New Environmental Liability Protections

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I. The Basics

A. Regulatory Background

Congress enacted The Comprehensive Environmental Response, Compensation, and Liability Act[1] ("CERCLA"), also known as Superfund, in 1980.[2] CERCLA serves as an effort to control further damages to sites contaminated by hazardous substances. The law imposes a tax on petroleum and chemical industries; the collected taxes are then placed in a trust fund and used to clean up hazardous waste sites. Ever since the passage of CERCLA, 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 CERCLA addresses have usually developed over long periods of time with involvement by numerous companies and individuals. CERCLA imposes liability for the releases of hazardous substances on (i) current owners of real property; (ii) past owners and operators; (iii) persons who arranged for disposal of substances, and (iv) transporters who selected the ultimate disposal site.[3] Although "Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility of remedying the harmful conditions they created,"[4] potential liability exists for owners regardless of whether they caused or contributed to the releases.[5]

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[1] 42 U.S.C. § 9601 et seq. (1980)[hereinafter "CERCLA"].

[2] The Superfund Amendments and Reauthorization Act of 1986 ("SARA") amended CERCLA.

[3] *See id.* § 9607(a).

[4] *United States v. Reilly Tar & Chem. Corp.*, 546 F.Supp. 1100, 1112 (D. Minn. 1982). *See also United States v. Northeastern Pharmaceutical & Chemical Company*, 579 F. Supp. 823, 840 (W.D. Mo.

A plaintiff must satisfy four requirements to establish liability under CERCLA: (1) that the contaminated site is a "facility"[6] within the meaning of the Act; (2) that the defendant is a potentially responsible person ("PRP"); (3) that there has been a release or there is a threatened release of hazardous wastes; and (4) that the release or threatened release caused the plaintiff to incur costs. As mentioned, the breadth of liability has not been limited to those who are culpable, in one way or another, for the environmental degradation. There is no necessity under CERCLA for a private party plaintiff or the government to show that any of the four potential groups of defendants was negligent or wrongfully conducted activities at the site. On the contrary, CERCLA imposes strict liability,[7] and the lawfulness of the previous activities at the site is irrelevant to the imposition of that liability.[8]

In addition to the abandonment of culpability under CERCLA, any and all of the four potential groups of defendants have traditionally been jointly and strictly liable for indivisible pollution.[9] Accordingly, it has been the defendant's burden to prove that her individual contamination may be sufficiently segregated and apportioned for purposes of liability. Given the complexities of groundwater management and the somewhat

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1984)(noting "Congress intended to have the chemical industry, past and present, pay for the costs of cleaning up inactive hazardous waste sites.").

[5] *See, e.g., United States v. Davis*, 261 F.3d 7 (1st Cir. 2001); *see also State of New York v. Shore Realty Corp.*, 759 F.2d 1032 (2nd Cir. 1985).

[6] CERCLA's definition of "facility" is quite detailed but basically, a facility is any structure, equipment, containment, vehicle, or site where hazardous waste is placed, disposed of, stored, or located. See 42 U.S.C. § 9601(9).

[7] *See Davis*, 261 F.3d at 28.

[8] *See Shore Realty Corp.*, 759 F.2d at 1043-44.

[9] *See, e.g., Sun Co., Inc. v. Browning-Ferris, Inc.*, 124 F.3d 1187, 1189 (10th Cir. 1997); *United States v. Chem-Dyne*, 572 F. Supp. 802, 805-10 (S.D. Ohio 1983).

theoretical nature of hydrology, one can easily conclude that this burden is extremely difficult, if not impossible, to establish at trial. This problem is exacerbated by the fact that the plaintiff need not prove that there is a causal link between the hazardous substances deposited by the defendant and the hazardous substances which have actually caused damage to the environment.[10]

Some courts have adopted the position that a defendant may escape liability if the defendant can show that "its pollutants, when mixed with other hazardous wastes, did not contribute to the release or the resulting response costs."[11] This determination will depend on the facts of each case, but it remains the defendant's burden to show divisibility.[12]

