are administered through the EPA to encourage businesses and localities to redevelop brownfields. Generally, grants of up to $200,000 each are awarded to assess brownfields and identify creative and cost-effective means to clean-up contaminated property and restore them to productive use. In 2003, $73.1 million in grants were awarded. In 2004, the EPA announced a record $75.4 million grants to be distributed to 219 applicants, including 42 states, Puerto Rico, and 5 tribes.

The Brownfields Revitalization Act also established the Brownfields Cleanup

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[44] The full text of the Act is available from the EPA's website at www.epa.gov/brownfields

Revolving Loan Fund (BCRLF).[45] The fund allows communities to provide funds to public and private entities for Brownfields clean up. Groups can apply for funds of up to $1 million, provided that sixty percent of the award must be used to capitalize a revolving loan of funds used in clean-up efforts. The EPA administers this fund, and has already awarded well over $100 million in grants. The loans contain escalation clauses that provide for the loan of additional cleanup funds if additional contamination is found during cleanup.

Similar to the purposes set forth in the Brownfields Law, the New Mexico Environment Department, pursuant to the New Mexico Voluntary Remediation Act[46] ("Remediation Act"), established a Voluntary Remediation Program to promote voluntary cleanup of contaminated sites. "The program is designed to facilitate redevelopment of contaminated sites by providing a streamlined, non-punitive remediation process."[47]

Any current or prospective landowner or operator can apply to participate in the program. Parties that successfully complete the program obtain a Certificate of Completion or a Conditional Certificate of Completion stating the contamination has been successfully mitigated. Parties can also receive a Covenant Not to Sue shielding the

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[45] Information on borrower eligibility and loan fund conditions can be found at www.epa.gov/brownfields/rlflst.htm

[46] 1978 N.M. STAT. ANN. 74-4G-1.

[47] New Mexico Environment Department, *Guidance for Prospective Applicants to the Voluntary Remediation Program* 1 (2004-05), http://www.nmenv.state.nm.us/gwb/New%20Pages/ROS_files/VRP_New/Statutes-Rules-Guidance/VRP_Prospect-App-Guide.pdf.

purchaser from liability. Finally, lenders are also protected from liability arising from any sites participating in the program.[48]

Cleanups conducted under the Brownfields Law or under the New Mexico Environment Department's Remediation Program limit the authority of the EPA at eligible response sites.[49] The Brownfields Law prohibits the EPA from bringing an action against a person conducting, or having completed, a response action.[50] This prohibition, however, extends on to actions as to the same releases addressed by the response action. Thus, the EPA may bring a separate action as to a different release. Furthermore, the prohibition applies only to the party that conducted, or is conducting, the cleanup.[51]

IV. ALL APPROPRIATE INQUIRY

The new "All Appropriate Inquiry" rule implements the Brownfields Law, and the Brownfields Law clarified and added defenses to CERCLA's strict liability. CERCLA and the EPA had previously not defined the minimum requirements for an "all

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[48] *Id.*

[49] Brownfields Law §231(b), Pub. L. No. 107-118, 115 stat. 2356, 2375-79 (codified at 42 U.S.C. § 9628) (2002). In order to effectively limit EPA authority, state programs must specifically govern response actions for the protection of public health and the environment. States must also maintain a public record of sites involved in remediation.

[50] Brownfields Law §128(b)(1).

[51] As the Committee Report commentary notes, there are four exemptions to this rule which include instances where the state requests assistance in a response action, when jurisdiction and cross-jurisdiction issues may arise, when an Administrator learns that information was not previously know by that state and further remediation is necessary to protect the environment or public health. *See* Report 107-2 to accompany S.350, Brownfields Revitalization and Environmental Restoration Act of 2001, 107th Cong. 1st Sess., Committee on Environment and Public Works, at 15-18 (Mar. 12, 2001).

appropriate inquiry." Therefore, consultants relied on the practices of the American Society for Testing and Materials ("ASTM") as the standard for an "all appropriate inquiry." The new "All Appropriate Inquiry" makes significant changes to the long used ASTM E1527-00 standard, mainly by enhancing the scope of the due diligence activities. These new changes will increase the cost and time associated with performing an Environmental Site Assessment ("ESA").[52] Parties can try to minimize these expenses and additional time commitments by incorporating language into purchase agreements that would permit a purchaser, or the purchaser's environmental professional, access to the property and property records while the property is still within the seller's control.

