

**American Bar Association
Section of Environment, Energy, and Resources**

**Introduction to CERCLA
(Superfund & Brownfields Law & Contribution
After *Aviall* and *Atlantic Research*)**

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I. Introduction²

In 1977 the small town known as Love Canal, New York became the focal point of national concern about death and disease from abandoned hazardous waste sites. A canal project, abandoned in the late 1800s, resulted in a pit, sixty feet wide and 3,000 feet long. In the 1920s the land became a municipal and chemical disposal site. During the WWII – Korea war period, Hooker Chemical, the City of Niagara Falls, and the U.S. Army dumped municipal garbage and industrial chemical wastes into the pit. In 1953, Hooker filled the canal, covered it with clay and dirt, and sold it to the Niagara Falls Board of Education for \$1. The deed Hooker used to convey the Love Canal property to the Board included a warning, an assumption of risk by the Board, and a waiver.³

The Board built the 99th Street Elementary School, with a playground. Over 1,000 homes and apartments were built in the neighborhood. 500 families lived within 10 blocks of the old landfill. Rains in 1975 and 1976 caused the groundwater table to rise and drums started emerging from the depths of the landfill.

An investigative reporter took sludge from a basement sump pump, had it tested and the State of New York began sampling and testing in 1977. In 1978, the State declared an

¹ Currently Chair, Sponsorship Committee; Secretary of the Section (2005-2007), Chair, Superfund & Hazardous Waste Committee (1996-1998); and Co-organizer, the Section's Annual RCRA/CERCLA and Private Litigation Update (1988-1998). © 2007 James R. Arnold and The Arnold Law Practice.

² This presentation and paper assumes the reader's familiarity with Switzer & Bulan, *Basic Practice Series: CERCLA* (ABA Section of Environment, Energy, & Resources (2002)(hereafter "Switzer & Bulan").

³ *United States v. Hooker Chemicals and Plastics Corp.*, 922 F.Supp. 960, 962 (W.D.N.Y., 1989).

emergency, closed the school and began to buy 240 homes closest to the landfill. In 1980, the federal government, led by President Carter, ordered the entire town of Love Canal evacuated.

In response to Love Canal and other environmental catastrophes that started surfacing in public awareness, government regulators and private citizens tried to secure clean up of hazardous waste sites under the Resource Conservation and Recovery Act (“RCRA”), the Clean Water Act and state common law. They had little success due to lack of funding and the uneven levels of development of state law.⁴ The result was that Congress in the waning days of 1980 enacted the Comprehensive Environmental Response, Compensation, and Liability Act⁵ (“CERCLA”).⁶ President Jimmy Carter signed the Act on December 11, 1980, and left office on January 21, 1981.

Love Canal was a turning point in public perception. It was a gathering of collective political will “to do something about” abandoned hazardous waste sites. The Act imposed strict, joint and several liability on persons and companies solely on account of their *status*. This concept was expressed in the 1978 amendments to RCRA which addresses “contributors.” But, RCRA was a poor tool for remediation of abandoned hazardous waste sites.

The concept of strict, joint and several liability that is imposed because of *status* can be traced to the common law state courts in *Greenman v. Yuba Power Products, Inc.* 59 Cal.2d 57 (1963)(Traynor, C.J.).⁷ The idea spread rapidly throughout the U.S., and was recognized in 1965

⁴ See generally Note, *Liability for Generators of Hazardous Waste: The Failure of Existing Enforcement Mechanisms*, 69 Geo. L.J. 1047 (1981). As for RCRA, Justice O’Conner explained in 1996 that

... RCRA is not principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards. Cf. *General Electric Co. v. Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415, 1422 (C.A.8 1990) (the “two ... main purposes of CERCLA” are “prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party”). RCRA’s primary purpose, rather, is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, “so as to minimize the present and future threat to human health and the environment.”
Meghrig v. KFC Western, Inc. 516 U.S. 479, 483 (1996).

⁵ Pub. L. No. 96-510, 94 Stat. 2767 (1980), codified at 42 U.S.C. §§9601-9675. CERCLA was amended and reauthorized by the *Superfund Amendments and Reauthorization Act of 1986* (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986).

⁶ A starting point for current education about Superfund is the website of the Environmental Literacy Council at <http://www.enviroliteracy.org/article.php/329.html>. And see the USEPA’s 2000 report, <http://www.epa.gov/superfund/action/20years/index.htm>

⁷ *Greenman* was authored by Chief Justice Roger J. Traynor, who served on the California Supreme Court from 1930-1970. The precedent for *Greenman* extends back to *Escola v. Coca Cola Bottling Co.* 24 Cal.2d 453 (1944) (where the idea of broad social responsibility was first introduced by then Associate Justice Traynor in a concurring opinion, explaining that “Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business....” Justice Traynor’s liberal tendencies have subjected his work to much criticism by libertarians,

when the American Law Institute adopted the principle of strict liability in Section 402A of the 2d Restatement of Torts. The idea of comparative fault, and allocation of damages (costs), also became more and more accepted as the common law courts extinguished the old principles of contributory negligence and similar rules in tort law. And, *caveat emptor* and contractual assumption of risk were likewise eroded in the field of contracts law.⁸

CERCLA was an awkward and poorly written manifestation of a variety of these new doctrines in American law, but “...effectively transformed centuries of real property and tort liability law by making those who contaminate a site strictly liable for the costs of subsequent cleanup by others.”⁹ It was not well thought out, and it contained elements of a government cleanup program – the “Superfund” – and elements of (i) “polluters pay first” and allocate later, and (ii) strict, joint and several liability for cleanups imposed on companies and persons as a “cost of doing business.” Congress left a lot of interpretation and analytical structuring to the federal courts.¹⁰ The consequences of this approach are reflected in the recent U.S. Supreme Court decisions in *Cooper Industries, Inc. v. Aviall Services, Inc.* and *U.S. v. Atlantic Research*.¹¹

It was clear, though, that CERCLA established the U.S. Environmental Protection Agency’s (USEPA) Superfund program and created government and private rights of action against responsible parties.¹²

For its part, the USEPA created three major regulatory mechanisms in its Superfund program to establish cleanup standards and procedures. These are discussed below. They include the National Contingency Plan (“NCP”), the Hazard Ranking System (HRS)¹³ and the National Priorities List (“NPL”).¹⁴

conservatives, and those in the tort reform movement. See http://en.wikipedia.org/wiki/Roger_J._Traynor; and <http://www.pointoflaw.com/products/overview.php> (American Enterprise Institute).

⁸ The reality, however, is that the old doctrines of contractual provisions limiting a seller’s risk, and providing a buyer assumed that risk, were eroded by pressure of public policy. See, e.g., the court’s ruling as to the chemical company’s assumption of risk argument at Love Canal. “OCC’s assertion of assumption of risk as a defense to its liability for restitution should not as a matter of public policy be allowed to completely bar recovery by the State for the costs it incurred, on lands properly acquired, in exercising its police power to protect the public health...” *U.S. v. Hooker Chemicals & Plastics Corp.*, 722 F.Supp. 960, 971 (W.D.N.Y., 1989) (as a result, the court applied the company’s assumption of risk argument to the allocation of cleanup costs).

⁹ *Atlantic Research Corp. v. United States*, 459 F.3d. 827, 830 (8th Cir., 2006).

¹⁰ This tension continues, as evidenced by the current litigation in the California courts as to liability for cleanups due to the effects of MtBE and dry cleaning fluids on groundwater supplies, based on common law principles of products liability and nuisance.

¹¹ *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004); *Atlantic Research Corp. v. United States*, 551 U.S. ____, 127 S.Ct. 233, ____ (2007) discussed below.

¹² *Dedham Water Co. v. Cumberland Farms, Inc.*, 805 F.2d 1074, 1080-1081 (1st Cir. 1986).

¹³ http://www.epa.gov/oerrpage/superfund/programs/npl_hrs/hrsint.htm

¹⁴ http://www.epa.gov/superfund/sites/npl/npl_hrs.htm

II. History of CERCLA

As noted by many, CERCLA is not a model for well thought out concepts and programs for what Congress sought to accomplish. Many provisions are ambiguous and vague. And, CERCLA's original legislative history is woefully inadequate because it provides inconclusive guidance in resolving specific issues of statutory construction.

As a result of the poor draftsmanship and unhelpful legislative history, the federal courts continue to deal with numerous legal issues in CERCLA.¹⁵ Thus, most of the courts¹⁶ have tended to construe CERCLA broadly and liberally in order to effectuate its remedial purpose with respect to hazardous waste clean up and liability.¹⁷

At its worst, CERCLA interpretation is a painful and tedious process for PRPs, with many pitfalls for both the unwary and the wary. See, e.g., *Dept of Toxic Substances Control v. Burlington Northern*, 479 F.3d 1113 (9th Cir. 2007) (approving allocation as a matter of liability, but rejecting proof accepted by trial court).

Congress intended that the federal district courts and the circuits interpret and apply CERCLA on a "case-by-case" basis, however. As explained by the Ninth Circuit in the recent *Burlington Northern* decision,

"...the history of § 107(a) of CERCLA, 42 U.S.C. § 9607(a), indicates that although Congress declined to mandate joint and several liability, it did not intend by doing so "a rejection of joint and severable liability." [citing *United States v. Chem-Dyne Corp.*, 572 F.Supp. 802, 808 (S.D. Ohio 1983.) Instead, recognizing the difficulties inherent "in prescribing in statutory terms liability standards which will be applicable in individual cases," [citing *Chem-Dyne, supra*, at 806] (quoting 126 CONG. REC. S14964 (Nov. 24, 1980) (remarks of Sen. Randolph)), Congress meant "to have the scope of liability determined under common law principles, where a court performing a case by case evaluation of the complex factual scenarios associated ... will assess the propriety of applying joint and several liability on an individual basis," [citing *Chem-Dyne, supra*, at 808].