United States v. A & F Materials Co., Inc.[13] adopted yet another approach to the division of joint and several liability. There the Court looked to whether there is a reasonable basis on which to apportion liability. If it finds none, the Court may nonetheless decline to impose joint and several liability if the result would be inequitable.[14] Whether the harm suffered by the plaintiff is apportionable is a question of law.[15]

1. Present Owner Liability.

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[10] *See id.*

[11] *Acushnet Co. v. Mohasco Corp*., 191 F.3d 69 (1st Cir. 1999); *United States v. Alcan Aluminum Corp*., 990 F.2d 711, 717 (2nd Cir. 1993); *see United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3rd Cir. 1992).

[12] *Alcan*, 964 F.2d at 269.

[13] 578 F. Supp. 1249 (S.D. Ill. 1984).

[14] *See In the Matter of Bell Petroleum Services, Inc*., 3 F.3d 889 (5th Cir. 1993) (discussing the evolving approaches to joint and several liability).

[15] *Id.* at 902.

Because owners of a facility are potentially responsible persons under CERCLA, probably the most appropriate way to define the theory of liability against a present owner of property is that of a "status tort." The imposition of absolute liability on present, innocent owners is somewhat ironic, particularly considering the expressed intent of Congress in enacting CERCLA.[16] According to one author and a variety of courts, the theme of CERCLA was "the imposition of liability for the effects of past disposal practices…on those who created and profited from waste disposal - generators, transporters, and disposal site owner/operators."[17]

Where does this imposition of liability leave the person who is not a chemical manufacturer and who purchased the site without knowing that it had previously been used for disposal activities? The so-called "polluter pays" policy simply has no application in this situation. Therefore, some believe this policy was created by accident in 1980 when Congress mistakenly attached absolute liability to innocent owners by a drafting error. By 1986, however, due to the increased costs associated with remediation, no one was seriously questioning the liability of the innocent, present owner.[18] This liability was solidified by the Superfund Amendments and Reauthorization Act of 1986[19] ("SARA") which state that the liability of present owners includes those who acquired

[16] *See Reilly Tar & Chem. Corp.*, 546 F. Supp. at 1112.

[17] *See United States v. Northeastern Pharmaceutical & Chemical Company*, 579 F. Supp. 823, 840 (W.D. Mo. 1984) ("Congress intended to have the chemical industry, past and present, pay for the costs of cleaning up inactive hazardous waste sites."). *See also, United States v. Bliss*, 667 F. Supp. 1298, 1304 (E.D. Mo. 1987), overruled on other grounds by U.S. v. Davis, 794 F.Supp. 67 (D.R.I. 1992); *United States v. Price*, 577 F. Supp. 1103, 1114 (D.N.J. 1983).

[18] JOEL S. MOSKOWITZ, ENVIRONMENTAL LIABILITY AND REAL PROPERTY TRANSACTIONS, 49 (1989).

[19] Pub. L. No. 99-499, 100 Stat. 1613 (1986)

"title or possession" through "land contracts, deeds or other instruments."[20] The theories of liability against present owners have mushroomed. The definition of "owner" has been extended by one Court to include a lessee or a sublessor.[21] Another Court conferred ownership status on a beneficiary of a trust who, by definition, did not possess any *indicia* of legal ownership.[22]

2. Prior Owner Liability.

Any person who, at the time of disposal of any hazardous substance, owned any facility at which such hazardous wastes were disposed of may be liable under CERCLA as an "owner."[23] While some authors have suggested that current theory imposes liability on anyone in the "chain of title" of a particular property, the precise language of Section 9607 (a)(2) is to the contrary.[24] The literal interpretation of the section appears to require a finding of ownership *during the time* of disposal before liability can attach. Consequently, before the enactment of SARA in 1986, it was possible for an owner of a property to avoid liability simply by transferring title. SARA expressly closed this loophole by providing the following in 42 U.S.C. § 9601 (35)(C):

> [I]f the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility *when the defendant owned the real property* and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such

[20] 42 U.S.C. § 9601(35).

