SECTION 4

ACQUISITION OF SITES

As part of their operations, transportation agencies frequently acquire sites for new rights-of-way and other transportation-related development. In making land takings and purchases agencies should make an effort to avoid environmentally contaminated sites where possible. Where it is not possible or prudent to avoid a contaminated site entirely, appropriate measures should be taken to limit the risks associated with such sites. The complications and potential liabilities attendant to contaminated sites can add significant expense and delay to a transportation project.

This section discusses liability under CERCLA, 42 U.S.C. 9601 *et seq*., and how transportation agencies are affected by CERCLA. It first discusses the basis for CERCLA liability, defenses available to transportation agencies, and regulatory actions that the U.S. EPA may take against transportation agencies. Second, it outlines considerations and strategies available to transportation agencies to discern, mitigate, and avoid, where possible, remediation costs for acquired sites.[1] Third, it discusses how transportation agencies may employ certain CERCLA provisions to recover remediation costs from the persons responsible for contaminating the site in question. The elements necessary for a transportation agency to establish a prima facie case and the defenses parties may raise in response to an agency's cost recovery action are addressed. Finally, this section provides a general discussion of state hazardous release laws that are analogous to CERCLA and that may supplement or expand CERCLA liability.

A. CERCLA LIABILITY AND HOW TRANSPORTATION AGENCIES ARE AFFECTED*

CERCLA liability is imposed under two basic provisions. The first provision permits the EPA and private parties to recover remediation costs from responsible parties.[2] The second provision permits the EPA to issue administrative orders and to seek judicial orders requiring a responsible party to abate a condition that endangers public health, welfare, or the environment.[3]

1. General Discussion—Basis for Transportation Agency Liability

a. Ways Transportation Agencies May be Involved in the CERCLA Statutory Scheme

Transportation agencies may be involved on both sides of CERCLA litigation and liability, as either parties from whom response costs are sought or as plaintiffs seeking recovery of their own response costs from responsible parties. Transportation agencies face the potential for CERCLA liability in connection with two major categories of activity: (1) the acquisition and development of a contaminated site or right-of-way; and (2) the disposition of wastes generated in transportation system operations, including the disposal of potentially contaminated excavation from development projects, as well as historic release of fluids from vehicle maintenance, solvents, pesticides, or other substances.

i. Retroactive.—Liability under CERCLA is imposed retroactively.[4] A responsible party may not avoid liability by asserting that the hazardous wastes remediated were disposed of prior to CERCLA's enactment. Parties may be found liable for disposal actions they undertook long before CERCLA was enacted.

ii. Liability Imposed on Several Classes of Persons.—There are four categories of persons upon whom liability may be imposed:

- Current owners and operators of contaminated sites;
- Former owners and operators who owned and/or operated the sites at the time when hazardous substances were disposed of there;
- Persons who arranged for disposal or treatment of hazardous substances; and
- Persons who accepted hazardous substances for transport to disposal or treatment facility or sites that they selected.[5]

In CERCLA jargon, these categories are referred to, respectively, as owners and operators, former owners and operators, generators or arrangers, and transporters. However, in CERCLA itself Congress did little more than to generally identify the categories of liable parties, and it has been left to the courts to address whether and how a party fits within a particular category.

[1] *See also* § 3.C *supra* for consideration of CERCLA in Transportation Planning.

[*] This Section updates, as appropriate, and relies in part upon the discussion of this subject in DEBORAH L. CADE, TRANSPORTATION AGENCIES AS POTENTIALLY RESPONSIBLE PARTIES AT HAZARDOUS WASTE SITES (Legal Research Digest No. 34, Nat'l Coop. Highway Research Program, 1995).

[2] 42 U.S.C. § 9607. (All references to U.S.C. are West, 1994 ed., unless otherwise stated).

[3] 42 U.S.C. § 9606.

[4] United States v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO), 810 F.2d 726, 732–33 (8th Cir. 1986); United States v. Monsanto Co., 858 F.2d 160, 173–74 (4th Cir.), *cert. denied*, 490 U.S. 1106 (1988); Abbott Lab. v. Thermo Chem., Inc., 790 F. Supp. 135, 138 (W.D. Mich. 1991).

