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HIGHLIGHTS

The most noteworthy decisions this month are the following:

• In *GenCorp, Inc. v. Olin Corporation*, Nos. 03-3019/3211 (6th Cir. November 22, 2004), Judge Sutton, writing for the Sixth Circuit Court of Appeals, affirmed a judgment of contribution liability for a company that was integrally involved in the development of a supplier's facility and disposal of wastes therefrom. The facility and its waste disposal were run by a committee, on which both parties had equal representation, and the contribution defendant was deeply involved in the operations at its supplier's facility. Although it may not have legally owned or possessed the hazardous substances, this participation qualified as constructive ownership and possession.

The action was not time-barred, because the long past cleanup actions were not remedial in nature and did not trigger CERCLA's limitations period. The court relied upon the short duration of the project and its relatively low cost and stressed that it took place before the remedial investigation and feasibility study or EPA administrative order for the site.

• In *Sierra Club v. Seaboard Farms Inc.*, No. 03-6104 (10th Cir. October 28, 2004), Judge Henry, writing for the Tenth Circuit Court of Appeals, reversed a district court opinion and held that emissions from multiple buildings on a single farm could be aggregated as a single facility, for purposes of section 103 reporting rules. Although one part of the statutory definition of facility suggested that each building was a separate discrete facility, an alternative part of the definition made it clear that a site at which hazardous substances were deposited was also a facility. Giving CERCLA its appropriate remedial construction, the entire farm could be considered a facility under the second approach, meaning that it had to aggregate its emissions from

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Let's Talk Dirty: How Government Regulators Have Helped and Hindered Redevelopment of Contaminated Property

By

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Two significant impacts on redevelopment have been the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (Brownfield Amendments) and the burgeoning of risk- based cleanups and their reliance on institutional controls. This paper looks at the potential for federal CERCLA liability relief under the Amendments and the significant hurdles to qualify for the relief. In addition, it looks at the problems with the enforcement on institutional controls and the attempts of the model Uniform Environmental Covenants Act (UECA) to address these concerns.

Is There Really Liability Relief Under the Small Business Liability Relief and Brownfields Revitalization Act?

The Brownfields Amendments have provided some of the most significant statutory changes in potential Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) liability for owners, developers, and prospective purchasers of real estate. However, the ability to use the relief is limited and is burdened with complex requirements that may cause the unwary to lose the potential CERCLA liability defenses.

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Who Can Qualify for Liability Relief?

The Brownfield Amendments can potentially impact the CERCLA liability of three categories of property owners—innocent purchasers, contiguous property owners, and bona fide prospective purchasers (BFPP)—provided that the property owner meets the statutory criteria, which are discussed below.

Innocent Purchasers

The 1986 amendments to CERCLA added Section 101(35)[1] in an attempt to provide protection for "innocent landowners." Section 101(35) provided that if the defendant acquired real property after the disposal of hazardous substances, did not know, and had no reason to know about the hazardous substances on, in, or at the facility when it was acquired; the defendant is a government entity, who through its responsibilities acquired the facility; or, the defendant acquired the facility by inheritance or bequest that the defendant has a defense to CERCLA liability. In reality, parties often had problems establishing the defense.[2] The Brownfields Amendments expanded and attempted to make clear the specific standards that must be met to qualify for the defense by requiring that the innocent landowner must:

- provide "full cooperation assistance and facility access" to the person authorized to conduct response actions at the facility;

- comply with land use restrictions and not impede the effectiveness or integrity of institutional controls;

- make all appropriate inquiries to establish that he had no reason to know of the hazardous substances; and,

- take reasonable steps to stop any continuing releases, prevent threatened future releases and prevent or limit human, environmental, or natural resources exposure.[3]

Contiguous Property Owners

The circuits have split on whether passive migration of contaminates could impose liability with some courts holding that liability can attach due to passive migration, while others have declined to find liability due to passive migration.[4] The Brownfields Amendments provide that a person who owns real property that is contaminated by a release of a hazardous substance from property "contiguous to or otherwise similarly situated"[5] to property that the person does not own, will not be considered an owner or operator under CERCLA, and, thus, not liable if certain criteria are met. These criteria, which will be analyzed on a fact-specific basis, include:

- the person did not cause, contribute or consent to the release;

