Environmental Considerations

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COMPLYING WITH ENVIRONMENTAL AND SPECIAL USE REGULATIONS

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I. INTRODUCTION

Anyone involved in the use and development of land must ensure that his actions comply with a myriad of 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. The details of these differing requirements cannot adequately be addressed within a single paper so the following materials are intended to give a general overview of some of the most important regulatory provisions affecting land use and development projects, and those who engage in such activities.

II. THE ENDANGERED SPECIES ACT

A. An Overview

Congress enacted the Endangered Species Act ("ESA")[1] in 1973, amid growing concern about the detrimental effects that land use and development have upon plants and wildlife. The ESA provides the means to identify species of plants and wildlife that are threatened by development and sets forth detailed guidelines for how those species will be protected to best ensure their continued survival. Although the ESA has nationwide application, it has special implications for each state in which endangered or threatened species are at risk. The ESA's impact on several New Mexico projects has been well documented because the state is home to such endangered or threatened species as the Mexican spotted owl, the black-footed ferret, the Rio Grande silvery minnow, and the

[1] 16 U.S.C. §§ 1531-1544.

bald eagle, among others. New Mexico is inhabited by 42 species officially listed as either endangered or threatened, 29 of which are animals, and 13 are plants.[2]

B. Administration

The Fish and Wildlife Service ("FWS"), in the U.S. Department of the Interior, and the National Oceanic and Atmospheric Administration ("NOAA") Fisheries, in the U.S. Department of Commerce, share responsibility for administration of the ESA.[3] The FWS operates the Listing Program, to determine whether a species should be added to the federal lists of endangered and threatened wildlife and plants. A species can become listed through one of two methods: through the petition process[4] or through the candidate assessment process.[5] The petition process allows any interested person to petition the Secretary of the Interior to add a species to the list of endangered or threatened species. In the candidate assessment process, FWS itself identifies species for the list.

Once identified as a candidate, the FWS looks to a variety of factors[6] to determine if the species should be listed and if so, whether it should be listed as endangered[7] or threatened.[8] Once the decision to list is made, the species then receives the heightened protection provided by the ESA. If possible, the FWS should designate a critical habitat

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[2] FWS Threatened and Endangered Species System (TESS), *available at* http://ecos.fws.gov/tess_public/TESSWebpageUsaLists?state=NM.

[3]FWS Listing Program, *available at* http://endangered.fws.gov/listing/index.html#listing.

[4] 5 U.S.C. § 553(e)

[5] 16 U.S.C. § 1533.

[6] The factors include: the present or threatened destruction, modification, or curtailment of the species' habitat or range; over utilization for commercial, recreational, scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; and other natural or manmade factors affecting the species' continued existence. *See* The Endangered Species Listing Program, *available at* http://endangered.fws.gov/ESB/99/11-12/6-9.pdf.

[7] "Endangered" means any species which is in danger of extinction throughout all or a significant portion of its range. *See* 16 U.S.C. § 1532(6).

[8] "Threatened" means any species which is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. *See* 16 U.S.C. § 1532(20).

concurrently with the listing of a species.[9] A critical habitat includes the areas occupied by the species, at the time it is listed, and any areas that are deemed essential to the conservation of the species.[10] Although the FWS is required to designate critical habitat for endangered or threatened species, it has discretion to consider the economic impact of such a designation and any other relevant impact that might be caused by the designation.[11]

C. Enforcement

TVA v. Hill[12] provided the Supreme Court with its first opportunity to interpret the ESA. The Court considered whether an almost completed dam project should be halted because it would harm the snail darter fish, a newly listed endangered species. The Court declared that the language, history, and structure of the ESA clearly indicated that Congress intended the highest protection for endangered species, even over the primary missions of federal agencies. The Court found that the "plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*."[13] The Court further noted that the ESA's "pointed omission of the type of qualifying language previously included in endangered species legislation reveal[ed] a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies."[14] Moreover, the Court found that the value of a species, any species, was "incalculable"[15] and therefore, the ESA prohibited the completion of the dam.

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[9] *See* 16 U.S.C. §1533(a)(3).

[10] *See* 16 U.S.C. § 1533 (5)(A).