[5] 42 U.S.C. §§ 9607(a)(1)–(a)(4).

iii. Liability is Strict, Joint, and Several.—CERCLA's strict liability scheme has been consistently affirmed by the courts.[6] Consequently, claims that a party was not negligent and that its activities were consistent with standard industrial practices are not a defense to liability.[7]

Liability under CERCLA is joint and several.[8] Even though Congress deleted provisions that imposed joint and several liability before CERCLA's enactment, courts have almost uniformly held responsible parties jointly and severally liable whenever there is any evidence of the commingling of hazardous substances by the different parties.[9]

This concept of joint and several liability significantly strengthens EPA's ability to encourage settlement as opposed to protracted litigation. Because there is joint and several liability, the EPA may sue a few PRPs at a Superfund site and obtain judicial decisions that each party is responsible for the entire cost of remediation at the site. EPA's ability to hold a few PRPs responsible for the cost of remediating an entire site burdens the PRPs not only with the entire remediation cost but also with the prospect of pursuing expensive contribution actions against the parties the EPA chooses not to sue.

CERCLA imposes a very low causation standard. In cost recovery actions brought by a private party, the only causal link required is a demonstration that a release or threatened release of hazardous substances has caused the suing party to incur response costs.[10] At multi-party sites, some courts have held that it does not matter whether a PRP's own waste was released or threatened to have been released as long as some hazardous substances at the site have been discharged.[11]

iv. Limited Statutory Defenses.—A PRP has only limited statutory defenses to CERCLA. These defenses require a PRP to demonstrate that the release of hazardous substances was caused by an "act of God," war, or solely by the act of an unrelated third party.[12]

These defenses are narrowly written and have been narrowly construed by the courts. Exceptional events, rather than ordinary natural occurrences, are required for the "act of God" defense.[13] For the act of war defense, it is unclear whether the release or threatened release must have occurred as a result of actual combat, or whether the defense also extends to releases that can be connected indirectly to war, such as, e.g., increased production demands during wartime.[14] The third party defense is available only when one or more third parties were the sole cause of the release or threatened release.[15] Any involvement, however slight, by the PRP asserting the defense in contributing to the release or threatened release renders the defense unavailable.[16]

For transportation agencies, the third party defense could succeed where the agency acquires a site that was contaminated by a third party prior to agency acquisition. The agency must be able to demonstrate that the contamination resulted from the actions or omissions of a party with which the agency had no "contractual relationship." The definition of "contractual relationship" as it applies to acquisition by eminent domain or through involuntary transfer to a government agency is discussed below.

v. Consistency with the National Contingency Plan.—In selecting and conducting CERCLA response actions, the EPA and private parties must follow the procedures set forth in the National Contingency Plan (NCP). CERCLA requires that response costs incurred by a private party be "consistent" with the NCP and that response costs incurred by the EPA be "not inconsistent" with the NCP.[17] The NCP has been updated several times since it was first promulgated in 1973. The current version of the NCP was promulgated in 1990 and it is more comprehensive than any of its predecessors.

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[6] *See, e.g.*, Levin Metals Corp. v. Parr-Richmond Terminal Co., 799 F.2d 1312 (9th Cir. 1986); United States v. NEPACCO, 810 F.2d 762 (8th Cir. 1986); Gen. Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1418 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991).

[7] United States v. Conservation Chem. Co., 619 F. Supp. 162, 204 (W.D. Mo. 1985).

[8] O'Neill v. Picillo, 682 F. Supp. 706 (D.R.I. 1988), *aff'd*, 883 F.2d 176 (1st Cir. 1989), *cert. denied,* 493 U.S. 1071 (1990); Monsanto, 858 F.2d at 171–72; Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1571 (E.D. Pa. 1988); United States v. Northernaire Plating Co., 670 F. Supp. 742, 748 (W.D. Mich. 1987).

[9] *Id.*

[10] *Id.* There is no quantitative threshold that must be reached before a court may find that a hazardous substance has been released for purposes of CERCLA liability. *See e.g.,* Arizona v. Motorola, Inc., 774 F. Supp. 566, 571 (D. Ariz. 1991); Louisiana-Pacific Corp. v. ASARCO, Inc., 735 F. Supp. 358, 361 (W.D. Wash. 1990); United States v. Nicolet, Inc., 712 F. Supp. 1205, 1207 (E.D. Pa. 1989). *But see* Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 669 (5th Cir. 1989), *clarified on denial of rehearing,* 889 F.2d 664 (5th Cir. 1990) (imposing a quantity requirement on the imposition of liability in an attempt to limit the scope thereof despite the fact that the "plain statutory language fails to impose any quantitative requirement on the term 'release'").