- the person or entity is not affiliated with any person who is liable for the release or is not the result of a reorganization of a potentially liable entity;

- the person takes reasonable steps to stop any continuing release, prevent future releases and prevent or limit human, environmental, or natural resources harm;

- the person provides full cooperation with persons authorized to conduct response actions;

- the person is in compliance with any land use restrictions and does not impede any institutional controls;

- the person is in compliance with any request for information or administrative subpoena issued by the EPA;

- the person provides all legally required notices with respect to the discovery of hazardous substances; and,

- at the time the person acquired the property he/she conducted all appropriate inquiry and did not have reason to know the property was or could be contaminated.[6]

It is important to note that in order for this provision to apply the landowner must, at the time it acquired the property, have conducted an appropriate inquiry and must not have reason to know of the contamination. This provision is intended to protect landowners that are the victim of pollution caused by their neighbor's actions.[7] If the purchaser has reason to believe that there is contamination then the purchaser would not qualify for the contiguous landowner relief, but could potentially qualify as a bona fide prospective purchaser.

Bona Fide Prospective Purchasers

The first two potential exemptions require that the purchaser of the property have no knowledge of the contamination at the time the property is acquired. However, with almost all Brownfields the purchaser has knowledge of some contamination, although the extent may not be clear. The bona fide prospective purchaser provision provides for a potential limitation on liability for a prospective purchaser whose liability is based solely on the purchaser's being an owner or operator of a facility, and provided that the purchaser does not impede the performance of a CERCLA action.[8] The Amendments define a "bona fide prospective purchaser" as a person, or tenant of that person, who acquires ownership of a facility after the date of enactment of the Brownfields Amendments, January 11, 2002, and by a preponderance of the evidence, establishes the following:

- disposal at the facility occurred prior to acquisition;

- before acquiring the property the person made all appropriate inquiry into previous ownership and uses of the facility in accordance with generally accepted practices and in accordance with the standards contained elsewhere in the Amendments and discussed below;

- the person provides all legally required notices with respect to hazardous substances found at the facility;

- the person exercises "appropriate care" with respect to the hazardous substances found at the facility by taking "reasonable steps" to (a) stop any continuing releases (b) prevent any threatened future releases (c) prevent or limit human, environmental or natural resource exposure to any previously released hazardous substance;

- the person provides full cooperation and access to the facility to those authorized to conduct response;

- the person is in compliance with any land use restrictions and does not impede the effectiveness or integrity of any institutional control;

- the person complies with any information request or administrative subpoena under CERCLA; and,

- the person is not potentially liable for response costs at the facility or "affiliated" with any such person through (a) direct or indirect familial relationship or (b) any contractual, corporate, or financial relationship (excluding relationships created by instruments conveying or financing title or by contracts for sale of goods or services).[9]

One immediate impact of the Brownfields Amendments was a change in EPA's position on Prospective Purchaser Agreements ("PPAs"). Since 1989, EPA has negotiated PPAs that provide a covenant from the EPA not to sue certain prospective purchasers of contaminated property for contamination that occurred prior to their acquisition of the property. In May 2002, EPA issued a memorandum stating that the Brownfield Amendments makes most PPAs unnecessary.[10]

How Does One Meet the Qualifying Criteria?

As noted above, the three classes of purchasers must meet certain criteria in order to qualify for the liability exemptions. EPA has stated that it intends to evaluate compliance with these criteria through a "careful, fact-specific analysis."[11] A close examination of the criteria indicates that it will not be a simple or easy process to determine compliance. Moreover, the qualifications are not limited to the time of the transaction, but there are continuing obligations that must be met to keep the defenses, once the initial criteria are met. An additional complication is that compliance is likely to be assessed long after closing pursuant to an enforcement or cost recovery proceeding. Therefore, it is important that the steps taken be appropriately documented.

The various criteria for compliance are discussed below.

"All Appropriate Inquiry" Criteria

The "all appropriate inquiry" criterion is applicable to all three potential defenses. What constitutes "all appropriate inquiry" varies depending upon when the property is acquired. It is important to remember that in all cases the inquiry must occur prior to the acquisition of the property. Therefore in situations where the parties agree to conduct certain investigations post-closing, the liability relief would not be an option.