[21] *See United States v. South Carolina Recycling & Disposal, Inc*., 653 F. Supp. 984 (D.S.C. 1984); *but see Commander Oil Corp. v. Barlo Equipment Corp*., 215 F.3d 321 (2nd Cir. 2000) (questioning a general rule of lessee liability).

[22] *See United States v. Burns*, 1988 LEXIS 17340, 1988 WL 242553 (D.N.H. 1988).

[23] *See* 42 U.S.C. § 9607(a)(2).

[24] *See* MOSKOWITZ, *supra* note 18, at 50.

> defendant shall be treated as liable . . . *and no defense* . . . shall be available to such defendant.[25]

It therefore appears that the following types of prior owners may avoid liability: (i) those without knowledge of the contamination; and (ii) prior owners with knowledge who conveyed the property with adequate disclosures. However, a significant barrier exists in order to employ the escape route provided by 42 U.S.C. § 9601(35)(C). If there has been a "disposal" during your client's period of prior ownership, the exception of 42 U.S.C. § 9607(a)(2) is unavailable.[26]

With respect to prior owners, one author has suggested that the best reading of CERCLA is that a prior owner has no liability and therefore no need for a defense if (i) she purchased the property after the release was completed and (ii) she either (a) sold the property with ignorance of the release or (b) disclosed the release to the purchaser.[27]

B. & C. Benefits for Property Purchasers & the New Incentive "To Know" About Prior Contamination

Since CERCLA's enactment in 1980, purchasers seeking protection from CERCLA liability have been required to perform an "all appropriate inquiry," but no definition ever existed as to what constituted an "all appropriate inquiry." Only the latest rule, discussed in Part II, *infra*, provides a somewhat bright-line test as to what constitutes an "all appropriate inquiry." The new "all appropriate inquiry," when conducted properly, allow purchasers to be free from future liability.

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[25] 42 U.S.C. § 9601(35)(c) (emphasis added).

[26] *See United States v. Price*, 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982) ("disposal" includes continued leaking during the period of ownership); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988) (grating of property constitutes disposal).

[27] 42 U.S.C. § 9607(a)(2). *See* MOSKOWITZ, *supra* note 18, at 53.

In addition to conducting an "all appropriate inquiry," purchasers must disclose any specialized knowledge they may have. A brownfields professional or a real estate developer, for example, could likely have specialized knowledge. Parties with specialized knowledge could jeopardize their "innocent purchaser" defense.[28] Thus, persons with such specialized knowledge may be advised to take steps beyond the "all appropriate inquiry" to demonstrate a more thorough due diligence investigation.

D. Other Requirements for CERCLA Liability Protection

Besides conducting an "all appropriate inquiry," any party claiming liability protection must not have caused, contributed, or consented to the release of hazardous substances. The party must also be free from any affiliations with a potentially responsible party "through any direct or indirect familial relationship or any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by a contract for the sale of goods or services)."[29]

Parties claiming protection must also take reasonable steps to stop any continuing or future releases. They are required to provide their full cooperation and assistance to the EPA or government authority during any response actions.[30] Parties must also be in full compliance with any land use restrictions that apply to the response action. Finally, parties must explain any discrepancies in the purchase price compared to other similarly situated non-contaminated properties.[31]

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[28] *See* 40 C.F.R. § 312.22(a) (2005). Parties should keep records of any additional investigatory steps then undertake because of their specialized knowledge. This information may be given to the environmental professional, but the AAI rule does not require parties to share this information.

[29] CERCLA § 107(q)(1)(A).

[30] *Id.*

[31] 40 C.F.R. § 312.29.