A. Objective of the "All Appropriate Inquiry" Site Assessment

The EPA's new "Standards for Conducting All Appropriate Inquiry"[53] rule ("Rule" or "AAI"), which became effective on November 1, 2006, establishes a regulatory standard for performing environmental due diligence in real property transactions. The new Rule supersedes the commonly used ASTM E1527-00 standard; parties would have to comply with the AAI requirements or follow the new ASTM E1527-05 standards.[54] The AAI serves as a crucial component to three liability defenses

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[52] The EPA estimated that the cost increase will be between $41 to $48. This number, however, appears unrealistically low and does not account for environmental professionals' increase in time that will be invested into conducted a more comprehensive AAI, among other factors. *See* "Preamble" to AAI.

[53] 40 C.F.R. § 312.

[54] *Id.* § 312.11(a). The now superseded E1527-00 standard can still be purchased through ASTM International by visiting their website at www.astm.org. The active standard, E1527-05, can also be purchased through ASTM's website.

available under CERCLA: innocent landowner defense,[55] *bona fide* purchaser ("BFP") defense,[56] and contiguous property owner defense.[57] Parties receiving grants under the Brownfields Grant programs must also perform an AAI.[58]

B. Standards and Practices of the "All Appropriate Inquiry" Site Assessment

An AAI requires an environmental professional to conduct an investigation of a property which includes: interviewing past and present owners, operators, and occupants; interviewing neighbors if the property is abandoned; reviewing historical sources of information; reviewing federal, state, tribal, and local government records; visually inspecting the facility and adjoining properties; reviewing commonly known or reasonably ascertainable information; and evaluating the degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect the

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[55] The innocent landowner defense applies to persons who purchase property and are unaware of, or have no reason to know of, contamination existing on the property at the time of purchase. The landowner may use this defense if: 1) the owner conducted an AAI before acquiring title, 2) no contractual relationship exists between the owner and the party responsible for the contamination, and 3) the owner exercised due care with respect to hazardous substances. 42 U.S.C. § 103(35) and § 107(b)(3).

[56] The BFP defense applies to purchasers with prior knowledge of contamination. The purchaser may assert this defense if: 1) the purchaser conducted an Inquiry prior to acquiring title, 2) disposal of all hazardous substances occurred prior to acquiring title, 3) the purchaser used "appropriate care" to prevent continued or future releases, 4) the purchaser limits or prevents exposure to the contamination. 42 U.S.C. § 101(40) and § 107(r).

[57] A purchaser of contiguous property must not know of, or have reason to know of, contamination existing on the property at the time of purchase. A landowner may assert this defense if: 1) the purchaser conducted an AAI prior to acquisition, 2) the contamination resulted from hazardous substances migrating from adjacent parcels, and 3) the purchaser took "reasonable steps" and used "proper care" to prevent future releases. 42 U.S.C. § 107(q).

[58] United States Environmental Protection Agency, *Comparison of the Final All Appropriate Inquiries Standard and the ASTM E1527-00 Environmental Site Assessment Standard* (Oct. 2005), *at* http://www.epa.gov/brownfields/.

contamination.[59] Although not necessarily performed by an environmental professional, an AAI must also include: searches for environmental cleanup liens; an assessment of the relationship of the purchase price to the fair market value of the property if the property was not contaminated; and an assessment of any specialized knowledge or experience of the prospective owner.[60]

The results of an AAI must be documented in a written report that includes: 1) "an opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases of hazardous substance…on, at, in, or to the subject property; 2) an identification of data gaps…that affect the ability of the environmental professional to identify conditions indicative of releases or threatened releases of hazardous substances…on, at, in, or to the subject property and comments regarding the significance of such data gaps on the…professionals' ability to provide an opinion as to whether the inquiry has identified conditions indicative of releases or threatened releases; 3) the qualifications of the environmental professional;"[61] and 4) two signed declarations.[62]

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[59] 40 C.F.R. § 312.20.