[11] New Mexico also has laws to protect wildlife habitats. *See e.g.*,the Habitat Protection Act, § 17-6-1, et seq. NMSA 1978.

[12] 437 U.S. 153, 184-185 (1978)

[13] 437 U.S. at 184 (*emphasis added*)

[14] *Id.* at 185.

[15] *Id.* at 187.

This strict interpretation of the ESA was, however, short lived. After the *TVA* decision, Congress amended the ESA to create an Endangered Species Committee consisting of the heads of various federal agencies as well as a resident of each affected state.[16] This Committee has the authority to exempt a project from the ESA's critical habitat requirements if it finds that no reasonable or prudent alternative exists and that the project's benefits clearly outweigh the benefits of any alternatives.[17] Consequently, the ESA now provides administrators limited authority to equitably weigh the competing demands of the endangered species against the needs of the proposed project and the affected community.

D. Central Provisions

1. Federal Agency Projects

One of the most important provisions of the ESA is Section 7.[18] This section prevents federal agencies from jeopardizing any listed species or destroying or altering any designated habitat. Section 7 requires all federal agencies to consult with the FWS or the NOAA (for marine animals) if a listed species or designated habitat may be present in the area of a proposed agency action. The federal agency must consult with the FWS for any project it initiates and any project for which it might issue a license or permit to a developer.[19] The ESA utilizes strong language in this section to assure compliance, prohibiting the consideration of economic or other factors when making critical decisions under Section 7, and requiring the use of only the best and most current data and procedures.

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[16] *See* 16 U.S.C. § 1536(e).

[17] This Committee is sometimes referred to as the "God Squad" because its decisions may ultimately decide whether an endangered species will survive.

[18] *See* 16 U.S.C. § 1536.

[19] *See* 16 U.S.C. § 1536(a). Therefore, any project authorized, funded, or carried out by the federal agency requires consultation with the FWS.

2. Unauthorized Takings by Private Parties

Section 9[20] of the ESA applies to all persons within the United States' jurisdiction. Its significant prohibitions include: (1) the import and export of endangered species, and products made from them; (2) commerce within the United States in listed species, and products made from them, and (3) possession of unlawfully acquired endangered species. Section 9 also prohibits the "taking" of listed endangered wildlife. The definition of "taking" is quite broad because it includes any act that would "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct."[21] By statute, the "take" definition only applies to endangered species. However, the ESA grants the FWS the power to extend the "take" regulation to threatened species as well.[22] The FWS has used this discretionary provision to attach the "take" regulation to virtually all threatened wildlife species.[23]

3. Incidental Takings and Habitat Conservation Plans[24]

Private landowners, corporations, state or local governments, or other non-federal landowners who want to conduct activities on land that might incidentally harm (*i.e.* "take") an endangered or threatened species, must first obtain an incidental take permit from the FWS.[25] A taking is "incidental" if it is incidental to, and not for the purpose of, the carrying out of an otherwise lawful activity.[26] An application for an incidental take permit must be accompanied by a Habitat Conservation Plan or "HCP."[27] HCPs are

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[20] *See* 16 U.S.C. § 1538.

[21] 16 U.S.C § 1532(19).

[22] 16 U.S.C. § 1533(d).

[23] 50 C.F.R. § 17.31(a).

[24] Please see the U.S. Fish & Wildlife Service's web page for more information on these matters. The website is located at: http://endangered.fws.gov/hcp

[25] *See* 16 U.S.C. § 1539.

[26] *See* 16 U.S.C. § 1539(a)(1)(B).

[27] *See* 16 U.S.C. § 1539(a)(2)(A).

intended to ensure that projects adequately minimize and mitigate the effects of the authorized incidental take. Section 10 also allows for "No Surprises" assurances by the government to provide certainty to private landowners through the HCP process. "No Surprises" assurances promise the private landowner that even if unforeseen circumstances arise, the government will not require the landowner to commit additional land, water, or financial compensation, nor will the government place additional restrictions on the use of the land, water, or other natural resources beyond the level otherwise agreed to in the HCP. The government will honor these assurances so long as a permittee continues his good faith efforts to adhere to the terms and conditions of the HCP and the permit.