While winning such cases as *Chem-Dyne*, it became clear to the attorneys for the government (the U.S. Department of Justice and the U.S. EPA) that it could only lose if it had to

¹⁵ See, e.g., *Jones-Hamilton Co. v. Beazer Materials & Services, Inc.* 973 F.2d 688, 692 (9th Cir. 1992) ("CERCLA's provision regarding indemnity clauses is truly murky.") (holding that responsible parties can contractually apportion risks among themselves, but cannot limit their CERCLA liabilities to the government or third parties); and *Otay Land Co. v. U.E. Limited, L.P.* 440 F.Supp.2d 1152, 1160 (2006) ("The legal landscape of firing range liability under CERCLA is still wild and untamed. Decisions involving CERCLA's safe harbor provision for consumer products in consumer use are scarce.") (ruling that consumer products exception to CERCLA applies to claims for cleanup of former public firing range).

¹⁶ Most courts including the Ninth Circuit, but perhaps not always the Supreme Court, as reflected in *Aviall* (discussed below).

¹⁷ Cooke & Davis, *The Law of Hazardous Waste*, Introduction - Clean Up & Liability, § 12.03, pp. 12-22-12-95, particularly §12.03[4][a], p. 12-32 (Lexis 2005 update) (hereafter "Cooke & Davis"). See *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557-58 (11th Cir. 1990), cert. denied, 498 U.S. 1046 (1991), discussed *infra* ("... In order to achieve the 'overwhelmingly remedial' goal of the CERCLA statutory scheme, ambiguous statutory terms should be construed to favor liability for the costs incurred by the government in responding to the hazards at such facilities....")

fight through each of the federal district courts the same issues over and over again. At the same time, private interests demanded some legislative indication as to when and how some owners of contaminated property would not be liable. The result was the most significant modification in the liability provisions in 1986, the Superfund Amendments and Reauthorization Act of 1986.¹⁸

A. Superfund Amendments and Reauthorization Act of 1986 (“SARA”)¹⁹

Congress reauthorized and greatly enlarged the CERCLA program in the Superfund Amendments and Reauthorization Act of 1986 (“SARA”).²⁰ The liabilities “victories” won by the government were codified into statutory law. In addition, funding for the Superfund itself was increased through 1995, USEPA was given deadlines for remediating sites on the NPL, and detailed requirements for selecting remedies were established.²¹ Procedures for USEPA’s settlements were also added.²²

As a result of embedding the principles of liability sought by the government into statutory law, SARA also expanded Section 113 of CERCLA to reform USEPA’s administrative decision-making process, and to establish statutes of limitation for cost recovery lawsuits.

And, a new provision, Section 113(f), was added to expressly authorize contribution lawsuits by liable parties against other potentially responsible parties.²³ As discussed below, the contribution/cost recovery language of Sections 107 and 113 resulted in two decisions of the Supreme Court which defined the scope of how can additional parties be forced to pay for cleanups.

SARA added a “citizen suit” provision to enable private parties to sue to force compliance with CERCLA.²⁴ And the new statute required public participation in remedy selection and settlements, and a new right to intervene in any CERCLA litigation.²⁵

¹⁸ Pub. L. No. 99-499, 100 Stat. 1613 (1986).

¹⁹ The Environmental Protection and Community Right to Know Act, also known as “SARA Title III,” 42 U.S.C. §§11001-11056, is outside the scope of this paper.

²⁰ Pub. L. No. 99-499, 100 Stat. 1613 (1986). *See also* Cooke & Davis, *supra*, §12.04[1][a]. Explaining that, “...Congress’ enactment of SARA transformed a relatively short, vague and general environmental statute [into] an extremely lengthy, specific, and detailed set of directives to the EPA and private parties. ...” Cooke & Davis, *supra*, §12.05(3)(b).

²¹ 42 U.S.C. §9621(d)(2)(A). These include standards for selecting a remedy, deciding the degree of clean up and making sure the selected remedy complies with the NCP. The degree of any clean up depends on both federal standards, any applicable or relevant and appropriate requirements (“ARARs”) and any state environmental standards that are more stringent than the federal standards.

²² Section 122, 42 U.S.C. §1922.

²³ 42 U.S.C. §9613(f); interpreted in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), discussed below.

²⁴ 42 U.S.C. §9659, and *see Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. July 3, 2006), discussed below.

²⁵ 42 U.S.C. §9617; 42 U.S.C. §9613(I).

As for natural resources damages (“NRDs”), SARA clarified what state and federal trustees of natural resources were to do, what funds they could spend, and who could appoint them.²⁶ The statute expanded and clarified USEPA’s inspection and remediation authority.²⁷

Finally, and most importantly for today’s emphasis on remediation and reuse of old military facilities and private properties, SARA applied CERCLA clearly to military facilities.²⁸

Last, but not least, SARA added the so-called “innocent landowner” defense.²⁹ This addition was the foundation for the Brownfields Act in 2002 discussed below. The Brownfields Act amended CERCLA again, and included definitions of “innocent landowner” (“ILO” -- carried forward from SARA), “bona fide prospective purchaser” (“BFPP”), and “contiguous property owner” (“CPO”) for defenses to CERCLA liabilities. Furthermore, the Brownfields Act directed USEPA to promulgate an “all appropriate entity” standard, which it began enforcing in 2005.

B. Other Amendments to CERCLA – post 1986 – One for the Banks and One for the Developers

The expansion of USEPA’s responsibilities in 1986 with SARA was followed by a vigorous period of expansion and elaboration of the Superfund program. There were continued calls for further “reform” of Superfund in the early 1990s, because the fundamental liability mechanisms in CERCLA had not been altered by SARA. These attempts failed, due in part to administrative reforms by USEPA in the early 1990s and some focused amendments. One significant “reform” was the expiration in 1995 of funding through excise taxes on crude oil purchases and chemical feedstocks, and an income tax on corporations.³⁰

1. Asset Conservation, Lender Liability, and Deposit Insurance Act of 1996

By the late 1990s, the national economy was growing and properties were being developed and redeveloped. In 1996 Congress passed the Asset Conservation, Lender Liability, and Deposit Insurance Act of 1996 (the “Asset Conservation Act”), as Subtitle E of the Omnibus Consolidated Appropriations Act.³¹ This legislation gave further assurances to secured lenders (and added trustees and other fiduciaries³²) that their risk was limited to the credit secured by the

²⁶ 42 U.S.C. §9607(f).

²⁷ 42 U.S.C. §§9611(b)(2), (e)(2), 9604(e), (j).

²⁸ And established the Department of Defense Environmental Restoration Program, 10 U.S.C. §2701-7.

²⁹ 42 U.S.C. §9601(35)(A) (defining the term “contractual relationship” in 42 U.S.C. §9607(b)(3)).

³⁰ By 2003, the Superfund trust fund was depleted, and is now supported by Congressional appropriations. <http://nseonline.org/NLE/CRSreports/Waste/waste-31.cfm>.

³¹ Pub. L. No. 104-208 (Sept. 30, 1996).

³² 42 U.S.C. §9607(n).

property.³³ Lenders were concerned about possible “operator” liability, despite the “secured creditor” exemption in CERCLA.³⁴ The 11th Circuit in *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557-58 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991)³⁵ had provided the impetus for this amendment with language about a lender’s “capacity to influence” the abandonment of hazardous wastes.³⁶

The Asset Conservation Act defined “participating in management” and provides circumstances where a lender can foreclose on contaminated properties and continue to be excluded from the owner/operator definition.³⁷ The Asset Conservation Act also extended an exemption to fiduciaries, which had not been excluded from CERCLA liability.³⁸

The next significant reform of CERCLA came in 2002.

2. *The Small Business Liability Relief and Brownfields Revitalization Act of 2002—“The Brownfields Act”*

The Small Business Liability Relief and Brownfields Revitalization Act (the “Brownfields Act”)³⁹ clarified CERCLA liability protections by:

- changing the definition of “innocent landowner” (“ILO”) in §101(35),
- adding a bona fide prospective purchaser (“BFPP”) defense in §101(40)
- adding a contiguous property owner (“CPO”) defense in §101(q);
- defining a “brownfields” site in §101(39);⁴⁰

³³ Those holding an interest in property as an *indicia* of ownership to protect a security interest had been exempted from the definition of owner/operator in CERCLA. 42 U.S.C. §9601(20)(E)(i).

³⁴ 42 U.S.C. §9601(2)(A).

³⁵ The facts were that an agent of the bank (that foreclosed on security interest in cloth printing plant) had left 700 drums of toxics and 44 truckloads of asbestos containing materials when it dismantled the plant, which cost USEPA \$400,000 for cleanup.

³⁶ “...a secured creditor may incur section 9607(a)(2) liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation’s treatment of hazardous wastes. It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable—although such conduct will certainly lead to the loss of the protection of the statutory exemption. Nor is it necessary for the secured creditor to participate in management decisions relating to hazardous waste. Rather, a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose. ...”

³⁷ 42 U.S.C. §9601(20)(A), (E), (F).

³⁸ In exempting trustees from personal liability, the Act addressed court decisions such as *City of Phoenix v. Garbage Services Co.*, 827 F. Supp. 600, 606-7 (D. Ariz. 1993) (trustee could be personally liable for wastes disposed onsite).

³⁹ Pub.L. No. 107-118 (Jan. 11, 2002).

⁴⁰ A Brownfields site is “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...” 42 U.S.C. §9601(39).

- authorizing funds for USEPA to assess and clean up brownfields; and
- authorizing funding for state and tribal response programs.

The most important of the liability protections for owners – and for the redevelopment of so-called “brownfields” properties -- are for contiguous property owners (“CPOs”) and bona fide prospective purchasers (“BFFPs”). These two new “*persona*” joined the so-called “innocent” landowners (“ILOs”) added by SARA, in the cast of characters with statutory protection from *status*-based CERCLA liabilities.

The Brownfields Act also added to CERCLA a *de micromis* exemption (e.g., the “one barrel” contributor to a landfill that is being cleaned up) and a municipal solid waste exemption.⁴¹

How these legislative alterations of CERCLA are applied is discussed in “IX. The Brownfields Act of 2002 – The Continuing Effects on Real Estate Development.”