[11] United States v. Chem Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983); New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985).

[12] 42 U.S.C. § 9607(b).

[13] United States v. Stringfellow, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987).

[14] *See* United States v. Shell Oil Co., 841 F. Supp. 962, 971–72 (C.D. Cal. 1993) (refusing to extend "act of war" defense to production of petroleum for government contracts under wartime controls.)

[15] 42 U.S.C. § 9607(b)(3).

[16] *Id.*

[17] 42 U.S.C. §§ 9607(a)(4)(A), (B); 40 C.F.R. pt. 300; J.V. Peters & Co., Inc. v. Administrator of the EPA, 767 F.2d 263, 266 (6th Cir. 1985).

b. Policy Behind CERCLA—As Applied to Transportation Agencies

In enacting CERCLA, Congress intended that the cost of remediation be borne by the parties that caused the disposal of hazardous substances and benefited from the industrial practices that resulted in the release of hazardous substances.[18] This policy is not as appropriate for transportation agencies as it is for private companies. A transportation agency is not operating for profit, but to carry out its statutory objective. However, an agency's taxpayers may have benefited from the transportation agency operation that caused the generation of hazardous substances. Where the only other alternative is for the federal Superfund itself to bear the cost of remediation, at least one court has noted that imposition of liability is more appropriate on a transportation agency where taxpayers of the agency have benefited.[19]

Transportation agencies may be disproportionately impacted by CERCLA's joint and several liability.[20] Where one of the PRPs identified in connection with a site no longer exists or cannot be located, the remaining identified PRPs become responsible for that "orphan share." One court has held that because the primary purpose of CERCLA is to encourage remediation, sometimes remediation must be paid for by the party that is least responsible because other, more responsible parties, either lack funds or cannot be found.[21] Because transportation agencies are frequently perceived as having substantial funds, they may be found responsible for some sites where the other responsible parties are insolvent or cannot be located.

2. Acquisition by Eminent Domain—The Condemnation Defense

a. Statutory Basis

A transportation agency that acquires a site by eminent domain may be entitled to a defense to CERCLA. Without the defense, the transportation agency would qualify as current "owner or operator" and therefore be a responsible party under Section 107(a).[22] The eminent domain defense is established within the definition of "contractual relationship." The definition of "contractual relationship," Section 101(35)(A), provides a defense to liability where:

> the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described by clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:
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> ….
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> (ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.[23]

The reference in Section§ 101(35)(A) to "involuntary transfer or acquisition" may be a redundancy in CERCLA. Government agencies that acquire sites "involuntarily" are already excluded from the definition of owner or operator. "The term 'owner or operator' does not include a unit of state or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign."[24]

In defending a CERCLA action, a transportation agency that has a good faith argument that the site was acquired involuntarily may assert both its exemption from the definition of owner or operator and the defense to CERCLA liability established by Section§ 101(35)(A).

b. Elements Necessary to Establish Condemnation Defense

To prevail in asserting the condemnation defense, a transportation agency must demonstrate that the site was contaminated prior to its acquisition and that it handled the hazardous substances on the site with due care.[25] At least one court has recognized the condemnation defense when it has been raised by a transportation agency.[26]

In contrast to a claim under the innocent purchaser defense, a transportation agency claiming the condemnation defense need not demonstrate that it did not know of the contamination.[27] A transportation agency only must show that the contamination in issue existed before it acquired the site. In order to be able to make a demonstration, if necessary, that contamination existed prior to ownership, a transportation agency should conduct an investigation of "baseline" existing site conditions prior to acquisition. An adequate investigation of existing site conditions will support a transportation agency's condemnation defense.[28]

A transportation agency need not actually initiate a condemnation action in its acquisition of a site in order to claim the defense. The statute specifically states "by

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[18] United States v. Allan Aluminum Corp., 964 F.2d 252, 257 (3d Cir. 1992).

[19] B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1204 (2d Cir. 1992).

[20] DEBORAH L. CADE, TRANSPORTATION AGENCIES AS POTENTIALLY RESPONSIBLE PARTIES AT HAZARDOUS WASTE SITES 6 (Legal Research Digest No. 34, Nat'l Coop. Highway Research Program, 1995).

[21] *Id.* Lincoln Properties Ltd. v. Higgins, 823 F. Supp. 1528, 1537 (E.D. Cal. 1992).