4. Sanctions

Those who violate provisions of the ESA are subject to the penalties provided for in Section 11.[28] This section authorizes the imposition of criminal sanctions, civil penalties, and injunctions for "takes" or other violations.[29] Civil penalties may not exceed $25,000 if the violation is done "knowingly" and may not exceed $500 if it is done without knowledge. The maximum criminal penalties are set at $100,000 for individuals and $200,000 for corporations.[30] Typical of various environmental laws, the "knowing" component of criminal and civil charges has been interpreted strictly against the violator. Courts have construed "knowingly" to mean only that the accused knowingly performed the action, not that he had any knowledge that the action affected an endangered or threatened species.[31]

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[28] *See* 16 U.S.C. § 1540.

[29] 16 U.S.C. § 1540.

[30] 18 U.S.C. § 3571.

[31] *See* United States v. Nguyen, 916 F.2d 1016 (5th Cir. 1991); United States v. St. Onge, 676 F.Supp. 1044 (D. Mont. 1988); United States v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987).

E. Recent Developments

Within the past few years, the Department of the Interior has been exploring new ways to encourage private landowners to undertake voluntary conservation measures on their property to benefit threatened and endangered species.[32] These programs include the Safe Harbor and Candidate Conservation Agreement with Assurances ("CCAA")[33] policies that enlist the cooperation of private landowners in return for certain assurances from the government. The Safe Harbor policies encourage private landowners to take actions on their property to benefit listed species, in return for assurances that their conservation measures will not lead to further restriction on the use of the land if they lead to an increase in the population of the species on the property. Recent updates to these regulations are designed to provide clearer definitions and greater assurances for those private landowners who choose to cooperate through a Safe Harbor or CCAA agreement.[34]

III. WETLANDS – CONTROLLING USE AND ABUSE

A. An Overview

In New Mexico, there are numerous organizations that take an active interest in regulating and expanding our knowledge of local wetlands. The U.S. Army Corps of Engineers studies wetlands using the "HGM" Approach (Hydro-Geomorphology), designed to produce regional methods for assessing the physical, chemical, and biological functions of wetland areas needing protection. The U.S. Fish and Wildlife Service is responsible for wetlands classifications and research on affected, threatened, or endangered species. The New Mexico Natural Heritage Program (of the University of New Mexico Biology Department) has developed the Handbook of Wetland

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[32] Assistant Secretary Manson Announces Revised Regulations for Endangered Species Conservation Agreements on Private Lands, *available at* http://endangered.fws.gov/candidates/news_release.pdf.

[33] CCAAs are essentially the same as Safe Harbor agreements except that CCAAs apply to species *proposed* for listing, while Safe Harbor agreements apply to species already listed. There are currently 23 Safe Harbor agreements and 7 CCAAs in effect, covering 29 and 21 species respectively.

[34] Please visit the U.S. Fish & Wildlife Service web page for more information on these and other new developments. The website is located at: http://endangered/fws/gov

Communities of New Mexico to aid in the description, inventory, and assessment of New Mexico's wetland resources. The handbook provides a survey work of all major basins of New Mexico. Other organizations with an interest in New Mexico wetlands include the U.S. Forest Service, the Bureau of Land Management, and private interest groups.

B. Regulation

The primary statutory provision regulating development in Wetlands is section 404 of the Clean Water Act ("CWA").[35] The Clean Water Act[36] prohibits the discharge of pollutants[37] from discrete point sources into waters of the United States.[38] However, Congress also authorized the Army Corp of Engineers to administer a separate program under Section 404 of the CWA to address discharges of dredged or fill material into the navigable waters of the United States. Because wetlands development often involves dredge and fill operations, Section 404 has evolved into the federal government's primary tool to limit and regulate development in wetlands.

Discharges of dredged and fill material have been defined broadly so many development activities in wetlands will involve a regulated discharge. The courts generally define "discharge of dredge material" as the addition of material excavated or dredged from waters of the United States, including run-off from a dredge material disposal area.[39] In response to the settlement of civil citizens' suits which were critical of the Corp's regulations, the Corp now adheres to a strict view of regulating dredging operations.