But, first we must review how “releases” of “hazardous substances” are found; the key definitions in CERCLA; and the NCP, the HRS, and the NPL.

And then, we address the pattern of liabilities that CERCLA imposes. It is like nothing else found in the common law or statutory law – but an amalgamation of principles and concepts from both sources (including the concept of strict products liability invented in the early 1960s, and discussed above).

III. EPA’s Information Gathering – How Releases Are Found

A. Reporting Requirements --- Section 103(a)

USEPA learns of releases of hazardous substances because CERCLA requires self-reporting. Section 103(a) requires any “person in charge” of a facility to report releases of hazardous substances when any release equals or exceeds the “reportable quantity” (“RQ”) established by USEPA pursuant to Section 102.⁴² The “person in charge” of a facility must immediately notify the National Response Center of any release of a RQ. And, even though CERCLA does not define “person in charge,” the courts have had little trouble with finding criminal and civil liabilities for releases.⁴³

EPA has promulgated regulations⁴⁴ regarding lists of hazardous substances subject to

⁴¹ 42 U.S.C. §9607(o)(1)-(2)(*de micromis* exemption); 42 U.S.C. §9607(p)(1)(A), (1)(B) & (1)(C) (municipal waste). And, a relatively minor amendment of CERCLA came in 1999, when Congress passed the Superfund Recycling Equities Act (“SREA”) which exempts certain scrap metal and lead acid battery transactions from CERCLA liability. Pub.L. No. 106-113 (1999), codified at 42 U.S.C. §9627.

⁴² 42 U.S.C. §§9603(a); 9602.

⁴³ See *United States v. Buckley*, 934 F.2d 84, 86 (6th Cir. 1991). (“The reporting requirements of CERCLA apply to any person –even if of relatively low rank-who, because he was in charge of a facility, was in a position to detect, prevent and abate a release of hazardous substances. The defendant’s control over a faculty need not be sole or exclusive. He need not be the only one in charge.”), cited with approval, “section 9603(a) does not demand knowledge of the regulatory requirements of CERCLA; it demands only that defendant be aware of his acts...” *U.S. v. Laughlin*, 10 F.3d 961, 967 (2d Cir. 1993).

⁴⁴ See 40 C.F.R. Part 302, table 302.4, found at <http://www.epa.gov/superfund/programs/er/triggers/haztrigs/302table01.pdf>

regulation and their reportable quantities. The reportable quantity language of Section 9602 addresses what threshold amount of hazardous substances must be released in order trigger a facility's self reporting requirements.

B. Information Gathering & Access -- Section 104(e)

USEPA has the authority in § 104(e) to enter facilities, get records of the business and hazardous substances. The main tool used by USEPA is a questionnaire with interrogatory type of questions.⁴⁵ Responses have deadlines, and penalties accrue on a daily basis for missing deadlines, even while USEPA seeks judicial orders for access.⁴⁶

With this background of the philosophy and history of CERCLA, and how hazardous waste sites needing cleanup become known to USEPA, we can look at several key definitions.

IV. Key Definitions

A. "Hazardous Substance"

CERCLA jurisdiction is triggered when there has been a release or threatened release of a hazardous substance into the environment from a facility or vessel.⁴⁷ CERCLA's definition of "hazardous substance"⁴⁸ is broad and encompasses lists of substances found in other environmental statutes. However, this definition does not include petroleum, crude oil, natural gas or synthetic gas used for fuel.⁴⁹

B. "Release"

A "release" includes any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance, pollutant, or contaminant.⁵⁰ CERCLA also applies to "threatened" releases, and there is no minimum threshold quantity for a release to trigger liability under CERCLA.⁵¹

⁴⁵ See Switzer & Bulan, *supra*, §11.1.1.3 p. 73.

⁴⁶ See *Barnet Aluminum Co. v. Reilly*, 927 F.2d. 289, 295-96 (6th Cir. 1991).

⁴⁷ Cooke & Davis, *supra*, §13.01[3][b], p. 13-11.

⁴⁸ 42 U.S.C. §9601(14). Section 101(14) defines "hazardous substances" to include substances listed or regulated by §§ 307(a) and 311(b)(2)(A) of the Clean Water Act; §112 of the Clean Air Act; §7 of the Toxic Substances Control Act; and §3001 of the Resource Conservation Recovery Act; and 42 U.S.C. §9602.

⁴⁹ 42. U.S.C. §9601(14).

⁵⁰ 42 U.S.C. §9601(22).

⁵¹ See, e.g., *Kalamazoo River Study Group v. Measha Corp.*, 228 F.2d 648 (6th Cir. 2000)(small PCB contributors are liable, and size of contribution will be addressed at allocation of costs phase); *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 720 (3d Cir. 1993) and *Amoco Oil v. Borden, Inc.*, 889 F2d. 664 (5th Cir. 1989).

The Ninth Circuit rejected the claim by one Defendant claiming that a minimum level requirement should be imposed, commenting,

“...[Defendant] asks us to read a minimum level requirement into the statute and regulations. It argues that trace levels of hazardous substances are present just about everywhere. Read as the EPA suggests, CERCLA seems to give the agency carte blanche to hold liable anyone who disposes of just about anything. Drop an old nickel that actually contains nickel? A CERCLA violation. Throw out an old lemon? It's full of citric acid, another hazardous substance.

It's not surprising that an agency would urge an interpretation which gives it such broad discretion. Perhaps more surprising is that CERCLA leaves us little choice but to agree.

...⁵²

C. “Environment”

The “environment”⁵³ includes all surface and ground waters, land surface and subsurface and ambient air under the jurisdiction of the United States.⁵⁴

D. “Facility”

“Facility”⁵⁵ includes any building, equipment, structure, installation, pipe or pipeline, well, pit, pond, impoundment, ditch, landfill, storage container, motor vehicle or aircraft and any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or has come to be located.⁵⁶

The only limit on the definition of facility is that it does not include a vessel or a consumer product in consumer use.⁵⁷ Thus, almost any natural location or artificial structure may constitute a facility.

E. Removal & Remedial Actions

“Removal actions” are short term measures that include clean up or removal of hazardous

⁵² *A&W Smelter and Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1110 (9th Cir. 1998)(Judge Kozinski).

⁵³ 42 U.S.C. §9601(8).

⁵⁴ *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. July 3, 2006)(“...seeking to enforce the terms of [an USEPA Unilateral Administrative Order for Remedial Investigation/Feasibility Study [“UAO”]] to a Canadian company for a “facility” within the United States – the Columbia River in the U.S. According to the court, up to 145,000 tons of slag from a Canadian smelter had been discharged into the Columbia River in Canada from 1906-1995 of which a significant portion comprised beaches, etc., in the U.S. The Court ruled that the UAO “does not invoke extraterritorial application of United States law precisely because this case involves a domestic facility,” *i.e.*, the Columbia River in the U.S.)

⁵⁵ 42 U.S.C. §9601(9).

⁵⁶ *Sierra Club v. Seaboard Farms, Inc.*, 387 F.3d 1167 (10th Cir. 2004)(large hog farming complex in Oklahoma panhandle is a single “facility”).

⁵⁷ See *Otay Land Co. v. U.E. Limited, L.P.*, *supra* (firing range is a consumer product). *Note*: Release must occur from a “vessel or facility,” and “vessel” is “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.” 42 U.S.C. §9601(28).

substances. They also include such actions as monitoring, assessing and evaluating threatened releases that may affect public health or the environment.⁵⁸ Removal actions are designed to contain or mitigate a release.

“Remedial actions” consist of long term clean up activities that are consistent with a permanent remedy and can consist of offsite transportation of hazardous substances or permanent relocation of communities.⁵⁹

The distinction between “removal” actions and “remedial” actions can be financially significant, particularly when USEPA or private parties seek to recover costs as response costs.⁶⁰

V. National Contingency Plan (“NCP”), Hazard Ranking System (“HRS”), & National Priorities List (“NPL”)

The National Contingency Plan (“NCP”) is a set of regulations as to the selection and implementation of remedial activities by USEPA and private parties to clean up hazardous wastes.⁶¹ The NCP is in Part 30 of Title 40, Code of Federal Regulations.

Section 105(a) of CERCLA authorizes the USEPA to establish standards and procedures for responding to releases of hazardous substances.⁶² It has done so by promulgating the NCP. And, because it wrote the rule, it made the burden of proof of consistency with the NCP for the government different than for private parties.

The USEPA can recover through lawsuits its costs for removal or remedial actions if its activities are “not inconsistent with” the NCP.⁶³ Thus, the government has a presumption of consistency with the NCP.

Private parties do not have a presumption of consistency with the NCP. Instead, they must prove that their response costs were “consistent with” the NCP.⁶⁴

Proving consistency with the NCP has been one of two biggest stumbling blocks for private parties who seek to recover through the federal courts all or part of the money they spend on cleanups. (And, as explained below, the “public participation” requirement for selecting a remedy is the second biggest stumbling block for private parties.)

⁵⁸ 42 U.S.C. §9601(23).

⁵⁹ 42 U.S.C. §9601(24).

⁶⁰ See *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1226 (9th Cir. 2005)(USEPA spent over \$54 million in cleanup as a “removal” action, challenged by the PRP).

⁶¹ 40 C.F.R. Part 300.

⁶² 42 U.S.C. §9605(a).

⁶³ 42 U.S.C. §9607(a)(4)(A).

⁶⁴ 42 U.S.C. §9607(a)(4)(B). *United States v. NEPACCO*, 579 F.Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986).

The National Priorities List (“NPL”) is USEPA’s listing of Superfund sites with the highest priorities for cleanups. The Hazard Ranking System (“HRS”) is used to determine whether sites should be added to the NPL, and then to prioritize them.

As revised in 1991, the HRS develops a score for a site, based on a process similar to a site assessment. The USEPA’s process in recent years to include a facility on the National Priorities List (“NPL”)⁶⁵ has become somewhat slower.⁶⁶

Finally, until a site is listed on the NPL, EPA does not have CERCLA authority to perform or order a remedial action, but it can still perform or order a removal action to address an imminent threat.