[22] 42 U.S.C. § 9607(a)(1).

[23] 42 U.S.C. § 9601(35)(A).

[24] 42 U.S.C. § 9601(20)(D).

[25] 42 U.S.C. § 9601(35)(A) and 42 U.S.C. § 9607(b).

[26] *See, e.g.*, United States v. Peterson Sand & Gravel, Inc., 806 F. Supp. 1346 (N.D. Ill. 1992).

[27] 42 U.S.C. § 9601(35)(A)(i) and (ii).

[28] CADE, *supra* note 20, at 7.

purchase or condemnation," and a transportation agency's authority to acquire sites, even by purchase, arises from its eminent domain authority.[29] An agency seeking to use this defense should be careful not to risk its loss through activities of its own that could give rise to a charge of failure of due care.[30] In one case involving a highway agency, the court held that the question of whether a highway agency had exercised due care entitling it to the defense is a question for the trier of fact.[31]

3. Regulatory Actions Against Transportation Agencies Under CERCLA

a. General Notice Letter

Typically transportation agencies are notified of their involvement at a cost recovery site through a general notice letter.[32] The letter usually states that the transportation agency is a PRP for the contamination at the site. The letter may also offer a basis for the agency's potential liability, such as an allegation that the agency is a current owner or operator of the site, a former owner or operator, an arranger, or a transporter of the hazardous substances at the site.

The general notice letter frequently also includes a Section§ 104(e) information request.[33] The information request may pose specific questions or may require the production of agency records.[34] The requested information and records typically must be produced within a specified period of time.

A transportation agency's response to a general notice letter gives it the opportunity to comment on its designation as a PRP and to present any defense as to why the transportation agency should not be a PRP. Similarly, where agency records are requested, the agency has the opportunity to provide exculpatory documents supporting a defense to CERCLA.

As discussed in Section 5.A.2., a transportation agency may successfully assert the condemnation defense to CERCLA. Where the EPA has not yet instituted a cost recovery action, a transportation agency must lay the groundwork for a successful condemnation defense. In responding to a general notice letter or a request for information, an agency needs to explain when and under what circumstances it acquired the site and what the agency knows about when the contamination occurred. Under the appropriate facts, the transportation agency may assert that it is entitled to the condemnation defense and that it should be removed from the list of PRPs.

b. Agreed Orders and Administrative Orders

Under CERCLA, the EPA has the authority to negotiate an "agreed order on consent" (AOC) with any party.[35] An AOC may be negotiated either for a limited purpose at a site, such as site investigation or partial remediation, or to completely resolve a party's involvement at a site.[36]

The wording of an AOC generally consists of standard EPA "boilerplate" provisions that the agency presents in every case.[37] However, because the language of the form document is tailored to private parties more than government agencies, transportation agencies should carefully examine the AOC's provisions and negotiate for modifications where necessary.[38] Additionally, a transportation agency considering entering into an AOC should be aware of the other parties to the agreement.[39] The EPA is negotiating the AOC on behalf of the United States. Any defense that is waived in the AOC with respect to the EPA may also be waived as to the entire United States Government. Conversely, the state or local agency asked to sign an AOC should ascertain whether its agreement will bind other agencies.[40]

Section 106 of CERCLA permits the EPA to issue administrative orders against PRPs.[41] The administrative orders are typically issued where negotiations for an AOC fail. The administrative order may require a PRP to conduct an investigation and remediation of a hazardous waste site.[42] Failure to comply with a Section 106 order may result in penalties being issued against a PRP, including fines of $25,000 per day.[43]

A transportation agency must make an adequate administrative record where it is a PRP at a contaminated site.[44] The EPA's decisions under CERCLA are reviewed by a court on the administrative record.[45] Any evidence that contests the EPA's decisions must be in the administrative record in order to support a challenge to the EPA's actions.

To review and possibly contest the EPA's decisions with respect to a contaminated site, a transportation agency may need to retain an experienced environmental consultant.[46] Having such a consultant on its staff or on retainer may permit a transportation agency to influence initial EPA decisions such as the

[29] 42 U.S.C. § 9601(35)(A)(ii); *see* CADE *supra* note 20, at 7.

[30] *See* 42 U.S.C. § 9607(b)(3)(a).

[31] United States v. Sharon Steel, 1988 U.S. Dist. LEXIS 11975 (D. Utah, 1988).