"Discharge of fill material" is likewise defined broadly, covering almost every activity that involves earth moving or the addition of any material into designated

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[35] 33 U.S.C §1344.

[36] *See* 33 U.S.C. §§ 1251 through 1387.

[37] "Pollutant" is defined broadly and includes dredged spoil, solid waste, incinerator residue, biological materials, rock, and sand. *See* 33 U.S.C. § 1362(6).

[38] *Id.* at § 1311(a).

[39] 33 C.F.R. § 323.2(d)(1).

wetlands. Among the regulated activities are: placement of fill that is necessary for construction in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for construction; site development fills; causeway or road fills; and many other protection or transportation devices.[40] Even the temporary stockpiling of soil from the construction of a drainage ditch or similar excavation may be a regulated discharge.

C. Permit Process

In light of the expansive definition of dredge and fill operations, every initial project assessment should determine whether the proposed development is in an area designated by the Corps as a wetland. Maps maintained by the Corps and by the Fish and Wildlife Service may be found on EPA's Wetlands website: http:\\www.epa.gov\owow\wetlands\. Under the 1989 Interagency Federal Manual for Identifying and Delineating Jurisdictional Wetlands, three criteria must be present for an area to be considered a Jurisdiction Wetland: (1) wetland vegetation, (2) hydric soils, and (3) wetland hydrology. In certain circumstances, the presence of one of the criteria may be presumed from the presence of the other two. If the proposed development is in a designated wetland area, a section 404 permit must be obtained from the Corps of Engineers before any activity begins.

There are two types of section 404 permits - individual and general. The Corps issues individual permits for specific projects and general permits for categories of activities that involve only minimal environmental disruption. General permits may be issued on either a nationwide or on a regional basis. Consequently, if a developer is involved in multiple similar projects, he should investigate the potential applicability of general permits and, if appropriate, consider redesigning his projects so that they fall within the parameters of a general permit. If a general permit is obtained, it will streamline the permitting process for all of the projects and result in fewer administrative obstacles for all involved parties.

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[40] 33 C.F.R. § 323.2(f)(1997).

D. Enforcement

The penalties for violating the Clean Water Act can be quite severe, ranging from civil monetary fines to imprisonment for criminal violations.[41] Criminal penalties are available for both negligent and knowing violations. It is not necessary that the violator know the conduct is criminal, or even that the discharge was illegal. It is only necessary that the violator knew that the discharge occurred.[42] In light of such severe penalties, anyone seeking to develop or alter land that may be regulated by the Clean Water Act should take great care to determine whether his proposed activities are regulated and authorized by the Act. However, all is not lost if a landowner or developer discovers that he has violated the Clean Water Act. If he works in good faith with the Corps of Engineers to correct the damage, the Corps has discretion to decide that no further enforcement action is necessary.[43]

E. Jurisdictional Wetlands – Recent Decisions

In *Rapanos v. United States*, 126 S.Ct. 2208 (2006) (consolidated with *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 304 (6th Cir. 2004)), the Supreme Court, by a 4:4:1 plurality, remanded to the Sixth Circuit the issue of whether the U.S. Army Corps of Engineers (the Corps) exceeded its statutory authority under the CWA by requiring property owners to acquire permits before dredging and filling certain wetlands. The case presented the Court with the opportunity to determine whether the wetlands at issue were subject to the United States' jurisdiction under the CWA. The Court's decision advanced conflicting tests for determining whether wetlands are protected by federal law. As explained in detail below, the Ninth and Seventh Circuits have held one test to be the controlling standard, while the First Circuit has held that if either of the two proposed tests is met, the federal government has jurisdiction over the wetland at issue.

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[41] *See* 33 U.S.C. § 1319.

[42] *See* Weitzenhoff v. United States, 35 F.3d 1275 (9th Cir. 1994).

[43] *See* 33 C.F.R. 326.3(d)(1).

Justice Scalia's 4:4:1 plurality decision in *Rapanos* took a narrow interpretation of "waters of the United States," and would remove many wetlands from the Corps' CWA jurisdiction by requiring a continuous surface water connection. Justice Scalia proposed a two-part test such that wetlands would be covered by the CWA where (1) "the adjacent channel contains a 'wate[r] of the United States,'" and (2) "the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id*. at 2227.