In addition to consistency with the NCP, two significant issues with the NCP are the *selection of a remedy* and *public participation*.

A. Remedy Selection

Subpart E of the NCP deals with the evaluation and selection of an appropriate remedy for a site.⁶⁷ The NCP, 40 C.F.R. §330.340, states that a site must have a remedial investigation/feasibility study (“RI/FS”) performed on it and this study must include selection of a remedy. The purpose of a RI/FS is to evaluate site conditions, develop alternatives for remediation, and select a remedy.

A part of the RI/FS must look to the availability of different response measures for the site which can include physical removal or treatment of wastes or institutional controls.⁶⁸ Further, the RI/FS must describe the alternatives for remediation and state final goals based on acceptable exposure levels.⁶⁹

The final chosen remedy has to be presented for public comment before it can be put into a record of decision (“ROD”).⁷⁰

PRPs are keenly aware that the ROD shapes the final cost of the ultimate remedy. The

⁶⁵ See USEPA’s website for NPL sites across the U.S. -- <http://www.epa.gov/superfund/sites/npl/npl.htm>

⁶⁶ See, e.g., 2003 investigation for Upper Columbia River Site, which is the subject of *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. July 3, 2006), <http://www.epa.gov/r10earth/offices/oec/UCR/Upper%20Columbia%20River%20ESI.pdf>.

⁶⁷ 40 C.F.R. § 300.425(b)(1).

⁶⁸ "Institutional controls," as used by USEPA, are “non-engineered instruments such as administrative and/or legal controls that minimize the potential for human exposure to contamination by limiting land or resource use.” USEPA, *Institutional Controls: A Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups 2* (2000). <http://www.epa.gov/superfund/action/ic/guide/guide.pdf> (last visited Aug. 15, 2006).

⁶⁹ See 40 C.F.R. § 300.430(e)-(f).

⁷⁰ 40 C.F.R. § 300.430(f)(1)(ii).

conventional wisdom is that PRPs should act vigorously to shape the final ROD in their favor.

B. Public Participation & the Administrative Record

As already noted, PRPs who spend money on cleanups usually need to attempt to recover cleanup costs from other parties or the Superfund. The NCP, 40 C.F.R. §300.700(c)(6), requires public participation as a significant part in developing alternatives and selecting a remedy.

So, in addition to the problems of proving “consistency,” private parties seeking cost recovery typically have difficulty with the requirement for public participation in the process of investigating a site, determining the appropriate remedy, and carrying out the response action.⁷¹ The result has been a split in the opinions of federal courts as to whether participation by a public agency is sufficient to satisfy the public participation requirement. In other words, if the state Superfund agency oversees the selection of a remedy and a cleanup, has the “public participation” requirement been met?

There are some additional issues in this area. Congress in SARA added some limits on lawsuits for judicial review of challenges to removal or remedial actions. Section 113(h) states that no federal court shall have jurisdiction to review any challenges to removal or remedial actions under Section 104 or Section 106 Orders until a lawsuit has been filed that uses Section 107 for costs recovery or §106 to compel a remedial action.⁷²

Thus, when USEPA issues a PRP a Section 106 order (discussed below) to conduct a removal or remedial action, the PRP cannot challenge the validity of the order before incurring daily penalties or performing the required clean up. The only defense to potential penalties is the “sufficient cause” defense where the PRP must establish it had sufficient notice not to comply with the order. In other words, as explained in more detail below, there is no “pre-enforcement review” of Section 106 orders.

Also, if a PRP challenges USEPA’s or another PRP’s selection of a remedy in a RI/FS, a federal district court can only review the administrative record.⁷³ And, the challenging PRP must “demonstrate on the administrative record, that the decision was arbitrary, capricious, or otherwise not in accordance with law.”⁷⁴ As experienced counsel know, this can be a hard standard to meet.

Why should any party, whether a PRP or not, put themselves through such trouble? The answer lies in the structure of CERCLA liabilities.

VI. CERCLA Liabilities

CERCLA imposes liability in two significant sections, Section 106 and Section 107.

⁷¹ See, e.g., *Carson Harbor Village, Ltd. v. County of Los Angeles*, 433 F.3d 1260 (9th Cir. 2006).

⁷² 42 U.S.C. §9613(h).

⁷³ 42 U.S.C. §9613(j)(1).

⁷⁴ 42 U.S.C. §9613(j)(2).

Section 106 is USEPA's authority for injunctive relief to compel cleanups. Section 107 is the authority for USEPA and private parties to recover the costs of cleanups from PRPs.

A. Liability for Injunctions and Unilateral Administrative Orders – Section 106⁷⁵

USEPA has two options for cleaning up a hazardous waste site.

USEPA can undertake the cleanup itself pursuant to Section 104 and sue PRPs to recover its response costs under Section 107.⁷⁶

Or, USEPA can sue PRPs under Section 106 for injunctive orders (or it can issue an administrative order to compel PRPs) to undertake cleanup measures at sites presenting an “imminent and substantial endangerment.”⁷⁷

The USEPA Section 106 administrative order is used most often.

1. Section 106 Administrative Orders

Section 106 authorizes USEPA to issue administrative orders to PRPs and to sue PRPs to abate releases or threatened releases of hazardous substances (otherwise known as “imminent and substantial endangerments”).⁷⁸

Section 106 is particularly significant because of the decades old USEPA policy (dating from 1989), that emphasizes “enforcement first.”

Settlements of Section 106 authorized administrative orders or lawsuits are called “administrative orders on consent.” Such consent decrees that are voluntarily entered provide PRPs with protection, according to Section 113(f), from contribution claims by other PRPs – and a covenant not to sue by USEPA.⁷⁹

The USEPA has a powerful enforcement tool in this Section 106 authority to issue administrative orders, backed by daily penalties for noncompliance and a bar on judicial review.⁸⁰

Simply put, USEPA is not required to negotiate with PRPs. And, CERCLA vests USEPA with considerable discretion in the terms, duration and use of such orders.⁸¹

⁷⁵ And Sections 104 (investigative orders) and 107 (cost recovery).

⁷⁶ See Cooke & Davis, *supra*, §14.02[1][c], pp. 14-177.

⁷⁷ See *North Shore Realty, supra*, at 1041 and *Lone Pine Steering Comm. v. EPA*, 777 F.2d 882, 886 (3d Cir. 1985).

⁷⁸ 42 U.S.C. §9606(a).

⁷⁹ USEPA also requires reciprocal covenants not to sue the U.S. or its agencies for response costs.

⁸⁰ See Cooke & Davis, *supra*, §14.03[1][c], pp. 14-274.

⁸¹ See Cooke & Davis, *supra*, §14.03[1][c], pp. 14-274. The only defense to potential penalties is the “sufficient cause” defense where the PRP must establish it had sufficient notice not to comply with the order.

2. *Pre-Enforcement Review*

The question of *pre-enforcement review* by the courts has existed since CERCLA was enacted. Section 113(h) of CERCLA bars federal courts from hearing

“...any challenges to removal or remedial action selected under Section 9604 of this title, or to review any order issued under Section 9606(a) of this title.”⁸²

The bar on pre-enforcement review may be weakening. Section 113(h) bars lawsuits challenging removal or remedial actions under Section 104 and Section 106 Orders, unless and until a Section 107 or a Section 106 lawsuit has been filed.⁸³

In 2004, the Court of Appeals for the District of Columbia ruled that the explicit limit in Section 113(h) on judicial review does not bar pre-enforcement review of a facial due process challenge to CERCLA.⁸⁴

B. Liability for Cleanups & NRDs -- Section 107

Section 107 allows the United States, a state or a private party to bring lawsuits in federal court to recover costs they spend to respond to releases of hazardous substances.⁸⁵ A Section 107 cost recovery action may be commenced against responsible parties which are statutorily defined. Section 107 sets forth four categories of potentially responsible parties (“PRPs”):

- 1) The *current owner or operator* of any facility from which there was an actual or threatened release of hazardous substances into the environment;
- 2) The *former owner or operator* at time of disposal;
- 3) The *arranger* for disposal or treatment of hazardous substances at such facility; and
- 4) The *transporter* who selected such facility and transported hazardous substances to it for disposal or treatment.

⁸² “...No federal court shall have jurisdiction under Federal law other than under section 1332 of the Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title...” 42 U.S.C. §9613(h).

⁸³ 42 U.S.C. §9613(h).

⁸⁴ *General Electric Co. v. Environmental Protection Agency*, 360 F.3d 188 (D.C. Cir. 2004); *on remand, General Electric Co. v. Johnson*, 362 F.Supp.2d 327 (DDC 2005)(In a case challenging USEPA Order to clean PCBs from the Hudson River, the court ruled that the PRP can challenge the “pattern and practice” of USEPA in issuing unilateral administrative orders).

⁸⁵ 42 U.S.C. §9607.

If PRPs are found liable for response actions (*i.e.*, removal or remediation), they are liable to the USEPA for the costs of enforcement, oversight and the response action itself.

A PRP may also be liable for natural resource damages (“NRDs”) which will require him, her, or it to compensate foreign, federal, state or Indian governments (*i.e.*, trustees) for damages to natural resources.⁸⁶ (Natural resources damages are based on the extent of harm to natural resources – *e.g.*, fish, biota, wildlife, air, water, drinking water supplies, *etc.* -- that are controlled by trustees. NRDs are not based on costs of restoration or replacement of that environment.⁸⁷)

C. Liability Standard for Section 107 – Joint & Several or Divisible?

As explained above, the liability embodied in Section 107 is considered to be strict, joint and several.⁸⁸ As a result, it can be the allocation of costs – and not liability – under CERCLA that allows for consideration of culpability.⁸⁹ However, the question of divisibility of liability vs. allocation of costs does not have an open-and-shut answer.