The Brownfield Amendments direct EPA to promulgate regulations for satisfying the appropriate inquiry for future purchasers. Under the Amendments, EPA must consider several factors including:

- results of the inquiry of an environmental professional;

- interview with past and present owners, operators, and occupants regarding the potential for contamination;

- review of historical sources;

- searches for recorded environmental clean up liens;
- reviews of federal, state and local records;
- visual inspections for the facility and adjoining properties;
- specialized knowledge or experience on the part of the defendant;
- relationship of the purchase price to the value of the property, if the property was not contaminated;
- commonly known or reasonably ascertainable information about the property; and,
- The degree of obviousness of the presence or likely presence of contamination and the ability to detect contamination by appropriate investigation.

EPA conducted a negotiated rulemaking under the Federal Advisory Committee Act to prepare the all appropriate inquiry regulations. The committee was composed of representatives from cities, tribes, the federal government, mortgage bankers, developers, and environmental groups.[12] In November 2003, the group reached a consensus on the draft proposed regulations. EPA will now issue these proposed regulations for notice and comment.[13] The regulations would be applicable to any transactions after the promulgation of the regulations. There are several issues regarding the proposed regulations that were subject to significant debate and are likely to be controversial in the implementation. For example, there was significant debate on the qualifications for an environmental professional. The environmental professional must possess certain skills to evaluate the information to be reviewed under the regulations. The proposed regulations establish certain educational and experience requirements. Nevertheless, it is important that one select an environmental professional that not only meets the established criteria but also has the correct skills for the specific properties. For example, a site with complex hydrology may require an environmental professional with a different set of skills than a site where the major concern is surface soils. In almost all cases a variety of skills will be required to conduct the inquiry. The regulations also require an onsite inspection in all but a limited number of circumstances. Some sellers maybe unwilling to allow such inspections. The regulations require interviews with neighbors if the property is abandoned. This issue has been controversial because businesses frequently want to keep the transaction confidential until completed and the appropriate inquiry must be conducted prior to acquiring the property. The regulations are expected to be published for comment in March 2004 and are likely to be the subject of numerous comments. Even if the specific transaction is not subject to the exemption, the regulations are likely to influence industry standards for conducting assessments.

Prior to the promulgation of the regulations, the amendments provide for interim standards based on when the property was purchased. For property purchased on or after May 31, 1997,[14] the procedures from the American Society of Testing and Materials (ASTM) Standard E1S27-97 "Standard Practice for Environmental Site Assessment; Phase 1 Environmental Site Assessment Process" are listed in the statute as satisfying the requirements of all appropriate inquiry. The standard referenced in the statute is not the current ASTM standard for conducting Phase 1 assessment, but was a hold over from an earlier version of the bill and was not corrected. EPA has issued guidance stating that the current ASTM standard should be used. Second, there is an issue on how to measure compliance with the standard. In many instances, consultants will modify the ASTM standard to address specific situations based on local conditions. Is an investigation with such variances in compliance with the standard? Also, is it sufficient that the report states that the work is completed in compliance with the ASTM standard or is more objective proof required? Because this will not become an issue until someone attempts to assert the defense, we may not know the answer for some time. The uncertainty is another element to be considered as part of the environmental due diligence for the specific transaction.

Full Cooperation

This criterion is applicable to all three potential exemptions and requires the property owner to provide full cooperation and assistance to persons authorized to conduct response actions or natural resources restoration. Full cooperation includes providing access necessary for the installation, operation, and maintenance of any response action. Providing such access could result in the disruption of certain operations on-site. If the persons authorized to conduct the remediation are known at the time the deal is negotiated, the transaction documents should include an agreement on the conduct of the work such as requiring a good faith effort to place equipment so that it will not interfere with ongoing operations, prior notice of entry onto property by those conducting the work and the right to participate in discussions with regulators regarding the remediation actions directly affecting the property.

Compliance With Land Use Restrictions and Institutional Controls

Much like "full cooperation," compliance with land use restrictions and institutional controls are applicable to all three potential exemptions. The primary issue here is to understand the restrictions and their impact on future use of the property. If one knows what the land use restrictions and institutional controls will be, then it should be possible to design the redevelopment around the controls. The real problem is when the potential institutional controls and land use restrictions are unknown or change. EPA takes the position that in order to obtain the liability relief, one must comply with the land use restrictions even if the restrictions have not been properly implemented through the use of an enforceable institutional control.[15] For example, the land use restriction may be a remedy decision document, but the party may not have filed the restriction with the deed records. Moreover, one must be careful not to impede the effectiveness of the control. This includes physical development on the property, such as protection of an asphalt cap, and administrative actions such as the failure to give proper notice of a restriction. This is an ongoing obligation for the lifetime of the ownership of the property.