Justice Kennedy specifically rejected Scalia's test in his concurrence. Kennedy found the plurality's interpretation of "waters of the United States," as inconsistent with the language and purpose of the CWA, and advanced a test that would require a "significant nexus" between wetlands and navigable waters on a case-by-case basis. *Id*. at 2243 (Kennedy, J., concurring). Under this test:

> Wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable."

The Supreme Court's decision in *Rapanos* both explicitly and implicitly left the door open for legislative and regulatory changes on this issue. In fact, Justice Breyer's dissent called on the Corps to "write new regulations, and speedily so." *Id.* at 2255 (Stevens, J., dissenting) (citations omitted).

The Ninth Circuit has interpreted Justice Kennedy's plurality opinion in *Rapanos* as the controlling law in this area. In *Northern California River Watch v. City of Healdsburg*, 457 F.3d 1023 (9th Cir. 2006), the Ninth Circuit held that a city must obtain an NPDES permit to discharge sewage into a rock quarry pit filled with water from an aquifer adjacent to the Russian River. In doing so the court held, with limited analysis, that Justice Kennedy's "significant nexus" test is the standard by which to determine whether particular wetlands constitute "waters of the United States" subject to the CWA.

The Seventh Circuit followed suit in *United States v. Gerke Excavating, Inc*., 464 F.3d 723 (7th Cir. 2006) by holding that Justice Kennedy's concurrence in *Rapanos* provides the legal standard for CWA wetlands jurisdiction. The court remanded the case to the district court with instructions to determine whether the Corps had jurisdiction over the wetland in question under Justice Kennedy's "significant nexus" test.

The First Circuit departed from the analysis of the Ninth and Seventh Circuits and has held that the federal government can establish CWA jurisdiction if it can meet either of the two standards set forth in the *Rapanos* decision. *See United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006).

IV. ENVIRONMENTAL CONDITIONS AND FEATURES AFFECTING PROPERTY DEVELOPMENT

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 five 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.

V. POLLUTION CONTROL AND PERMITS

A. Air

1. Federal Regulation

The federal Clean Air Act[44] protects the public from dangerous levels of air contaminants. After the EPA identifies an air pollutant as "reasonably anticipated to endanger public health or welfare," it publishes air quality criteria for the pollutant and indicates its anticipated effects on public health and welfare.[45] The EPA then establishes National Ambient Air Quality Standards ("NAAQS") which set the maximum quantities of specific pollutants that can safely be allowed in the air.[46] Each state must then submit a State Implementation Plan ("SIP") that demonstrates how it will meet the requirements of the NAAQS.[47] Each SIP contains specific information about how the state will monitor pollution sources within its borders and how the state will regulate industry and development to ensure compliance with the federal ambient air standards. Therefore, anyone planning to engage in an activity that will emit any type of air pollutant must consult with the appropriate state regulatory agency to obtain the required permits and authorization for his project.

2. State Regulation

Under the New Mexico Air Quality Control Act,[48] the Environmental Improvement Board is designated as the state air pollution control agency.[49] Section 74-

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[44] *See* 42 U.S.C. §§ 7401 to 7671.

[45] *See* 42 U.S.C. § 7408.

[46] *See* 42 U.S.C. § 7409.

[47] *See* 42 U.S.C. § 7410.

[48] §§74-2-1 et. seq. NMSA 1978

[49] N.M. Stat. Ann. § 74-2-3(B)

2-7 requires an air quality permit for the construction or modification of any air pollution source. "Air pollution" is defined as

> "[t]he emission, except emission as occurs in nature, into the outdoor atmosphere of one or more air contaminants in such quantities and duration that may with reasonable probability injure human health, animal, or plant life or as may unreasonably interfere with the public welfare, visibility, or the reasonable use of property."[50]

It is important to understand that there is a difference between a construction permit and an operating permit.[51] Construction permits are required before operation of an air pollutant source can occur. Consequently, environmental modeling studies must be completed well before construction, and they must identify levels of potential emissions. Those emissions typically include Nitrous Oxide, Carbon Monoxide, and Non-Methane Hydrocarbons.