[32] CADE, *supra* note 20, at 11.

[33] 42 U.S.C. § 9604(e).

[34] 42 U.S.C. § 9604(e)(2).

[35] 42 U.S.C. § 9622(a).

[36] *Id.*

[37] CADE, *supra* note 20, at 11.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] 42 U.S.C. § 9606(a).

[42] *Id.*

[43] 42 U.S.C. § 9606(b).

[44] CADE, *supra* note 20, at 11.

[45] 42 U.S.C. § 9613(j)(1).

[46] CADE, *supra* note 20, at 11.

scope, manner, and extent of the investigation or remediation.

In responding to a PRP notice, a transportation agency should raise any defense it may have to liability, such as the condemnation defense discussed in Section 5.A.2. above. This is a specific defense potentially available to an agency whose sole involvement with a site is with respect to assistance provided in cleaning up a site. That is the exception to liability for rendering care or advice.[47] This exception allows a state or local government agency to respond to a release incident creating an emergency without incurring liability, provided that the response does not involve gross negligence or intentional misconduct.[48] This exception could apply, for example, when a highway agency takes nonnegligent emergency measures to control a release from a vehicle accident.

CERCLA generally prohibits judicial review of any internal EPA decisions prior to the initiation of a cost recovery action. However, judicial review may be obtained over a challenge to a site's inclusion on the NPL.[49] The United States Court of Appeals for the District of Columbia Circuit has jurisdiction over this type of complaint.[50] A petition challenging whether a site should be on the NPL must be filed within 90 days after EPA publishes notice in the *Federal Register* that the site is on the list.[51] However, the court has indicated a willingness to consider untimely NPL listing challenges where a party had no way of knowing it would be implicated at a particular site.[52] State transportation agencies should consider the political implication or feasibility of challenging an NPL listing over the objections of the state environmental agency.

4. Taking Cleanup Costs into Account at Acquisition

In acquiring sites, it is very important that a transportation agency evaluate potential contamination as early as possible. Evaluation early in the process permits transportation agencies to reconsider the design of a project, if necessary, to avoid the contaminated site. In evaluating whether to design a project around known areas of contamination, the transportation agency should carefully weigh the complications, costs, and potential liabilities associated with ownership of and construction in contaminated sites. However, avoiding contaminated sites may not be possible in all instances, and a transportation agency may have to undertake additional steps to protect its interests.[53]

a. Acquisition of Less than Fee Interest

Where it is not possible to avoid contamination altogether, a transportation agency may consider acquiring less than a fee ownership of the site.[54] Acquisition of an easement across a contaminated parcel or acquisition of an airspace easement, rather than a fee interest, may limit a transportation agency's exposure to liability. Although acquiring interests of this type is unusual, at least one court has held that the holder of an easement was not an "owner" under CERCLA and was therefore not liable where the holder's use was not the cause of the contamination.[55]

However, even if the transportation agency holds only an easement, where the agency's use of the property results in a further release of hazardous substances, the agency may be held liable as an operator.[56]

b. Valuation Methods for Acquiring Contaminated Property

When acquiring contaminated property, there are a number of different valuation methods a transportation agency may employ. Obviously, a contaminated site is worth less than an uncontaminated site. However, establishing the exact value of the contaminated site involves many factors and many potential methodologies. As one commentator has noted, guidance in the case law on this subject is "minimal and split."[57] This section discusses various methods transportation agencies may employ to establish the value of a contaminated site.[58]

i. Value as "Clean" and Subtract Remediation Costs.—A common method transportation agencies use is to value a site as clean and then subtract the remediation costs of a site. This method involves risk because there is the potential for gross miscalculation of remediation costs for a site. This method is most useful where

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[47] 42 U.S.C. § 9607(d)(2).

[48] *Id*.

[49] CADE, *supra* note 20, at 12-42; U.S.C. § 9613(a).

[50] *Id.*

[51] *Id*.

[52] Washington State Dep't. of Transp. v. United States Envtl. Protection Agency, 917 F.2d 1309 (D.C. Cir. 1990).

[53] *See* KEVIN M. SHEYS & ROBERT L. GUNTER, REQUIREMENTS THAT IMPACT THE ACQUISITION OF CAPITAL-INTENSIVE LONG-LEAD TIME ITEMS, RIGHTS OF WAY, AND LAND FOR TRANSIT 14–15 (Transportation Research Board Legal Research Digest No. 6, 1996).