Did Not Cause, Contribute or Consent to a Release/Disposal Occurred Prior to Acquisition

The contiguous landowner exemption uses the phrase "did not cause, contribute or consent to a release" and the BFPP language states "disposal occurred prior to acquisition." CERCLA defines release as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injection escaping, leaching, dumping, or disposing into the environment.[16] For the contiguous property exemption EPA has stated that where there are multiple discreet releases on a property, some of which originated on the landowner's property and some of which migrated from other property, that the landowner may not meet the criteria for the contiguous property owner exemption. [17] Nevertheless, EPA has stated it may use its enforcement discretion and not pursue the landowner with the respect to the releases which migrated from another property.[18] In private party litigation, however, EPA's position could be used to argue that the contiguous property owner must not have contributed to any contamination of the property in order to qualify for the exemption.

For the bona fide prospective purchasers, the statutory language clearly states that disposal must have occurred prior to acquisition of the property. However, CERCLA defines disposal, as "the discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste or hazardous waste into or onto any land or water so that such solid or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters including groundwater."[19] Cases decided before the enactment of the Brownfields Amendments have split on whether passive activities create disposal.[20] The language in the statute requiring the bona fide prospective purchaser to stop any future releases supports the argument Congress meant active disposal; however, this is not clear. Moreover, EPA has stated in guidance that it does not believe that Congress intended to impose a burden on bona fide prospective purchasers to remove contaminated soil or extract groundwater.[21] Nevertheless, the potential outcome is not clear, especially in jurisdictions that previously have held that passive migration constitutes disposal under CERCLA. The issue is likely to be decided on a case-by-case

basis. It is important to remember that this is a continuing obligation that will extend past the closing if one chooses to seek the exemption.

Compliance With All Requests for Information

This criterion applies to both the contiguous property owners and the bona fide prospective purchaser and requires compliance with all requests for information issued by the President under CERCLA. A reasonable interpretation of the language would be to limit the requirement to only those requests related to the specific property at issue; however, the statutory language is "any request" and it could be interpreted to mean any request from EPA under CERCLA, even those completely unrelated to the specific property. EPA has stated that it believes this criterion requires compliance with any request for information under CERCLA[22] EPA's guidance has classified this as a continuing obligation.[23] EPA has not addressed the question of whether the assertion of defenses to the information request would be considered non-compliance with request for information. If one chooses to attempt to benefit from the requirement then those responsible for responding to such requests must be aware of the continuing obligations.

All Legally Required Notices

The criterion applies to both the contiguous landowner and the Bona Fide Prospective Purchaser and requires that one provide all legally required notices under federal, state and local laws. This would include notices such as those regarding the release of a substance[24] and the presence of underground storage tanks.[25] EPA has suggested that the regions may wish to obtain certification from property owners regarding compliance with this criterion.[26] EPA views this as a continuing obligation and is yet another in the list of obligations that the facility must comply with in order to qualify for the liability exemption.

No Affiliation With a Potential Liable Party

The no affiliation with a potential liable party criterion appears in both the contiguous property and BFPP potential exemptions. The term "affiliated with" is not defined in the regulations and could be interpreted to encompass a wide range of relationships. The intent of the criteria is to prevent a party from contracting away its CERCLA liability through a transaction with a related corporate entity or a family member. For example, a company's transfer of the property to a partially owned subsidiary would not qualify for the exemption as it would be viewed as a transaction to escape CERCLA liability. EPA has issued guidance stating that it "intends to be guided by Congress' intent of preventing transactions structured to avoid liability."[27]