[60] *Id.*

[61] *Id.* § 312.21(c).

[62] *Id.* § 312.21(d). The professional must include the following two statements: 1) "[I, We] declare that, to the best of [my, our] professional knowledge and belief, [I, we] meet the definition of Environmental Professional as defined in § 312.10 of this part" and 2) "[I, We] have the specific qualifications based on education, training, and experience to assess a property of the nature, history, and setting of the subject property. [I, We] have developed and performed the all appropriate inquires in conformance with the standards and practices set forth in 40 CFR Part 312."

All AAIs must be conducted within one year of acquisition of a property. Certain components, however, must be updated within 180 days of acquisition.[63]

C. How Much Research is Enough?

As mentioned, the AAI requires more research than ASTM E1527-00. In the event that a property is abandoned, for example, the AAI rule, unlike ASTM E1527-00, requires the environmental professional to interview neighbors or nearby property owners.[64]

Furthermore, all "[h]istorical documents and records must be reviewed for the purposes of achieving the objectives and performance factors."[65] These documents, under the AAI, must "cover a period of time as far back in the history of the subject property as it can be shown that the property contained structures or from the time the property was first used for residential, agricultural, commercial, industrial, or governmental purposes."[66] This new requirement proves far more extensive than the ASTM E1527-00 standard of researching only obvious uses beginning when the property was first developed.

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[63] *Id.* § 312.20.

[64] *Compare* 40 C.F.R. 312.23(d) *with* ASTM E1527-00.

[65] 40 C.F.R. § 312.24(a).

[66] *Id.* § 312.24(b).

D. "Di Minimis" Contamination

The Brownfields Law added a new liability exemption to CERCLA. The new exemption provides otherwise liable generators or transporters a qualified exemption from liability where the parties can demonstrate that, prior to April 1, 2002, the amount of hazardous substances they contributed to a CERCLA site listed on the National Priorities List ["NPL"] was less than 200 pounds of solid materials or less than 110 gallons of liquid material.[67] This exemption "is similar, but not identical, to the protection previously afforded by the" EPA and U.S. Department of Justice ("DOJ") "regarding settlements with de minimis parties at Superfund sites."[68] This exemption, however, does not apply in certain cases.[69]

A party may still enter *di minimis* waste contributor settlements under the EPA/DOJ policy. A party entering such settlements provides cleanup funds based on its share of the total waste contribution.[70] This share often includes a premium.[71] In

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[67] *See* CERCLA § 107(o).

[68] Memorandum from Barry Breen, Director, Office of Site Remediation Enforcement at EPA, and Bruce Gelber, Chief of Environmental Enforcement Section at DOJ, to EPA directors and regional counsel 2 (Nov. 6, 2002) *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/wv-exmpt-dmicro-mem.pdf. The codified exemption differs from the EPA/DOJ's policy in two significant ways. First, the exemption applies only to NPL sites, while the EPA/DOJ policy applied to both NPL and non-NPL sites. Second, the exemption does not apply to disposal or transport occurring after April 1, 2001, while the EPA/DOJ policy did not have a date limitation. *Id.* at 4.

[69] The exemption does not apply when "the President determines that: 1) the person sent material that contributed or could contribute significantly…to the cost of the response action…; 2) the person has failed to comply with an information request or agency subpoena; 3) the person has impeded, through action or inaction, a response action…; or 4) the person has been convicted of a criminal violation for conduct related to the exemption." *Id.* at 3.

[70] United States Environmental Protection Agency, *Superfund Enforcement FAQs* (Mar. 2006), http://www.epa.gov/compliance/resources/faqs/cleanup/superfund/enf-faqs.html [hereinafter "Superfund

exchange, a party may receive "a covenant not to sue and contribution protection from the United States."[72]

FAQs"]. In lieu of, or in addition to, providing funds, parties may undertake some of the cleanup work. *Id.*

[71] *See, e.g., United States v. Cannons Eng'g Corp,*. 899 F.2d 79 (1st Cir. 1990)(upholding premium).

[72] *Id.*