A permit must be obtained from the Environment Department under the following circumstances: (i) prior to the construction of a source which emits one or more regulated air contaminants for which there is a national ambient air quality standard or state ambient standard and which emits greater than ten pounds per hour of any regulated air contaminant or has a potential emission rate of greater than one hundred pounds per hour; and (ii) toxic air pollutants. Oil and gas operations, including distribution facilities, are exempt from the toxic air pollutant requirements. Typically, the Environment Department will notify the applicant concerning the completeness of the permit application within thirty days after the application has been submitted. After notification of the completeness or lack thereof, the Environment Department is allowed one hundred twenty days to conclude the processing of the permitting application. Accordingly, an applicant may reasonably expect a one hundred-fifty day waiting period prior to the issuance of an air quality permit.

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[50] N.M. Stat. Ann. § 74-2-2(B)(1978).

[51] *See* § 74-2-7(A) for a discussion of the relationship between state and federal regulations on this matter.

B. Water

1. Federal Regulation

The federal Clean Water Act ("CWA")[52] prohibits the discharge of any pollutant from a point source[53] into the navigable waters of the United States.[54] Under the CWA, the EPA and the states work together to form a regulator framework for water quality. States establish water quality standards based upon designated uses and water quality criteria and then polluters apply to the EPA for National Pollutant Discharge Elimination System ("NPDES") permits. NPDES permits impose effluent limitations on industry designed to ensure that the state water quality standards are satisfied. However, before an applicant can obtain a NPDES permit from the EPA, he must get certification from the state in which pollutants will be discharged.[55]

2. State Regulation

New Mexico regulates water pollution through the Water Quality Act.[56] Anyone intending to discharge pollutants into water must first obtain a permit from the Water Quality Control Commission. The permit will contain conditions and limitations on the nature and amount of pollutants that may be discharged. Discharging pollutants into water without a permit, or in violation of a permit, can result in civil penalties of up to $15,000 per day and possible felony criminal charges.[57]

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[52] 33 U.S.C. §§ 1251 to 1387.

[53] "Point Source" is defined in the Clean Water Act as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel . . . ." 33 U.S.C. § 1362(14). Traditionally, point source discharges have been considered "discrete" discharges, from a source that is readily discernable. *See* Hudson Riverkeeper Fund, Inc. v. Harbor at Hastings Associates, 917 F. Supp. 251, 257 (S.D.N.Y. 1996). However, the United States District Court for the District of Oregon recently held that cattle grazing constitutes a point source because the activity "may" result in water pollution. *See* Oregon Natural Desert Ass'n v. Thomas, 940 F.Supp 1534, 1541 (D.Or. 1996), *overruled* by Oregon Natural Desert Ass'n v. Bombeck, 172 F.3d 1092 (9th Cir. 1998).

[54] 33 U.S.C. § 1311(a).

[55] 33 U.S.C. § 1341.

[56] *See* §§ 74-6-1 to 74-6-17 NMSA 1978.

[57] *See* §§ 74-6-10, 10.1, and 10.2.

C. Hazardous Wastes

1. Federal Regulation

The federal Resource Conservation and Recovery Act ("RCRA")[58] regulates the disposition of hazardous wastes. RCRA provides a "cradle to grave" tracking system that sets standards for generators and transporters of hazardous wastes as well as operators of treatment, storage, and disposal facilities. Each entity involved with hazardous wastes in any of these ways must have a permit from the appropriate regulatory agency. RCRA's regulatory reach depends on whether a substance is designated as a "hazardous waste." This is not as simple as it seems because some substances are hazardous, but not wastes, and other substances are wastes, but not considered hazardous under the Act. Therefore, any business involved in processes that may fall within RCRA's regulatory scheme should consult its attorney and the appropriate regulatory agency to ensure that its actions are authorized.

2. State Regulation

New Mexico fulfills its RCRA obligations through the New Mexico Hazardous Waste Act.[59] The Act allows the Environment Improvement Board to issue hazardous waste permits as necessary to protect public health and the environment and to set standards for hazardous wastes that are equivalent to, but no more stringent than the standards established through RCRA.[60] The Act's primary means of tracking wastes from generation through disposal is through a comprehensive manifest system. Violations of the Act can result in civil penalties of up to $25,000 per day and felony criminal charges.[61]

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[58] 42 U.S.C. § 6901 et seq. RCRA is also known as the Solid Waste Disposal Act.