Reasonable Steps

This criterion requires the parties to take reasonable steps to stop any continuing releases, prevent any future releases and prevent or limit human, environmental or natural resources exposure to any previously released hazardous substances. Clearly it means that any leaking drums would need to be removed and actions that would exacerbate the contamination, such as certain types of excavation, should be avoided. The more difficult issue is that of underground plumes. Under the CERCLA definition of release the passive migration of the contaminate could be considered a release, but does the property owner have to take steps to prevent that release? EPA has stated that it does not believe that Congress intended the parties, under normal circumstances, to be required to excavate contaminated soil or extract groundwater; however, it also does not intend to allow the landowner to ignore the dangers associated with the hazardous substances on the property.[28] Given these countervailing concerns the characterization of the contamination during the all appropriate inquiry will be critical. It appears that if the contamination is not migrating to an exposure pathway, the new owner will not be required to engage in active remediation. The new owner may be required to take action to block exposure pathways. This may be relatively simple such as covering contaminate soil with an asphalt cap parking lot or more complex such as installing a ground water extraction system to prevent contamination of a drinking water source.

Important Points To Remember Regarding the Limits of the Liability

While the 2002 Brownfields Amendments offer some potential liability relief, it is important to

remember the limits of that relief. First, as discussed above there are several criteria that must be met and within the specified time frames. For example, the All Appropriate Inquiry must be completed before ownership is acquired. Given the specifics of the inquiry in the draft consensus regulations this inquiry could take some time and the transaction will have to allow for this time. Moreover, many of the other criteria impose obligations on the owners of the property that continue for the life of the property ownership. Second, the amendments only provide CERCLA liability relief. There are a variety of state laws that also impose liability and the amendments do not address these programs. It is worth noting that many of the state law programs have liability protections provided that state law criteria are met. Since the state law criteria do not necessarily dovetail with the federal criteria, careful planning is required to meet both the state and federal criteria within the constraints of the deal. The value and costs of the potential CERCLA defenses will need to be evaluated on a site specific basis.

Now That I Have a Risked-Based Cleanup, How Do I Enforce Institutional Controls

The expansion of risk-based remediation plans[29] has resulted in an ever-increasing use of legal and physical restrictions on property. These are known under a variety of names including institutional controls, activity and use limitations, and land use controls.

What Is the Problem With the Current Enforcement of Institutional Controls?

Although various states have enforcement schemes for institutional controls,[30] those laws vary widely in scope and most apply only to state remediation programs.[31] For example, in many jurisdictions there are issues with recording the controls in a central place where all potential purchasers of the facility will have notice of the restrictions. In some locations the records clerk will not know how to file the instrument. In addition, there may be various limitations imposed under state common and statutory law that the statutes may not address. For example, doctrines such as adverse possession, abandonment, and waiver can extinguish some types of covenants. Likewise, covenants can be impaired by the issuance of a tax deed, foreclosure of a tax lien or state marketable title and dormant mineral interest laws. These provisions all serve important policies regarding the use and alienation of real property. However, they can sometimes be at odds with the creation of a perpetual institutional control. The long-term integrity of the institutional control is important to the protection of human health and the environment and to the willingness of the many owners to place the land in the market place.

How Would the Uniform Environmental Covenants Act Help?

To address this issue the National Conference of Commissioners of Uniform State Laws (NCCUSL) has prepared a model Uniform Environmental Covenants Act (UECA).[32] It is now up to the various states to adopt the Act. UECA provides a systemic approach to recording the environmental covenants and protecting the integrity of the covenant once recorded. UECA does not impact the authority of any agency to require remediation or the conduct of that remediation. UECA specifically states that it does not impact and has no effect upon environmental covenants previously recorded or subsequently developed outside of the Act.

Requirements of a Covenant

Section 4 of UECA establishes the requirements for a covenant. There must be an agreement between the owner of the property, a regulatory agency and a holder, which is the grantee of the covenant. A holder is defined in UECA as any person, including a person that owns an interest in the real property, the agency, or a unit of local government. UECA specifically states that the interest of the holder is an interest in real property. The covenant must provide a legally sufficient description of the real property subject to the covenant and describe the land use restrictions and any affirmative requirements. The covenant also must identify every holder and must be signed by the agency, every holder, and, except in unusual circumstances, the owner of the fee simple of the property. The covenant also must identify the name and location of any administrative record for the environmental response project that precipitated the

institutional controls. Only covenants that had some involvement from a regulatory agency would be covered under UECA. This would include state voluntary cleanup programs. Purely private agreements to impose institutional controls would not be covered by UECA. Such arrangements would be outside the UECA and subject to other laws.