As explained by one commentator, there are starting to appear decisions in which PRPs whose wastes have commingled at multi-party sites do not inevitably suffer joint and several liabilities.⁹⁰ Of course, any party who seeks to avoid joint and several liability has a significant burden of proof that the harm is divisible.⁹¹

As already explained, SARA’s addition in 1986 of Section 113(f)(1) established a right of contribution. Allocation of liabilities could be made in the context of a contribution lawsuit that is interrelated with a cost recovery lawsuit. Contribution has the potential of allocating liabilities.⁹²

Next we turn to who is liable under CERCLA.

⁸⁶ See CERCLA §101(16), 42 U.S.C. §9601(16) for a definition of natural resources and §107(a), 42 U.S.C. §9607(a), which establishes a cause of action for recovery of natural resource damages.

⁸⁷ See Cooke & Davis, *supra*, §14.01(10)(a).

⁸⁸ For an explanation of the circuitous statutory basis for strict liability, and the nuances of the court-devised law of joint and several liability, see Cooke & Davis, *supra*, §14.01(6)(b)-(c).

⁸⁹ Cooke & Davis, *supra*, §14.01[6][c], p. 14-143.

⁹⁰ See Cooke & Davis, *supra*, §14.01(6)(c)(iii), pp. 14-147 – 14-164; *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 184-185 (2d Cir.2003); *U.S. v. 175 Inwood Associates LLP*, 330 F.Supp.2d 213 (E.D.N.Y. 2004).

⁹¹ *Dept of Toxic Substances Control v. Burlington Northern*, 479 F.3d 1113 (9th Cir. 2007)(approving allocation as a matter of liability, but rejecting proof accepted by trial court); *United States v. Agway, Inc.*, 193 F.Supp.2d 545 (N.D.N.Y. 2002)(burden not met); *United States v. Alcan Aluminum Corp.*, 315 F.3d 179 (2d Cir. 2003); *United States v. Alcan Aluminum Corp.*, No. 5:03-CV-0765, 2006 WL 1133291 (N.D.N.Y.2006).

⁹² In recovering response costs, a governmental entity or a private party need not incur all of its costs before it brings suit and it may seek a declaratory judgment that a defendant PRP is liable for future response costs. The defendant PRP may challenge, of course, on the basis of consistency with the NCP.

D. Liable Parties

1. Liability of “Current Owners” and “Owners at Time of Disposal”

Section 101(20)(A)(ii) defines owner as “any person owning or operating such facility.”⁹³ This definition of owner is not helpful to establish liability because it is circular. Telling us that an owner is one who owns fall short of clarity and so has not established a national definition of who is an “owner”.

As a result, the federal courts have used the law of the state where the property is located to determine ownership.⁹⁴ (This is yet another example of the “pre-SARA” courts deciding issues of liability on case-specific facts. And, because SARA did not define all issues, the courts will continue to play a major role – and the outcome will continue to be uncertain for cost recoveries.)

Section 107(a)(2) of CERCLA makes two types of *owners* potentially liable:

a) “*Current owners*” – those who currently own a facility, whether or not disposal of hazardous substances is or has occurred during the present ownership of the facility,⁹⁵ and

b) “*Former owners at time of disposal*” – those who previously owned the facility at the time when hazardous substances were disposed of there. (The question as to former owners is whether so-called “passive migration” can be the basis for liability at a time of disposal.⁹⁶)

2. “Operator” Liability

⁹³ 42 U.S.C. §9601(20)(a)(2).

⁹⁴ *Butner v. United States*, 440 U.S. 48, 55 (1979) and *Barnhill v. Johnson*, 503 U.S. 393, 397-98 (1992). See also *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1498 (11th Cir. 1996) (court used law of Alabama to establish if limited partners could be owners under CERCLA for liability purposes).

⁹⁵ See *New York v. North Shore Realty Corp.*, 759 F.2d 1032, 1043-44 (2d Cir. 1985) (hereafter *North Shore Realty*).

⁹⁶ See 42 U.S.C. §9607(a)(2) and *North Shore Realty*, 759 F.2d at 1044 (citing *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, (not officially reported) 21 Env’t.Rep.Cas. (BNA) 1108, 1113 (C.D. Cal. 1984)) and 42 U.S.C. §9607(a)(1). *Southfund Partners III v. Sears, Roebuck and Co.*, 57 F.Supp.2d 1369, *1377 (N.D.Ga.,1999) (“...the vast majority of courts to address the issue have concluded a landowner is a “covered person” if it owned property when hazardous materials leaked or spilled out of containers and into the environment regardless of whether it committed affirmative acts to cause the leak or spill. ...”). And, for once, the 9th Circuit is in step, *Carson Harbor Village, Ltd. v. County of Los Angeles*, 270 F.3d 863, 874-887 (9th Cir., en banc 2001). See Lightfoot, T.R., “Reversal of Fortune: The Ninth Circuit and Passive Migration as CERCLA ‘Disposal’”, Vol. 3, Newsletter of ABA/SEER Science & Technology Committee (Dec. 2002), at <http://www.abanet.org/environ/committees/sciencetech/newsletter/dec02/passivemigration.shtml>

Again, CERCLA has a circular definition. An “operator” is one who operates a facility.⁹⁷ But, unlike “owner,” the Supreme Court has sharpened this definition beyond what is found in CERCLA. An “operator” means one who is managing, directing or operating activities relating to hazardous substances.⁹⁸

Lenders who have a security interest in a facility that has had hazardous substances releases must avoid exercising control or making decisions about the business on the subject property to avoid operator liability. As noted above, the Asset Conservation Act in 1996 provided additional definition as to what lenders could and could not do while protecting their security interests.

3. “Parent Corporation Liability” as Owner/Operator

In its unanimous decision in *Bestfoods*⁹⁹, the Supreme Court adopted a test to determine the derivative liability of a parent corporation for the actions of its subsidiary as an owner/operator.

In order to “pierce the corporate veil” and hold the parent company liable for the actions of its subsidiary, the parent must have exercised control over, participated, or had an active role in the operations of the polluting facility of the subsidiary.¹⁰⁰

Further, severe misuse of the corporate form may justify piercing the corporate veil and holding the parent corporation liable.

The Court concluded that to determine “parent” liability the focus should be on the relationship between the parent and the subsidiary facility.

4. “Successor Corporation” Liability

Private and governmental plaintiffs have argued that “successor liability” should be imposed on corporations that have merged or consolidated with corporations that are PRPs. Since CERCLA does not specifically address successor liability, the federal courts have applied general rules of corporate law via state law or through federal common law.

However, every federal court that has examined the issue of successor liability has

⁹⁷ In the words of the Supreme Court, “Here of course we may again rue the uselessness of CERCLA's definition of a facility's ‘operator’ as ‘any person ... operating’ the facility.” *United States v. Bestfoods*, 524 U.S. 51, 66 (1998)(hereafter *Bestfoods*), discussed below in text..

⁹⁸ “To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.” *Bestfoods*, *supra*, 524 U.S. at 66-67. In short, almost anyone can be an “operator.” *North Shore Realty*, 759 at 1052 (stockholder who managed corporation held personally liable as operator).

⁹⁹ *Bestfoods*, 524 U.S. 51.

¹⁰⁰ *Bestfoods*, 524 U.S. at 55.

concluded Congress intended it to apply in the context of CERCLA.¹⁰¹

5. “Transporter” Liability

A transporter is one who accepts or has accepted hazardous substances for transport to a disposal or treatment facility where there is a release or threatened release of hazardous substances.¹⁰² For practical purposes under CERCLA liability, a transporter only becomes a PRP if it selects the treatment facility for the outbound waste. Thus, if transporters simply transport waste to a facility of the generators choosing the transporter will not incur CERCLA liability.

6. “Arranger” Liability

An arranger is a person who by contract arranges for the disposal or treatment (or who arranges with a transporter to transport materials for disposal or treatment) of hazardous substances that are owned by the arranger or another entity.¹⁰³ For arranger liability, the federal courts look to the underlying obligation and examine the facts on a case by case basis.

The Eighth Circuit in 1989 extended arranger liability to parties who did not intend to dispose of hazardous substances.¹⁰⁴ The Court found a manufacturer of a pesticide could be held liable for CERCLA response costs at a facility owned by a formulator who combined the manufacturer’s pesticide with other ingredients to create a final product for the manufacturer to sell. The court ruled entities that supply raw materials to another and own or control the product being formulated at the site when the generation of hazardous substances is possible in the production process, can be liable as an “arranger for disposal.”¹⁰⁵

In many cases of claimed “arranger” liability, the question is whether the defendant has arranged to sell goods or participated in some way in the activity that produced hazardous wastes. A seller will claim that its purpose was only to sell goods and not dispose of waste. The courts analyze the facts of the transaction or the formulation or other activity that resulted in a release, and determine whether “arranger” liability exists.¹⁰⁶

VII. Defenses to CERCLA Liability

¹⁰¹ See Cooke & Davis, *supra*, §14.01[4][c][iii][B], pp. 14-108-14-116 for an exhaustive analysis of Successor Corporation Liability. See also *New York v. National Service Industries, Inc.*, 460 F.3d 201, (2nd Cir. 2006) (federal common law governs successor liability under CERCLA) and *Smith Land & Improvement Corp v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988) (state common law governs successor liability).

¹⁰² Switzer & Bulan, *supra*, §5.4, p.32.

¹⁰³ See Switzer & Bulan, *supra*, §5.5, p. 33.

¹⁰⁴ *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir. 1989).

¹⁰⁵ See Switzer & Bulan, *supra*, §5.6 p. 34.

¹⁰⁶ See, e.g., *South Florida Water Management Dist. v. Montalvo*, 84 F.3d 402 (11th Cir. 1996)(cropduster and pesticide formulator sued farmers for contribution, using “arranger” liability theory; court held that farmers had not “arranged for disposal.”) And, see *United States v. Wedzeb Enters., Inc.*, 809 F. Supp. 646 (S.D. Ind. 1992) (question of fact whether sale of PCB laden capacitors was true or sham transaction).