It is important to note that defendants may escape liability for recovery of any cost incurred by the government which is inconsistent with the National Contingency Plan ("Plan"). The burden is on the defendant to show the government's chosen response action was inconsistent with the Plan and that the government acted arbitrarily and capriciously in choosing that response action.[32] An excessive cost can be challenged if the defendant argues that the government arbitrarily and capriciously failed to consider cost as a factor when deciding on the appropriate response, or selected a response action that was not cost-effective.[33]

E. What Does All This Have to do With "Brownfields" or the New Mexico Remediation Program

The EPA defines 'Brownfields' 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."[34] The EPA estimates there are more than 450,000 brownfields in the United States.[35] Uncertainty about potential contamination and/or Superfund liability may prevent otherwise interested parties from purchasing or redeveloping brownfields. "To encourage developers to clean up and

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[32] *U.S. v. Hardage Steering Committee*, 982 F.2d 1436, 1442 (10th Cir. 1992) *cert. denied*, 510 U.S. 913 (1993); *see also U.S. v. Northeastern Pharmaceutical & Chemical Co., Inc*., 810 F.2d 726 (8th Cir. 1986) *cert. denied*, 484 U.S. 848 (1987).

[33] *Hardage*, 982 F.2d at 1443.

[34] United States Environmental Protection Agency, *Brownfields Cleanup and Redevelopment* (June 30, 2006), *at* http://www.epa.gov/swerosps/bf/about.htm (hereinafter "Brownfields Cleanup"). The legislative definition of 'Brownfields' is found in Pub. L. No. 107-118, 115 stat. 2356 – "Small Business Liability Relief and Brownfields Revitalization Act"—which was signed into law January 11, 2002.

[35] *Id.*

redevelop these properties, Congress enacted the Small Business Liability Relief and Brownfields Revitalization Act in 2002" ("Brownfields Law").[36]

The Brownfields Law provides "funds to assess and clean up brownfields;" clarifies the liability protections afforded under CERCLA;[37] and provides money to state and tribal response programs.[38] Numerous reforms have been proposed to the brownfields program whose funding expires this year. Some suggested reforms include significantly increasing the program's funding, "expanding allowable uses for the federal grants, and easing the application process" to allow for rolling application or biannual applications."[39]

Similar to the purposes set forth in the Brownfields Law, the New Mexico Environment Department, pursuant to the New Mexico Voluntary Remediation Act[40]

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[36] Robyn A. Friedman, *Cleaning Up the Transaction; Don't Make a Real Estate Deal Without Checking for Potentially Costly Environmental Issues*, SUN-SENTINEL 12 (May 29, 2006); *see also* Brownfields Cleanup, *supra* note 8 (noting that the Brownfields Program has resulted in more than $6.5 billion in cleanup and redevelopment of brownfields).

[37] The EPA has two primary mechanisms for the clarification and liquidation of potential liability: comfort letters and Prospective Purchaser Agreements (PPAs"). Comfort letters provide prospective purchasers with the best, current information about the EPA's interest, or lack thereof, in a given site. The letters summarize data abailable 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's model comfort letter is attached as Appendix A.

In contrast to comfort letters, PPAs provide actual resolution or liquidation of any legal liability that the prospective purchaser might incur. PPAs are available only for sites where there has been, or where there realistically will be, a CERCLA response action. 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. A draft PPA is attached as Appendix B. For a discussion of the effectiveness of PPAs and comfort letters, see Enviromental Protection Agency, *U.S. EPA's Prospective Purchaser Agreements and Comfort/Status Letters: How Effective Are They?* (Sep. 2000), *available at* http://www.epa.gov/compliance/resources/publications/cleanup/superfund/ppa-comfort-effect.pdf.

[38] United States Environmental Protection Agency, *Laws and Statutes* (June 30, 2006), *at* http://www.epa.gov/swerosps/bf/gdc.htm.

[39] *Congress Eyes Brownfields Reforms in Bid to Renew Funding Authority*, 57 INSIDE EPA 25 (June 23, 2006).

[40] 1978 NMSA § 74-4G-1.

("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."[41]

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 purchaser from liability. Finally, lenders are also protected from liability arising from any sites participating in the program.[42]

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.[43] The Brownfields Law prohibits the EPA from bringing an action against a person conducting, or having completed, a response action.[44] 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.

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[41] 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.