Section 4(b) contains a "roadmap" of items that are not required to be included in the covenant but that the drafters may want to consider. These include: notice of change of specified interest in the property[33] or land use; periodic reporting on the compliance with the covenant; rights of access to the property granted in connection with the implementation and enforcement of the covenant, and limitations on termination and amendment of the covenant.

Recordation of the Covenant

Section 8 of the UECA provides for the recordation of the covenant and any amendment or termination of the covenant in the land records of every county in which a portion of the property is located. There have been problems in the past in some jurisdictions with how and where to record institutional controls. It is important to the validity of the controls that those who search the title records be able to locate the institutional control and that buyers take the property with knowledge of the institutional control requirements. This provision would standardize the recording within a specific state and make it follow other real property recording forms.

Validity and Permanence

Section 5 of the UECA makes clear that the covenant runs with the land and is enforceable even if it does not appear to meet certain real property law criteria. For example, the covenant is valid and enforceable even if: it is not appurtenant to an interest in real property; can be assigned to a person other than the original holder; imposes a negative burden; imposes an affirmative obligation on a person having an interest in the real property; the benefit or burden of the land does not touch or concern real property; there is not privity of estate or contract; the holder dies or ceases to exits; and, the owner of the interest subject to the covenant and the holder are the same person. All of the above would make a covenant subject to attack under traditional property law.

UECA also addresses various future legal actions that could undercut the validity of the covenant. Section 9(c) of the Act states that state tax liens and foreclosures, adverse possession, prescription, abandonment, waiver, lack of enforcement, acquiescence or similar doctrines cannot impact the validity of the covenant. Section 9(d) provides that the covenant cannot be extinguished by the marketable title and dormant mineral interest acts.

While we have not seen wholesale attacks of this nature on institutional controls so far, the uses of theses controls are relatively new. For example, the marketable title acts would not have come into play for institutional controls. The longer the controls are in place the more likely it is that these issues may arise. We have already seen the reluctance of some regulators to rely on institutional controls because of concern about the long-term validity of the controls. In addition, some owners are unwilling to put property subject to such controls into the marketplace for fear that if they lose ownership the controls might be disturbed and they could be subject to liability for exposure to the remedial contamination.

It is important to note that while UECA focuses on maintaining the enforceability of the covenant, it recognizes that situations may change and makes provisions for the modification and termination of the covenant. Section 10 addresses amendment of termination by consent. Such modifications will require the input of parties such as the regulatory agency to protect the purpose of the control. Moreover, the original signers of the covenant also have the right to participate in the modification. This provision provides some comfort to those who were subject to the response action that resulted in the institutional control. Section 9 addresses modification from eminent domain proceedings and other court actions.

Summary

UECA would apply to both federal and state led cleanups. It would expressly preclude various

common law doctrines that could hinder enforcements and would ensure that the covenant will survive despite tax lien foreclosure, marketable title statutes and dormant mineral interest statutes. UECA also provides for the amendment and termination of the covenant, including impacts from the exercise of eminent domain. It will now be up to the various states to enact the UECA. Enactment of the UECA would improve the implementation of institutional controls and increase the marketability of land subject to institutional controls.

Notes

[1] 42 U.S. C. § 9601 (35).

[2] *See e.g. Sherwin Williams Co. v. Artra Group, Inc.*, 125 F. Supp.2d 739 (D. Md. 2001), (to meet the innocent purchaser defense a party had to be "truly innocent of any pollution.") (quoting *Axel Johnson, Inc. v. Carroll Carolina Oil Co.* 191 F. 3d 409 (4th Cir. 1999)).

[3] See 42 U.S.C. § 9601 (35).

[4] Compare *Carson Harbor Village, Ltd. v. UNOCAL Corp.*, 227 F.3d 1196 (9th Cir. 2000) (passive migration is within the CERCLA definition of "disposal.") with *United States v. 150 Acres of Land*, 204 F.3d 698 (6th Cir. 2000) ("disposal" limited to spills occurring by human intervention).

[5] EPA has stated in guidance that contiguous property includes more than the property immediately next door and will exercise its enforcement discretion to determine if the property has been impacted by a release from a contaminated property at a distance in the same or similar way that it would have been impacted by a release from a contaminated property adjoining the landowners property. See Jan. 13, 2004 *EPA Memo on Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners,* from Susan Bromm to various Directors, Regional Counsels available at www.epa.gov/brownfields/liab.htm. Hereinafter *Contiguous Property Owners Guidance.*

[6] 42 U.S.C. § 9607(q).