[59] *See* § 74-4-4.1 et seq. NMSA 1978. The Hazardous Waste Act also regulates underground storage tanks. See § 74-4-4.4.

[60] *See* § 74-4-4.

[61] *See* §§ 74-4-10, -11, and -12.

VI. ENVIRONMENTALLY DISTRESSED PROPERTY – WHAT ARE YOU LIABLE FOR AND HOW DO YOU REDUCE THE IMPACT?

A. An Overview of CERCLA

Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")[62] 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.

B. CERCLA Liability

CERCLA is a direct extension of common law principles of strict liability for abnormally hazardous activities.[63] 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.[64] However, the term does not include petroleum, including crude oil or any fraction thereof, unless specifically listed or designated as a hazardous substance.[65]

To establish liability, there must be a release, or threatened release, of a hazardous substance from a facility[66] which caused a government or private plaintiff to incur costs.

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[62] 42.U.S.C. §§ 9601 to 9675.

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

[64] 42 U.S.C. § 9601(14).

[65] *Id*.

[66] *See* 42 U.S.C. § 9601(9).

Four categories of persons are considered potentially responsible parties ("PRPs") who can be held liable for pollution. These PRPs include:[67]

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
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.[68]

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.[69] However, in a private party

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[67] *See* 42 U.S.C. § 9607(a).

[68] 42 U.S.C. § 9607(a)(4).

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

cost recovery action, the plaintiff must prove that the necessary costs of response were "consistent" with the NCP.[70]

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.[71] To be eligible for this defense, the purchaser must demonstrate that:

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

[71] *See* 42 U.S.C. § 9601(35).

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.[72]

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.[73] 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 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.[74] 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

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[72] *See id.*

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

[74] *Id.* at 573.

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."[75]

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 elements of operator liability under CERCLA.[76] 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.[77] 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

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

[76] *Id*. at 1886.

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

government,[78] if he acquired the facility by inheritance or bequest,[79] or if he purchased the land from the federal government.[80]

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,[81] 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."[82] 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.[83] Other Courts expressed the more rational view that only some form of government approval is necessary before allowing a private party cost recovery action.[84] The better view, however, appears only to require private parties to prove that the costs incurred were "consistent with" the NCP.[85]

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[78] *See* 42 U.S.C. § 9622.

[79] *See* 42 U.S.C. § 9601(35).

[80] *See* 42 U.S.C. § 9620(h).

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

[82] 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).

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

[84] *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).

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

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.[86]

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 *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.[87]

3. Conditions Precedent to Private Action.

Before initiating a claim under CERCLA, the party seeking cost reimbursement

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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).

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

[87] *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.

must have incurred at least one cognizable response cost.[88]

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.[89] 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.[90]

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 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."[91] 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.[92] These Courts have found that the 1986 enactment of Section 113 indicates that Congress intended contribution to be an

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[88] *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).

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

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

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

[92] *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).

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."[93]

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 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.[94] Thus, several district courts have held that PRPs that are "innocent" may maintain a direct 107 action.[95]

"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).[96] 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).[97]

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

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

[94] *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).

[95] *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).

[96] *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").

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

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 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."[98] 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.[99] 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.[100] 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.[101] 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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[98] *See* 42 U.S.C. § 9607.

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

[100] *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).

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

H. Recent 9th Circuit Decision 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 – must 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 therefore held that the Railroads and Shell were jointly and severally liable for the entire harm at the site. The court based its holding that the harm was not divisible (and therefore able to be apportioned) on a very detailed analysis as to whether the harm at the site (the contamination) could be traced to, and quantified, as to each of the PRPs based on their status as such. For example, the Railroads were PRP-owners and held liable for the contamination under CERCLA. But the trial court's apportionment of liability with respect 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 situations where multiple PRPs are found liable under CERCLA the Burlington Northern case provides a useful framework to analyze apportionability issues.