[42] *Id.*

[43] 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.

[44] Brownfields Law § 128(b)(1).

Furthermore, the prohibition applies only to the party that conducted, or is conducting, the cleanup.[45]

II. New "All Appropriate Inquiry" Requirements

The new "All Appropriate Inquiry" rule implements the Brownfields Law. The Brownfields Law intended to clarify and add possible defenses to CERCLA's strict liability. CERCLA and the EPA had previously not defined the minimum requirements for an "all appropriate inquiry." Therefore, people 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").[46] 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.

[45] 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).

[46] 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.

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

The EPA's new "Standards for Conducting All Appropriate Inquiry"[47] rule ("Rule" or "AAI"), which takes effect 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; when the rule takes effect, parties will have to comply with the AAI requirements or follow the new ASTM E1527-05 standards.[48] The AAI serves as a crucial component to three liability defenses available under CERCLA: innocent landowner defense,[49] *bona fide* purchaser ("BFP") defense,[50] and contiguous property owner defense.[51] Parties receiving grants under the Brownfields Grant programs must also perform an AAI.[52]

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[47] 40 C.F.R. § 312.

[48] *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.

[49] 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).

[50] 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).

[51] 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).

[52] 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/.

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 contamination.[53] 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.[54]

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;

[53] 40 C.F.R. § 312.20.

[54] *Id.*

3) the qualifications of the environmental professional;"[55] and 4) two signed declarations.[56]

All AAIs must be conducted within one year of acquisition of a property. Certain components, however, must be updated within 180 days of acquisition.[57] Peter Domenici and Bill Mansker will provide an in-depth analysis of the components of an AAI.

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.[58]

Furthermore, all "[h]istorical documents and records must be reviewed for the purposes of achieving the objectives and performance factors."[59] 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."[60] This new requirement proves far more extensive than the

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[55] *Id.* § 312.21(c).

[56] *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."

[57] *Id.* § 312.20.

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

[59] 40 C.F.R. § 312.24(a).

[60] *Id.* § 312.24(b).

ASTM E1527-00 standard of researching only obvious uses beginning when the property was first developed.

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.[61] 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 micromis parties at Superfund sites."[62] This exemption, however, does not apply in certain cases.[63]

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

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[61] *See* CERCLA § 107(o).

[62] 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.

[63] 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 tot eh exemption." *Id*. at 3.

share of the total waste contribution.[64] This share often includes a premium.[65] In exchange, a party may receive "a covenant not to sue and contribution protection from the United States."[66] The EPA/DOJ policy memorandum is attached as Appendix C.

E. Interim Standards

Purchases of real property are advised to comply with the new AAI. The current standard established by Congress[67] for all appropriate inquiries will also satisfy statutory requirements until November 1, 2006.

III. Regulation of Environmental Professionals

An environmental professional, as defined in the AAI rule, is "a person who possesses sufficient specific education, training, and experience necessary to exercise professional judgment to develop opinions and conclusions regarding conditions indicative of releases or threatened releases on, at, in, or to a property."[68] Finding a qualified environmental professional to conduct due diligence is of the utmost importance in minimizing a purchaser's potential liability. Any professional should be familiar with local issues and laws and should have sufficient insurance coverage. A professional must also qualify as an environmental professional as defined under the Rule in order to be

[64] United States Environmental Protection Agency, *Superfund Enforcement FAQs* (Mar. 2006), http://www.epa.gov/compliance/resources/faqs/cleanup/superfund/enf-faqs.html [hereinafter "Superfund FAQs"]. In lieu of, or in addition to, providing funds, parties may undertake some of the cleanup work. *Id*.

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

[66] *Id*.

[67] ASTM E1527-00.

[68] 40 C.F.R. §312.10(b)(1).

able to assert a liability defense.[69] The Rule defines specific qualifications for environmental professionals.