[7] S. Rep. No. 107-2 at 10 (2001).

[8] 42 U.S.C. § 9607(r).

[9] 40 U.S.C. 9601(40).

[10] See May 31, 2002 *EPA Memo regarding Bona Fide Prospective Purchasers and the New Amendments to CERCLA* from Barry Breen to Superfund Senior Policy Managers and Regional Counsels available at www.epa.gov/brownfields/liab.htm.

[11] See Mar. 6 2003 *EPA Memorandum on Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner or Innocent Landower Limitations on CERCLA Liability ("Common Elements")* from Susan Bromm to various Directors and Regional Counsels available at www.epa.gov/brownfields/liab.htm. [hereinafter *Common Elements Guidance*]

[12] The members of the committee were: Trust for Public Land; National Groundwater Association; American Society of Civil Engineers; International Council of Shopping Centers; International Municipal Lawyers Association; Mortgage Bankers of America; National Brownfield Association; Bureau of Land Pollution Control; Environmental Defense; Partnership for Sustainable Brownfields Redevelopment; Gila River Department of Environmental Quality; MD Department of the Environment; Wasatch Environmental, Inc.; ASFE; U.S. EPA Office of Solid Waste and Emergency Response; West Harlem Environmental Action; National Association of Homebuilders; National Association of Development Organizations; The Real Estate Roundtable; Center for Public Environmental Oversight; The U.S. Conference of Mayors; Environmental Bankers Association; National Association of Industrial and Office Properties; National Association of Local Government Environmental Professionals; and U.S. Public Interest Research Group. In addition,

the ABA Section of Environment, Energy and Resources, AIG Environmental, Zurich North America, the National Association of Realtors, and the American Society of Testing and Materials (ASTM) served as resources to the committee.

[13] At press time the regulations had not been published in the Federal Register, but were anticipated by the end of March 2004. The consensus draft is available at www.epa.gov/brownfield/regneg.htm.

[14] For property purchased before May 31, 1997 the statute requires that purchaser should have taken into account such things as commonly known information about the property, the value of the property if clean in relation to the actual purchase price, the ability of the purchaser to detect the contamination and other similar criteria. 42 U.S.C. § 9601(35)(B)(iv)(I).

[15] *Common Elements Guidance* at page 7.

[16] 42 U.S.C. § 9601 (22).

[17] *Contiguous Property Owners Guidance* at 5.

[18] I*d.*

[19] 42 U.S.C. § 9601 citing to 42 U.S.C. § 6903(3).

[20] Compare *Carson Harbor Village, Ltd. v. UNOCAL Corp.*, 227 F.3d 1196 (9th Cir. 2000) (passive migration is within the CERCLA definition of "disposal.") *with United States v. 150 Acres of Land*, 204 F.3d 698 (6th Cir. 2000) ("disposal" limited to spills occurring by human intervention).

[21] *Common Elements Guidance* at 10.

[22] *Id.* at 13.

[23] *Common Elements Guidance.*

[24] 42 U.S.C. § 9603.

[25] See e.g. 42 U.S.C. § 6991a.

[26] *Common Elements Guidance,* at p. 13.

[27] *See Common Elements Guidance* at p. 5.

[28] *Common Elements Guidance* at pp. 9-10.

[29] Risk-based remediation plans allow residual contamination to remain in place under the premise that the residual chemicals will not present an unacceptable risk to human health or the environment. In many cases the risk is acceptable only if certain restrictions are placed on the property. The restrictions can be in the form of the use of property, such as no residential use or no use of groundwater, or in the maintenance of some physical treatment program such as a cap over contaminated soil.

[30] As used in this paper the term institutional controls includes both institutional (such as land use restrictions) and engineering controls as well as "activity and use limitations" and "land use controls."

[31] For an overview of existing implementation schemes in a number of states see *Implementing Institutional Controls at Brownfields and Other Contaminated Sites*. (Amy Edwards ed.2003).

[32] UECA is available on the NCCUSL website at www.nccusl.org.

[33] One may want to have notice about changes in ownership other than a fee simple interest. For example, one might want to have information about changes in a mineral rights interest or in a long-term tenant.