[54] CADE, *supra* note 20, at 13.

[55] Long Beach Unified School District v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364 (9th Cir. 1994).

[56] *See, e.g*., Kaiser Aluminum v. Catellus Dev. Co., 976 F.2d 1338 (9th Cir. 1992).

[57] SHEYS & GUNTER, *supra* note 53, at 13.

[58] The following discussion is taken in substantial part from CADE *supra* note 20, at 14–18. For additional discussion of the practical effects of environmental remediation in condemnation proceedings, including methods of valuation, *see* ch. 37 in T. NOVAK, ET AL., CONDEMNATION OF PROPERTY: PRACTICE AND STRATEGIES FOR WINNING JUST COMPENSATION (1994); discussion and cases cited in *The Taking of Environmentally Contaminated Property in* NICHOLS' THE LAW OF EMINENT DOMAIN THIRD EDITION, ch. 13B (1996 Supp.); and LEONA D. JOCHNOWITZ, INTRODUCING EVIDENCE OF CONTAMINATION AND OFFSETTING COST OF REMEDIATION IN DETERMINING FAIR MARKET VALUE FOR EMINENT DOMAIN AWARDS: A REVIEW OF INTERRELATIONSHIP BETWEEN ENVIRONMENTAL AND ACQUISITION LAW 21 (Transportation Research Record 1527, 1996).

contamination is limited and well-defined, and remediation costs may be quantified with some certainty.

Valuing a site as clean and subtracting remediation costs has not been uniformly accepted by courts in condemnation proceedings. For example, in *Illinois Department of Transportation v. Parr*, the Illinois Department of Transportation unsuccessfully sought to use the remediation costs associated with a site to offset the uncontaminated value of the site.[59] The court held that the transportation agency could not use evidence of remediation costs to establish property value in a condemnation action.[60] In *Aladdin, Inc. v. Black Hawk County*, the Iowa Supreme Court held that the estimated cost of remediation of existing groundwater contamination could not be used to reduce a compensation award.[61]

However, in other instances, evidence of remediation costs have been permitted in condemnation proceedings. In *City of Olath v. Stott*, the Supreme Court of Kansas permitted evidence of remediation costs in a condemnation proceeding.[62] The court reasoned that because underground petroleum contamination necessarily affects the market value of real property, evidence of contamination and cost of remediation must be admissible.[63] Similarly, in *Redevelopment Agency of the City of Pamona v. Thrifty Oil Company*, a California appeals court upheld the trial court's decision to consider remediation costs in a condemnation proceeding.[64]

One difficulty with raising the issue of remediation costs in a condemnation proceeding is that remediation costs may exceed the fair market value of the property. Courts may well be unwilling to value property at a zero or negative value and require an owner to pay a transportation agency, particularly given that CERCLA provides the condemner with the right to recover clean-up costs from PRPs.[65]

Another difficulty arises when the agency is acquiring the property from an intervening innocent landowner. The intervening innocent owner likely purchased the property for its full value, with no discount from the contamination. This difficulty arose in *Murphy v. Town of Waterford*, where the current owner did not contribute to the contamination of a site.[66] The Connecticut trial court would not permit the condemning agency to subtract remediation costs from the fair market value of the site.[67] The court based its ruling on equitable grounds and noted that the condemning agency had not done any environmental site testing prior to the date of acquisition, despite the agency's prior notice of the site's former use as a gas station.[68]

An additional difficulty with incorporating remediation costs into condemnation proceedings is the risk of collateral estoppel. Where an agency has successfully introduced evidence at a condemnation proceeding as to remediation costs, but is unsuccessful in having the costs deducted from the takings award, it could be estopped from later recovering these response costs from the owner. Thus the agency could be required to pay the clean value of the property and could also have to incur the remediation costs.

One final difficulty with this method is that it does not account for depreciation of the site's value as a result of stigma. In addition to the cost of remediation, a site's value may decrease because of the stigma that is associated with contaminated properties. Uncertainty as to whether additional contamination exists at a site and will be discovered in the future may create a public stigma that reduces the value of sites that have been contaminated.

ii. Use of Contaminated Comparable Sales.—The concept of "stigma" comes into play when estimating the value of contaminated property using the comparable sales approach. Stigma reflects the negative effect of perception on the value of a contaminated property. It takes into account that the market value of a contaminated parcel may be less than simply the value of the parcel "if clean" minus the cost of cleanup. In part this discount factor is a transaction cost reflecting the difficulty and increased cost of financing and developing parcels that have been contaminated or are in the process of cleanup. But in part it reflects fears or other negative feelings, whether objectively based or not, that the general public has about purchasing property that is or has been contaminated.