A. Minimum Educational & Experience Requirements

Under ASTM E1527-00, environmental professionals were not required to have any specific licensing or education requirements. Under the new AAI rule, by contrast, an environmental professional must: hold a current Professional Engineer's or Professional Geologist's license and have three years of full-time relevant experience; hold a state or tribal license to perform environmental inquiries and have three years of relevant full-time experience; have a baccalaureate or higher degree in engineering or science and have five years of relevant experience; or have the equivalent of ten years of full-time relevant experience.[70] Under the AAI rule, relevant experience means:

> Participation in the performance of all appropriate inquiries investigations, environmental site assessments, or other site investigation that may include environmental analyses, investigations, and remediation which involve the understanding of surface and subsurface environmental conditions and the processes used to evaluate these conditions and for which professional judgment was used to develop opinions regarding conditions indicative of releases of hazardous substances to the subject property.[71]

In addition, all professionals should remain current in their field "through participation in continuing education or other relevant activities."[72]

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[69] *Id.* § 312.1(c).

[70] *Id.* § 312.10(b)(2).

[71] *Id.* § 312.10 (b).

[72] *Id.* § 312.10 (b)(3).

B. No Private Certifications

As noted above, the new AAI does not require environmental professionals to hold a degree. Many pushed for the controversial college degree requirement, but no such requirement was included in the final AAI rule.[73]

The education requirements prescribed under the AAI do not preempt state professional licensing or registration requirements.[74] Thus, any professional must ensure that he or she meets all state requirements.

C. Professional Judgment

The AAI rule specifies factors that an expert should take into account in making an AAI. The rule, however, does not provide simply for these factors to serve as the sole basis of an AAI. Rather, the AAI rule provides for a subjective analysis in conducting an AAI.

In fact, under the new AAI standard, environmental professionals have more discretion in a few areas than they did under the ASTM 1527-00 standard. For example, environmental professionals may choose to limit the extent of a records search. Furthermore, under the new AAI, written reports should contain any other investigations the environmental professional deems necessary in order to detect any contamination. This increase in discretion for environmental professionals demonstrates the AAI's heightened reliance on environmental professionals.

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[73] *See* John Epperson ET AL., *Superfund and Natural Resource Damages Litigation*, *in* ENVIRONMENT, ENERGY, AND RESOURCES LAW: THE YEAR IN REVIEW 2005 97, 97 (2006).

[74] 40 C.F.R. § 312.12 (b)(4).

D. Performance Factors & Data gaps

As mentioned, in order to identify releases and threatened releases, the AAI rule sets forth certain standards and practices. The objective of the AAI is to identify "conditions indicative of releases and threatened releases of hazardous substances" on a property.[75] To meet this objective, an environmental professional must "seek to identify" the following: "1) current and past property uses and occupancies; 2) current and past uses of hazardous substances;" 3)waste management and disposal activities; 4)current and past remediation at the property; 5) engineering controls; 6)institutional controls; and 7) properties adjoining or located nearby the property.[76]

When performing these tasks, an environmental professional must: 1) gather the required information "that is publicly available, obtainable from its source within *reasonable* time and cost constraints, and which can *practicably* be reviewed; and 2) review and evaluate the thoroughness and *reliability* of the information gathered."[77] These performance factors allow for an environmental professional to make subjective decisions and to exercise discretion.[78] Thus, although certain objectives must be completed, the AAI rejects a "checklist" approach in conducting an AAI.

The new Rule also requires more extensive documentation of data gaps. A data gap is lack of, or inability to obtain, required information despite good faith efforts by an

[75] *Id.* § 312.20 (e).

[76] *Id.*

[77] *Id.* § 312.20 (f) (emphasis added).

[78] Because of the subjectivity the performance factors allow for, this element of the AAI could potentially lead to controversy and litigation risk, to both the person asserting a liability defense and to the environmental professional, when any AAI is challenged.

environmental professional.[79] Under the new AAI rule, environmental professionals must identify all data gaps, "identify the sources of information consulted to address such data gaps, and comment upon the significance of such data gaps with regard to the ability to identify conditions indicative of releases or threatened releases of hazardous substances."[80] In order to reduce some of the data gaps, purchasers may determine that sampling and analyses may be beneficial.[81]

E. Associate Workers

Persons who do not meet the requirements of an environmental professional may still participate in making an AAI. These individuals, however, must work under the supervision of a person who does meet the requirements of an environmental professional.