Section 107(b)(3) provides three statutory defenses to CERCLA liability: 1) act of God; 2) act of war; and 3) act or omission of a third party.¹⁰⁷ All three of these defenses are affirmative defenses, meaning the defendant bears the burden of proof.¹⁰⁸

The first two have not amounted to much since 1980, but amendments to the third one are the basis for the brownfields reforms beginning in 2002.¹⁰⁹

A. Act of God & Act of War Defenses

To date, the Act of God defense has never been successfully asserted by a defendant in a reported CERCLA case; rainstorms, floods, hurricanes, *etc.* are all foreseeable events and hazardous substances releases are preventable and so are not Acts of God.¹¹⁰

The act of war defense has had a lot of attention, primarily for facilities that the U.S. used during WWII to manufacture munitions and fuels.¹¹¹

B. Act or Omission of a Third Party -- Section 107(b)(3)

The most successful defense, and the one that is the basis for protections for developers who seek to redevelop brownfields property is Section 107(b)(3). An owner or operator is not liable under CERCLA if the release was caused solely by the act or omission of a third party – to whom they are not contractually related.¹¹² The definition of a contractual relationship includes

¹⁰⁷ At times, defendants have asserted equitable defenses, which have generally been unsuccessful. See *Western Properties Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 692-693 & fn. 66 (collecting cases).

¹⁰⁸ See *United States v. Price*, 577 F. Supp. 1103, 1114 (D.N.J. 1983).

¹⁰⁹ In addition to the enumerated defenses, private parties have continue to argue that even if Section 107(a) makes them liable parties, it is a denial of due process and an unconstitutional taking to hold them retroactively liable for conduct prior to the effective date of CECLA namely, December 11, 1980. In rejecting this inquiry, the majority of federal courts have ruled that Section 107(a) does allow for retroactive liability and that it is constitutional. However, defendants continue to raise the retroactive liability issue because the Supreme Court has to yet to resolve the issue. *United States v. Alcan Aluminum Corp.*, 49 F.Supp.2d 96 (NDNY 1999)(retroactive application of CERCLA to impose clean-up cost liability did not violate takings clause, due process clause or ex post facto clause); *and see* Cooke & Davis, *supra*, §14.01[8][c][iv], pp. 14-176.57.

¹¹⁰ See Cooke & Davis, *supra*, §14.01[8][b][ii], pp. 14-176.20; *United States v. Stringfellow*, 661 F. Supp. 1053 (C.D. Cal. 1987) (heavy rainfall was not the kind of exceptional natural phenomenon to which the act of God exception applies) and *United States v. Alcan Aluminum Corp.*, 892 F. Supp. 648, 658 (M.D. Pa. 1995) (corporation liable for contaminating river due to hurricane, and Act of God defense not applicable, because because (1) “no reasonable fact finder could conclude that Hurricane Gloria was the sole cause of the release and the resulting response costs,” (2) “the effects of Hurricane Gloria could have been prevented or avoided by the exercise of due care or foresight,” and (3) “heavy rainfall is not the kind of exceptional phenomenon to which the Act of God exception applies.”).

¹¹¹ The act of war defense has been successful in only one reported decision, *United States v. Shell Oil Co.*, 13 F. Supp. 2d 1018, 1030 (C.D. Calif. 1998)(aviation gas wastes in landfill). See also Cooke & Davis, *supra*, §14.01[8][b][ii], pp. 14-176.20 and Switzer & Bulan, *supra*, §6.3 p.41.

¹¹² 42 U.S.C. §9607(b)(3).

deeds, land contracts, or other instruments transferring title.¹¹³ In addition, the defendant has the burden of proof that it exercised due care and was not negligent with respect to the hazardous substances at issue.¹¹⁴

As already noted, SARA in 1986 added the concept of “innocent purchaser” to the “third party defense.”¹¹⁵ And, the Brownfields Act in 2002 added the “*bona fide* prospective purchaser,” and the “contiguous property owner” to the persons who could be protected from CERCLA liability.

C. Innocent Landowner (“ILO”) Defenses

Originally in CERCLA, the third party defense protected those who owned property on which hazardous wastes had been released, if they were “innocent landowners” (*e.g.*, victims of midnight dumpers).¹¹⁶ SARA extended the due care defense in Section 107(b)(3) to innocent purchasers. To plead this defense, a defendant must establish that it “did not know and had no reason to know” of a disposal of any hazardous substance when it acquired the facility, or that it acquired the facility “by inheritance or bequest.”¹¹⁷ To meet the former condition, the defendant must have “undertaken at the time of acquisition, *all appropriate inquiry* (“AAI”) into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability.”(*Emphasis added.*)¹¹⁸

[For the discussion of the *bona fide* prospective purchaser (“BFPP”) and contiguous property owner (“CPO”) defenses/exemptions, see below.]

VIII. Recovery of Cleanup Costs by Private Parties -- Sections 107 & 113 and the *Aviall* and *Atlantic Research* Decisions

A. The Problem of Getting Others to Contribute to Cleanup Costs.

¹¹³ 42 U.S.C. §9601(35).

¹¹⁴ 42 U.S.C. §9607(b)(3).

¹¹⁵ 42 U.S.C. §9607(b)(3).

¹¹⁶ The third party defense is that an owner of real property shall not be held liable when the release or the threat of a release is caused solely by “an act or omission of a third party, other than an employee or agent of the defendant, other than one whose act or omission occurs in connection with a contractual relationship existing directly or indirectly with the defendant...” In order to invoke this defense, the defendant must additionally be able to establish, by a preponderance of the evidence, that, “(a) he exercised due care with respect to the hazardous substance [or petroleum] concerned taking into consideration the characteristics of such hazardous substance [or petroleum], in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions...” 42 U.S.C. §9607(b)(3).

¹¹⁷ 42 U.S.C. §9601(35)(A)(i) and (iii).

¹¹⁸ 42 U.S.C. §9601(35)(B).

PRPs who spend money remediating facilities often seek to recover at least a share of their costs from other PRPs. Until 2004 these parties filed contribution or cost recovery suits under Sections 107(a)(4)(B) and 113(f)(1) of CERCLA. Like many areas of CERCLA, the precise difference between these sections of the statute was unclear. It took several years of litigation in federal appeals courts to clarify the answer.

Before SARA some federal courts recognized a right of a PRP to sue for costs using Section 107(a).¹¹⁹ The language of Section 107(a)(4)(A) and (B) provided that “covered persons” are liable for:

- (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
- (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan[.]¹²⁰

Congress added rights of contribution in SARA by adding §113. Specifically, Section 113(f)(1) authorized lawsuits for contribution. It states,

Any person may seek contribution from any other person who is liable or potentially liable under [§107(a)], during or following any civil action under [§ § 106 or 107(a)].

Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law.

In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.

Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [§§106 or 107]. [Emphasis and re-formatting supplied.]¹²¹

Section 113 clarified and confirmed a right to contribution.¹²² The Eighth Circuit has explained that the federal courts after 1986 favored §113 contribution, with its constraints, over §107 with its authorization for recovery of “all necessary costs.”¹²³

The result has been that §107 lawsuits were restricted to plaintiffs who could assert one of the statutory defenses to their own liability (*e.g.*, “victims of midnight dumpers,” property owners who suffered from Acts of God, or from Acts of War, or those who qualified for the ILO, BFFP, or CPO defenses described above).

¹¹⁹ For this history, see *Atlantic Research Corp. v. United States* F3d. 827, (8th Cir., 2006), *cert granted*.

¹²⁰ 42 U.S.C. §9607(a)(4)(A)-(B).

¹²¹ 42 U.S.C. §9613(f)(1).

¹²² *Atlantic Research, supra*, citing *United Technologies Corp. v. Browning-Ferris Industries, Inc.*, 33 F.3d 96, 100 (1st Cir. 1994).

¹²³ *Atlantic Research, supra*, at 4-5.

Over the 20 years since SARA, the lower federal courts generally assumed that §113 contribution lawsuits were available to anyone, whether found liable according to §107 or not. They had not counted on Justice Thomas and an adherence to the literal language of the statute.

B. The Aviall Decision

The *Aviall* decision in 2004 sent a major shockwave to PRPs who had engaged in voluntary cleanups.¹²⁴ The Supreme Court ruled that the right of contribution from PRPs under Section 113(f)(1) only applies when a cleanup has been compelled by USEPA.

If the USEPA has not instigated a "civil action" under Section 106 or Section 107(a), the party who cleaned the property could not recover under Section 113.¹²⁵ In other words, a PRP who voluntarily cleaned a property could not sue another PRP under Section 113.¹²⁶

And, perhaps more importantly, the Court did not address whether the same rationale applied to Section 107. One commentator noted that, the Court "put every aspect of CERCLA contribution up for grabs."¹²⁷ The decision created widespread uncertainty as to whether any costs could be recovered if a cleanup was not mandated.

In *Aviall*, the defendant Cooper owned 4 sites where it repaired aircraft engines. Cooper sold the business to Aviall, who discovered that both of them had contaminated the property. Aviall sold the property but agreed by contract to retain liability for the contamination. Aviall cleaned up the properties, under threat of lawsuit by a state environmental agency. Aviall used Section 113 to sue Cooper for contribution to the cleanup costs.

The federal trial court dismissed the CERCLA claim, but the Fifth Circuit reversed, ruling that Section 113(f) authorizes CERCLA contribution lawsuits. The Supreme Court reversed. Aviall also argued that if it could not sue using Section 113, it should be able to sue using Section 107(a) for recovery of cleanup costs. The Court declined to address this argument.

The *Aviall* decision lead PRPs to be cautious before they engaged in voluntary cleanups.¹²⁸ The ruling was a warning signal to these parties. Once Section 113 was not a remedy for contribution for parties who voluntarily cleaned up properties, there was considerable uncertainty as to the scope of Section 107. Would Section 107 provide a remedy for parties who cleaned up hazardous waste sites?

¹²⁴ *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004).