Some courts have recognized the role of stigma in valuing contaminated property taken by a transportation agency. For example, *Tennessee v. Brandon*,[69] involved the condemnation of property by the state Department of Transportation. The trial court had heard evidence concerning the market value of the property but had excluded evidence concerning the effect on market value of the property's contaminated nature and the cost of cleanup. The appellate court reversed, holding that the evidence offered by the agency as to the market value of the property in its

[59] Ill. Dep't of Transp. v. Parr, 633 N.E.2d 19, 259 Ill. App. 3d 602, *review denied*, 642 N.E.2d 1276 (1994).

[60] *Id.*

[61] Aladdin, Inc. v. Black Hawk County, 562 N.W.2d 608 (Iowa 1997).

[62] City of Olath v. Stott, 861 P.2d 1287 (Kan. 1993).

[63] *Id.*

[64] 5 Cal. Rptr. 2d 687 (Cal. App. 2 Dist. 1992), *review denied*.

[65] *See, e.g.*, Northeast Conn. Alliance v. ATC Partnership, 776 A.2d 1068, 1998 Conn. Super., LEXIS 1057 (April 16, 1998). (Court rejects valuation based on deduction of clean-up costs from unstigmatized fair market value where result was that the property had "no value").

[66] Murphy v. Town of Waterford, 1992 Conn. Super., LEXIS 2085 (July 9, 1992) (No. 520173).

[67] *Id.*

[68] *Id.*

[69] State v. Brandon, 898 S.W.2d 224 (Ct. App. Tenn. 1994).

contaminated state, including the cost of clean up, should have been admitted for the purposes of determining the condemnation award. The court then acknowledged the role that stigma played in determining the value of property and announced that on remand the effects of stigma should also be taken into account by the jury:

> the evidence which DOT attempted to offer relative to the contamination of the property and the cost of remediation was relevant to the value of the property on the date of taking, but it was also relevant regarding the effect which the stigma of contamination would have on its market value in the mind of the buying public. DOT's experts were prepared to offer evidence that the opinion of an interested buyer would be affected by the fact that the property had suffered contamination, as well as its present condition.[70]

There are two general approaches to using comparable sales to value contaminated property. The first is to directly compare a site to sites with similar contamination issues for which sales data exists. However, identifying such sites for comparison purposes may be difficult. In particular, it may be difficult to compare the type and extent of contamination across disparate sites. This approach may be used when it is possible to find sales of property that is similar to the subject parcel in size, location, and highest and best use.[71] A second approach is to use sales of comparable contaminated properties to estimate a discount factor for the difference between clean and contaminated property, which can be applied to the "if clean" value of the parcel in question. This approach may be suited to situations in which contaminated properties comparable in size, location, highest and best use, and other attributes are not readily available, although the reliability of the discount factor will likely be greater the more the properties are comparable.[72] It is important that testimony as to a stigma discount be based on comparable sales or other admissible facts and not simply reflect "a mere surmise that because property is contaminated, it logically follows that the value of the property is decreased."[73]

iii. Income Approach with Amortization of Costs.—This method involves determining the value of a property based on an income stream that has been adjusted by the amount required to amortize remediation costs. This approach has been used to value sites in tax assessment cases.[74] However, transportation agencies have not reported using this method and are not likely to because it depends upon the property generating an income stream.

iv. Valuation as "Clean" in Exchange for Owner Cleanup and/or Indemnification.—This method places the burden on the owner to remediate a site in exchange for receipt of the full fair market value of the site as if clean. If an indemnification from the owner is also obtained, the transportation agency is protected from liability for any future response action as a result of contamination left by the owner. The owner is effectively accepting responsibility for both the current cost of cleanup as well as the risk of any future response costs. However, an indemnification is not a defense to liability under CERCLA. The agency as the site's current owner may still be named as a PRP, regardless of an indemnification agreement. The indemnification agreement is only enforceable between the agency and former owner.