F. Lender Issues

In its initial passage, CERCLA included a security interest holder exemption that excluded from liability those who, without participating in the management of a facility, held "indicia of ownership" primarily to protect a security interest.[82] In 1990, the Eleventh Circuit caused considerable concern within the lending community by holding that a lender who has the *ability* to participate in the management of a business cannot avail itself of the exemption.[83] In response to the ruling, the EPA issued its CERCLA

[79] *Id.* § 312.10.

[80] *Id.* § 312.20(g).

[81] The new AAI does not require any sampling or analyses, but such actions are advisable to reduce potential liability arising from the gaps.

[82] CERCLA § 101(20)(A).

[83] *See United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991).

Lender Liability Rule which clarified the scope of the security interest exemption to provide lenders with certain safe harbors.[84]

This rule was immediately challenged, and a D.C. Circuit vacated the EPA's rule, holding that an administrative agency has no authority to issue regulations defining the liability under Section 107 of CERCLA.[85] The Court declared that, when lenders are named as defendants under CERCLA, the "claim…should be evaluated by the federal court independent of EPA's institutional views."[86]

Congress responded to the invalidation of the EPA's "safe harbor" rule by passing the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996[87] ("Lender Liability Act"). The Lender Liability Act generally follows the EPA's Lender Liability Rule.[88] Under the Lender Liability Act, secured lenders who do not participate in management are not owners or operators within the meaning of CERCLA and therefore not liable for response costs.[89] By explicitly excluding capacity to influence from the definition of "participate in management," the Lender Liability Act effectively

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[84] *See* 57 Fed. Reg. 18,344 (Apr. 29, 1992).

[85] *See Kelly v. EPA*, 15 F.3d 1100, *reh'g denied*, 25 F.3d 1088 (D.C. Cir. 1994), *cert. denied, American Bankers Ass'n. v. Kelley*, 513 U.S. 1110 (1995).

[86] *Id.* at 1109.

[87] Pub. L. No. 104-208, §§ 2501-2505, 110 Stat. 3009-462 to 3009-469 (1996)(codified as amended at 42 U.S.C. § 9601(20)(E)-(G)(2000).

[88] *See* Superfund FAQs, *supra* note 37.

[89] The Lender Liability Act defines "participate in management" to mean actually participating in the management or operational affairs of a vessel and not merely having the capacity to influence or the unexercised right to control facility operations. CERCLA § 101(20)(F)(i), 42 U.S.C. § 9601(20)(F)(i). The Act also clarified other activities a lender may participate in without "participat[ing] in management."

nullified the rationale in cases, such as *Fleet Factors*, that found lenders liable even if they did not participate in the management or operational affairs.

Additionally, the Lender Liability Act provides that lenders may take certain actions prior to and after foreclosure without invalidating the secured creditor exemption. A lender may: 1) sell, lease, or liquidate the facility in question; 2) maintain business activities or wind-up operations at a facility; or 3) undertake response actions with respect to hazardous substance contamination. These activities are exempted only if the lender is actively attempting to divest itself of the facility "at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements."[90] The EPA's memorandum interpreting Lender liability under CERCLA is attached as Appendix D.

G. Benefits of Using Licensed Professionals

Besides the new AAI requiring the use of licensed environmental professionals, purchasers can also benefit from using environmental professionals. Environmental professionals often carry liability insurance. Purchasers can require the environmental professional to add them as additional insureds under the policy. Finally, as discussed, the use of environmental professionals serves as a form of insurance for purchasers.

[90] 42 U.S.C. § 9601 (20)(E)(ii). Under the EPA's policy, this "test will generally be met if the lender, within 12 months of foreclosure, lists the property with a broker or advertises it for sale in an appropriate publication." Superfund FAQs, *supra* note 37.