¹²⁵ The Court declined to rule on the nature of a "civil action" because it was "undisputed that Aviall has never been subject to such an action" *Aviall, supra*, at 158.

¹²⁶ *Aviall, supra*, 543 U.S. at 165-166, quoted in *Atlantic Research, supra*, at 6.

¹²⁷ Steinberg, M., "Cloudy With a Chance of Contribution: Life After *Cooper Industries*, 2 *Superfund & Natural Resources Damages Newsletter*, No. 1, Aug. 2005; ABA Section of Environment, Energy, and Resources.
<http://www.abanet.org/enviro/committees/superfundnatresdamages/newsletter/archiveslist.html>

¹²⁸ See Cooke & Davis, *supra*, §16.01[2], pp. 16-8.

The Third Circuit in 2006, for instance, held that §113 provided the exclusive remedy for parties seeking reimbursement under CERCLA and, as such, *Aviall* had foreclosed that option.¹²⁹

C. *The Atlantic Research Decision*

Three years later the U.S. Supreme Court clarified its holding in *Aviall*, and held unanimously that Section 107(a)(4)(B) did provide a private right of action.¹³⁰ The Court gave relief to those who cleaned sites prior to *Aviall* and had depended on cost recovery from other PRPs.

Atlantic Research had leased property at a federally-owned site, where it retrofitted rocket motors for the United States. It removed propellant from the motors with a high pressure water spray. When these pieces were burned, residue from burnt rocket fuel contaminated the site's soil and groundwater. Atlantic Research cleaned up the contamination at its own expense and then sought to recover some of its costs from the United States pursuant to sections 107(a) and 113(f) of CERCLA.¹³¹

Following the *Aviall* decision, Atlantic Research amended its complaint to seek relief under section 107(a) and federal common law. The United States moved to dismiss on the grounds that section 107(a) does not allow PRPs to recover costs. The District Court agreed and dismissed the case.

The Eight Circuit reversed, ruling that section 113(f) does not provide the exclusive means by which PRPs may recover cleanup costs. In doing so, it joined with decisions made by the Second and Seventh Circuits. Atlantic Research petitioned for cert. review by the Supreme Court, and it was accepted.

In Atlantic Research's appeal to the Supreme Court, 38 states joined as *amicus curiae* in support of the company. The states favored allowing more cost-recovery suits. At oral argument, Washington Deputy Solicitor General Jay Geck argued that lawsuits, as opposed to settlements, are a much more effective way to clean up contaminated sites.¹³²

The U.S. Supreme Court agreed that 107(a) provided a cause of action to Atlantic Research for cost recovery against the United States. Writing for a unanimous court, Justice Thomas relied on principles of statutory interpretation. The government claimed that the remedy was available only to "innocent" parties. The Court concluded that such a view would make the provision a "dead letter." Virtually all voluntarily clean ups are induced by PRPs given the broad liability that CERCLA imposes.

The Court also rejected the government's argument that permitting one cause of action but not the other would create "friction" between them. Section 107(a), for instance, has a longer

¹²⁹ *E.I. Dupont de Nemours and Co. v. United States*, 460 F. 3d 515 (3d Cir. 2006), joined with and abrogated in *Atlantic Research Corp. v. United States*, 551 U.S. ____, 127 S.Ct. 233, __ (2007).

¹³⁰ *U.S. v. Atlantic Research Corp.*, *supra*.

¹³¹ *U.S. v. Atlantic Research*, *supra*.

¹³² *U.S. v. Atlantic Research*, No. 06-562, Oral Argument Transcript, April 23, 2007, pg. 46, lns. 8-10, available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-562.pdf

statute of limitations period than Section 113(f). The Court distinguished between “contribution” and “cost-recovery” as a rationale explanation why Congress would distinguish the remedies. While the right of contribution is “contingent upon an inequitable distribution of common liability among liable parties,” cost recovery “allows a party to recover...without establishing liability to a 3rd party.” The provisions are “complementary” because they distinguish between two distinct procedural circumstances.

The Court gave much-needed clarification to parties who clean up brownfields and seek reimbursement. The election between Section 107(a) or Section 113(f) will now be determined by whether or not an entity has been mandated to clean up a property or chooses to engage in a voluntary cleanup.

D. Contribution Protection and Covenants Not to Sue – Sections 113(f) & 122(f).

Many CERCLA lawsuits brought by USEPA are settled with a consent decree. The key benefit of consent decrees is protection of the private party from contribution lawsuits, due to §113(f)(2).¹³³ Another effect of *Aviall* is that the incentive of contribution protection is not available for settlements of §107 claims for cost recovery.¹³⁴

E. Private Cost Recovery & Contribution – “Equitable Factors” and the Section 107 vs. Section 113 Question

A §107 claim can be initiated at any time between the date *any costs are incurred* up to the date three years after a removal action is completed or construction begins for a remedial action.¹³⁵

A §113 claim, after *Aviall*, allows a PRP who is being sued under §106 or §107 to seek contribution from any person also liable under §§106 or 107.¹³⁶

Thus, Section 113(f) allows PRPs to sue other liable parties to for contribution to remediation costs.¹³⁷

¹³³ 42 U.S.C. §9613(f). In addition to protection from contribution lawsuits, USEPA has authority in §122(f) to enter covenants not to sue, so a settling PRP can “buy” protection from future claims for cleanup.

¹³⁴ *Aviall Services, Inc. v. Cooper Industries, LLC*, No. 3:97-CV-1926-D, Slip Op. at 7, 2006 WL 2263305 (N.D. Tex. Aug. 8, 2006).

¹³⁵ 42 U.S.C. §9613(g)(2). In fact, many private cost recovery lawsuits are filed early, as soon as the plaintiff takes the first steps to comply with the NCP.

¹³⁶ The pre- and post-*Aviall* world is stark. As explained in *Atlantic Research, supra* at 3, “In the pre-*Aviall* analysis, §113 was presumed to be available to all liable parties, including those which had not faced a CERCLA action. [Citations omitted.] Accordingly, most courts concluded liable parties could not use §107.[Citations omitted.]”

¹³⁷ *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 350 (6th Cir. 1998) (“[c]laims by PRPs...seeking cost from other PRPs are necessarily acts for contribution, and are therefore governed by the mechanisms set forth in §113(f)”; *OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d. 1574, 1582 (5th Cir. 1997) (“we hold that section 113(f) contribution actions may only be brought by persons who

Another significant aspect of §113(f) claims is the use of “appropriate equitable factors.” In other words, when §113(f) was enacted with SARA in 1986, the principle of allocating response costs “using such equitable factors as the court determines are appropriate” was established.

And, of course §107 allows 100% cost recovery, but as the Eighth Circuit points out, while the §107 language allowing recovery of “any other necessary costs of response” may suggest “full recovery,” “they do not compel it.” The Circuit suggests that a 100% cost recovery claim using §107 would be countered by a claim for contribution using §113.¹³⁸

As noted, a Section 113(f) claim only allows a PRP to seek a defendant’s equitable share of the response costs.¹³⁹ What should be that share?

Many courts have used the so-called “Gore factors” to apportion costs. The factors are:

- a) The amount of the hazardous waste involved;
- b) The degree of toxicity of the hazardous waste involved;
- c) The degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
- d) The degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
- e) The degree of cooperation by the parties with federal, state, or local officials to prevent any harm to the public health or the environment.¹⁴⁰

These factors still are likely to be used whenever PRPs have been sued and then sue other PRPs for contribution, using §113 for federal court jurisdiction.

IX. The Brownfields Act of 2002 -- The Continuing Effects on Real Estate Redevelopment

As explained above, the 2002 Brownfields Act modified the definition of “innocent landowner” (ILO) in §101(35), and added an exemption for *bona fide* prospective purchaser (BFPP) in §107(r)(1) and §101(40) and an exemption for contiguous property owners (CPOs) in §107(q).¹⁴¹

are liable or potentially liable under CERCLA.”) *See also Key Tronic Corp v. United States*, 511 U.S. 809, 814-15 (1994).

¹³⁸ *Atlantic Research, supra* at p. 8.

¹³⁹ *See Centerior Services*, 153 F.3d at 348 (“In actions seeking contribution, unlike those for joint and several cost recovery, the burden is placed on the plaintiff to establish the defendant’s equitable share of the response costs.”) “Section 113’s right is subject to a three-year statute of limitations; plaintiffs can recover only costs in excess of their equitable share, and may not recover from previously-settling parties. §113(f)(1), (f)(2), (g)(3).” *Atlantic Research, supra* at p. 3.

¹⁴⁰ *See* H.R. Rep. No. 253 (II), 99th Cong., 1st Sess. 1, 19 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 3042.

¹⁴¹ 42 U.S.C. §§9601(35), 9607(r)(1), 9601(40), 9607(q).

Arguably, the most significant amendment in the 2002 Brownfields Act for those seeking to redevelop contaminated property – and all persons who seek to buy real estate -- was establishing the “all appropriate inquiry” (“AAI”) standard.

Congress did this by amending the definition of “innocent landowner” in §101(35)(B).¹⁴² Congress amended §101(35)(B), to address “reason to know” [of contamination].

The statutory language includes a series of tests to demonstrate “all appropriate inquiry” for commercial property.¹⁴³ (The 2002 Brownfields Act also directed USEPA to issue regulations defining “all appropriate inquiry.” USEPA’s regulations become effective November 1, 2006.¹⁴⁴)

The statutory language for “all appropriate inquiry” is:

“(B) Reason to know.—

(i) All appropriate inquiries.— To establish that the defendant had no reason to know of the matter described in subparagraph (A)(i), the defendant must demonstrate to a court that—

(I) on or before the date on which the defendant acquired the facility, the defendant carried out all appropriate inquiries, as provided in clauses (ii) and (iv), into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices; and

(II) the defendant took reasonable steps to—

(aa) stop any continuing release;
(bb) prevent any threatened future release; and
(cc) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance.¹⁴⁵

To repeat, the *bona fide* prospective purchaser and the contiguous property owner are the two characters that join the innocent landowner in acquiring property without acquiring liability for abandoned hazardous wastes.