I. 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*., 551 U.S. ___ (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).[102] 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 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 liablie 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

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[102] 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**.

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.

VII. BROWNFIELDS INITIATIVES[103]

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."[104] 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

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[103] For more information about brownfields, visit the EPA's website at http://www.epa.gov/brownfields The EPA's website also has a list of brownfields-related laws and regulations. New Mexico is located in the EPA's Region 6 and the Brownfield contact is Dorothy Crawford, U.S. Environmental Protection Agency, Regional Brownfields Team Region 6, MC: 6SF-P, 1445 Ross Avenue Suite 1200, Dallas, Texas, 75202-2733. Telephone: 214.665.6735. E-mail: Crawford.Dorothy@epa.gov. The state contact for brownfield information is Christine Bynum, Manager, NM Environment Department, Voluntary Remediation Program. Post Office Box 26110, Santa Fe, New Mexico, 87502. Telephone: 505.827.2754. E-mail: chris_bynum@nmenv.state.nm.us

[104] *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).

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[105] 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 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

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[105] 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 contaminated properties. New Mexico is one of these states.

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 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 Act106 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 Revolving Loan Fund (BCRLF).[107] 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[108] ("Remediation Act"), established a Voluntary Remediation Program to promote

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

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

[108] 1978 N.M. STAT. ANN. 74-4G-1.

voluntary cleanup of contaminated sites. "The program is designed to facilitate redevelopment of contaminated sites by providing a streamlined, non-punitive remediation process."[109]

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.[110]

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.[111] The Brownfields Law prohibits the EPA from bringing an action against a person conducting, or having completed, a response action.[112] 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.[113]

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[109] 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.

[110] *Id.*

[111] 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.

[112] Brownfields Law §128(b)(1).

[113] 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).

D. 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").[114] 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.

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

The EPA's new "Standards for Conducting All Appropriate Inquiry"[115] 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.[116] The AAI serves as a crucial component to three liability defenses

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[114] 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.

[115] 40 C.F.R. § 312.

[116] *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,[117] *bona fide* purchaser ("BFP") defense,[118] and contiguous property owner defense.[119] Parties receiving grants under the Brownfields Grant programs must also perform an AAI.[120]

2. 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.[121] Although not necessarily performed by an environmental professional, an AAI must also include: searches for environmental cleanup liens; an assessment of the

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[117] 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).

[118] 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).

[119] 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).

[120] 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/.

[121] 40 C.F.R. § 312.20.

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.[122]

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;"[123] and 4) two signed declarations.[124]

All AAIs must be conducted within one year of acquisition of a property. Certain components, however, must be updated within 180 days of acquisition.[125] Peter Domenici and Bill Mansker will provide an in-depth analysis of the components of an AAI.

3. 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,

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[122] *Id.*

[123] *Id.* § 312.21(c).

[124] *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."

[125] *Id.* § 312.20.

requires the environmental professional to interview neighbors or nearby property owners.[126]

Furthermore, all "[h]istorical documents and records must be reviewed for the purposes of achieving the objectives and performance factors."[127] 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."[128] 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.

4. "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.[129] 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."[130] This exemption, however, does not apply in certain cases.[131]

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

[127] 40 C.F.R. § 312.24(a).

[128] *Id.* § 312.24(b).

[129] *See* CERCLA § 107(o).

[130] 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,

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.[132] This share often includes a premium.[133] In exchange, a party may receive "a covenant not to sue and contribution protection from the United States."[134] The EPA/DOJ policy memorandum is attached as Appendix C.

CONCLUSION

As evidenced by the discussion above, land development projects can be subject to a variety of state and federal environmental laws. Determining which regulations are applicable depends on such factors as, but not limited to: the type of land involved; how the land has been used in the past; how the land will be used in the future; what types of emissions or wastes might be generated; the nature of the parties involved; and whether any endangered or threatened species will be affected by the planned activity. Therefore, prior to committing extensive resources to a project, a prudent developer will research these matters to determine whether the project is cost effective and worth the potential liability inherent to the activity.

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while the EPA/DOJ policy did not have a date limitation. *Id.* at 4.

[131] 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.

[132] 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.*

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

[134] *Id.*