A. Bona Fide Prospective Purchaser (“BFPP”)

¹⁴² 42 U.S.C. §9601(35)(B).

¹⁴³ For residential property, the 2002 Brownfields Act provided: “Site inspection and title search.— In the case of property for residential use or other similar use purchased by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this subparagraph.” 42 U.S.C. 9601(35)(B)(v).

¹⁴⁴ On November 1, 2005, the USEPA published its final AAI Rule at 70 Fed. Reg. 66070, titled “40 CFR Part 312, Standards and Practices for All Appropriate Inquiries.”

¹⁴⁵ 42 U.S.C. §9601(35)(B).

Added by the Brownfield Act, a “*bona fide* prospective purchaser” (BFPP) of contaminated property is exempt from CERCLA liability if the BFPP

- performed due diligence before acquiring the property,
- acquired the property after enactment of the *bona fide* prospective purchaser provision (*i.e.*, after 2002), and
- does not impede the performance of any response action taken on the property.¹⁴⁶

Moreover, the USEPA can impose a lien upon any property to recover its response costs if the property value has increased as a result of a clean up of the site by the government.¹⁴⁷

B. Contiguous Property Owner (“CPO”)

The owner of a contiguous property contaminated by or threatened with contamination from an adjacent property is not considered to be an owner or operator of a contaminated facility as defined by Section 107(a)(1) or (a)(2).¹⁴⁸ However, the contiguous property owner (“CPO”)

- cannot have owned or operated the contaminated property,
- the contamination from the adjacent property must constitute the sole premise for the CPO’s liability and
- the CPO must establish he, she, or it did not cause, contribute, or consent to the release or threatened release of a hazardous substance.¹⁴⁹

C. The All Appropriate Inquiry (“AAI”) Rule

Congress established the all appropriate inquiry rule (“AAI”) in SARA. But, Congress did not define specific standards for AAI in SARA. Instead, it passed this “hot potato” to USEPA. It required USEPA to promulgate regulations specifying what specific standards and practices would constitute an AAI.¹⁵⁰ (Until USEPA delineated a final rule on specific standards for an AAI, Section 101(35)(B) provided general interim standards for what constituted an AAI for nonresidential properties purchased before May 31, 1997.¹⁵¹) Congress also divided ILOs into categories, depending on when they went into title (“closed escrow”) on a property.

1. Before May 31, 1997

For a buyer to demonstrate it meets the AAI standard for properties purchased before May 31, 1997, the buyer must prove that he, she or it,

¹⁴⁶ CERCLA §107(r), 42 U.S.C. §9607(r). *See also* §101(40), 42 U.S.C. §9601(40), which describes the requirements for a *bona fide* prospective purchaser.

¹⁴⁷ 42 U.S.C. §9607(r)(2).

¹⁴⁸ *See Cooke & Davis, supra*, §14.01[8][b][vi], pp. 14-176.37.

¹⁴⁹ 42 U.S.C. §9607(q)(1)(A), (B).

¹⁵⁰ 42 U.S.C. §9601(35)(B)(ii).

¹⁵¹ 42 U.S.C. §9601(35)(B).

- a) Had insufficient specialized knowledge or experience,
- b) Paid full price as if the property were clean,
- c) Looked at commonly known or easily found information about the property.
- d) Contamination was not obvious or suspected, and
- e) Could not have found the contamination with an appropriate inspection.¹⁵²

2. *After May 31, 1997*

For properties purchased on or after May 31, 1997, Section 9601(35)(B)(iv)(II) authorizes buyers to satisfy the requirements of the American Society for Testing and Materials (“ASTM”) ASTM E1527-00 (current interim standard for AAI investigations) to conduct a proper AAI.¹⁵³

3. *After November 1, 2006*

As noted above, on November 1, 2005, USEPA issued a final rule detailing the standards and practices for qualifying for AAI for the ILO defense.¹⁵⁴ The final rule became effective November 1, 2006, and until then parties could follow either the final rule or the ASTM standard.

After acquiring title, a property owner must “maintain” its ILO defense by:

- Complying with land use restrictions/institutional controls.
- Taking “reasonable steps” as to any releases or possible releases of hazardous substances.
- Cooperate fully, with assistance and access, to all persons who are authorized to do response actions or restore natural resources.
- Comply with all requests for information and administrative subpoenas.
- Provide all legally required notices.¹⁵⁵

D. Risk Based Cleanups

Traditionally, remediation of contaminated properties was a system in which wastes were removed, destroying or reducing their toxicity (sometimes by disposing of them in new controlled

¹⁵² 42 U.S.C. §9601(35)(B)(iv)(I).

¹⁵³ 42 U.S.C. §9601(35)(B)(iv)(II).

¹⁵⁴ On November 1, 2005, the USEPA published its final AAI Rule at 70 Fed. Reg. 66070, titled “40 CFR Part 312, Standards and Practices for All Appropriate Inquiries.” See 40 CFR §§312.1 – 312.31.

¹⁵⁵ 42 U.S.C. §9601(35)(A)-(B).

sites), or by sealing them in place. Properties would be restored to full and unrestricted use.

The costs of restoring property to its original condition has come to be disfavored as more is learned about the costs of curing the “last little bit of contamination.” The last 10% of a complete cleanup can be 90% of the costs. In other words, not all property needs to be restored to a condition that it will grow food crops.

Since the early 1990s, there has been a shift in thinking away from requiring cleanups to “background standards” and towards “risk-based corrective actions” (“RBCA”). The idea is that if the pathways to exposures of humans and the environment are controlled, the enormous costs of removal are not incurred while human health and the environment are protected.

To evaluate the risk, the first step in the RBCA process is a risk assessment that considers the character and “geometry” (lateral and vertical extent) of contamination, the exposure pathways, and the actual potential for exposure.

The second step is to couple *in situ* engineered controls and necessary removals with institutional controls.

The final step is to actually complete the construction of the engineered controls (and complete any removals) and make the institutional controls an enforceable part of the legal title to the property.

E. Institutional Controls

Legally enforceable constraints on the use of property – and annual maintenance requirements – can be used to limit exposure to residual contamination and thus ensure the effectiveness of risk-based cleanups. These limitations on use are called institutional controls.¹⁵⁶ Institutional controls are

"legal or physical restrictions or limitations on the use of, or access to, a site or facility to eliminate or minimize potential exposures to chemicals of concern or to prevent activities that would interfere with the effectiveness of a response action."¹⁵⁷

Institutional controls include easements, restrictive covenants, equitable servitudes, zoning controls, conditions in building permits, bans on well-drilling or use for crops or consumable fruit trees, contractual documents such as consent decrees recorded against titles, and other legal devices.¹⁵⁸

Institutional controls can be grouped into three types,

¹⁵⁶ Also, called activity and use limitations (“AULs”), or “deed restrictions” or “land use covenants.” See American Society for Testing and Materials, *Standard Guide for the Use of Activity and Use Limitations, Including Institutional and Engineering Controls* (E 2091-00) (2000).

¹⁵⁷ *Id.*

¹⁵⁸ Edwards, Amy, “An Overview of Institutional Controls,” *Implementing Institutional Controls at Brownfields and Other Contaminated Sites*, p.4 (ABA Section of Environment, Energy, and Resources 2003).

- proprietary controls (restrictive covenants, deed restrictions, and other property-based restrictive forms),
- governmental controls (zoning regimes, restrictions on well-drilling and groundwater use, *etc.*), and
- informational documentation (Internet site registries,¹⁵⁹ educational materials, *etc.*).¹⁶⁰

Because of the variation in real property law throughout the States, the National Commission on Uniform State Laws in 2003 issued the Uniform Environmental Covenants Act (“UECA”).¹⁶¹

The UECA has two purposes:

- (i) land use restrictions to control exposures to contamination will be recorded and enforced as real property servitudes, and
- (ii) establishing a clear and uniform process to create, record, modify, enforce, and terminate such restrictions.¹⁶²

As of August 2007, 18 states and the District of Columbia and the Virgin Islands have adopted UECA. In 2 other states it was introduced in 2007.¹⁶³

UECA has been criticized as shutting out parties other than owners and PRPs from participating in designing and creating land use restrictions, limits the discretion of overseeing health and environmental protection agencies, and the restrictions lack citizen enforcement provisions.¹⁶⁴

X. Conclusion

As experienced counsel know, CERCLA is not a model of statutory clarity. The federal courts have been left with the task of interpreting key provisions of this national program to clean up abandoned hazardous waste facilities. Sections 106 and 107 give USEPA broad authority to deal with releases of hazardous substances into the environment. Section 107 defines which parties can be found liable and the available defenses for a PRP. And, so far the retroactive liability aspect of CERCLA has withstood attacks that it constitutes a denial of due process and is an unconstitutional taking.

¹⁵⁹ See <http://www.lucs.org/links.cfm?id=23> for a listing of State site registries.

¹⁶⁰ Ruiz-Esquide, A., Comment, The Uniform Environmental Covenants Act – An Environmental Justice Perspective, 31 *Ecology Law Quarterly* 1007 (University of California, 2004).

¹⁶¹ <http://www.environmentalcovenants.org/ueca/DesktopDefault.aspx?tabindex=1&tabid=86>

¹⁶² *Id.*

¹⁶³ http://www.environmentalcovenants.org/ueca/UECAnews/UECA_colormap.pdf Note: California, New York, Texas, and Illinois apparently have not adopted UECA.

¹⁶⁴ The Uniform Environmental Covenants Act – An Environmental Justice Perspective, *supra*.

The effectiveness of this national program to include all liable parties has been re-shaped by the *Aviall* and *Atlantic Research* decisions. The *Aviall* decision only allows PRPs to bring a §113 contribution action after they have been sued under CERCLA. However, *Atlantic Research* affirmed the view that §107(a)(4)(B) will provide private parties a remedy against PRPs for voluntary cleanups. Finally, the AAI Rule will lead to more environmental due diligence – and costs -- in purchases of contaminated properties.