Alternatively, a transportation agency could agree to value a site as clean even without obtaining an indemnification from the owner. The Nebraska Department of Transportation and the Nevada Department of Transportation have both reported successfully negotiating a commitment by the owner to remediate sites in exchange for having a site valued as clean.[75]

An agreement to conduct site remediation with or without an indemnification is only as good as the party that stands behind it. While this approach may be appropriate for purchase from a credit-worthy "deep pocket," it would not be advisable where the seller's future financial status is questionable. As discussed immediately below, one approach is to have the indemnifying party escrow or otherwise secure the funds necessary to ensure cleanup, including a contingency for unforeseen costs. An agency using this approach should also be sure that the acceptable cleanup standards are clearly set forth by agreement of the parties.

v. Valuation as "Clean" and Placement of Funds in Escrow.—An agency paying "clean" value with the owner agreeing to take care of the cleanup may want to obtain an agreement that a portion of the purchase price is held in escrow until cleanup is completed to the satisfaction of regulators and the agency. The escrow amount in such situations is frequently set at an amount greater than the expected cleanup costs in order to provide for the uncertainty inherent in estimating future costs.

This method has reportedly been successfully employed by a number of state departments of transportation, including the South Carolina Department of Transportation and the Washington State Department of Transportation (WSDOT).[76]

vi. Valuation as "Clean" and Payment of Funds into Court Pending Cleanup and/or Indemnification.—A variation of the previously described method is for the agency to pay funds for the value of the site into a court to be held pending remediation. In this way, a transportation

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[70] *Id.* at 228, citing Florida Power & Light Co. v. Jennings, 518 So. 895, 899 (Fla. 1987).

[71] CADE, *supra* note 20, at 16.

[72] *Id.*

[73] Finkelstein v. Department of Transp., 656 So. 2d 921, 925 (Fla. 1995).

[74] *See, e.g.*, Inmac Assoc., Inc. v. Borough of Carlstadt, 112 N.J. 593 (1988); CADE, *supra* note 20, at 16.

[75] CADE, *supra* note 20, at 16.

[76] *Id.* at 17.

agency may comply with its legal condemnation requirements and take possession of the site while negotiations and/or remediation of the site occurs.[77]

vii. Valuation of Access Rights.—In certain instances a transportation agency will only need access rights to a site, not a full fee simple interest. Where a site is contaminated, the question arises as to whether the value of the access rights should be discounted as a result of contamination. Although this issue may arise infrequently, it is worth a transportation agency considering it in negotiating access rights.[78]

viii. Prospective Purchaser Agreements.—Many state environmental agencies have procedures for entering into prospective purchaser agreements with the buyer of a contaminated site.[79] A prospective purchaser agreement generally limits the buyer's responsibility for existing contamination at a site. In exchange for some investigation or remediation costs, a state agency may absolve a purchaser such as a transportation agency from liability.

The EPA has issued guidance on prospective purchaser agreements.[80] The guidance allows for prospective purchaser agreements where there will be substantial benefit to the community, such as job creation through economic development or the productive use of an abandoned building. The EPA also provides for the related option of the *de minimus* settlement agreement. *De minimus* settlements may be considered when the owner's liability is very small. Either of these approaches may allow a purchasing transportation agency to ascertain its exposure and price its acquisition accordingly.

c. Negotiation with Responsible Parties

Before acquiring a contaminated site, a transportation agency should initiate negotiations with any known PRPs. Negotiations with PRPs may lead to the PRPs assisting in remediation, accepting responsibility for remediation, or indemnifying the agency. Moreover, negotiations should conform to CERCLA's notification requirements by informing PRPs of the type of proposed remediation and giving them the opportunity to perform the remediation themselves.[81] The NCP requires that PRPs be notified of "removal actions" so that they have the opportunity to perform the actions "to the extent practicable."[82] A transportation agency or any party that fails to provide the required notification may be unable to recover its CERCLA costs.[83] State statutes and regulations may have similar notification requirements.[84]

B. RECOVERY OF CLEANUP COSTS*

A transportation agency will often need to identify and pursue PRPs if it wants to recover the cost of remediating a contaminated site. Such cost recovery can be a lengthy and expensive process with no certainty of success. This section discusses strategies for pursuing cost recovery actions and defenses a PRP may raise in a cost recovery action.

1. Identifying PRPs

In addition to the prior owner from which the transportation agency acquired the site, there may be many other PRPs to which a transportation agency may look for recovery of its remediation costs. At a minimum, the transportation agency should undertake a chain of title review to identify past owners and holders of other interests at the site. The agency may also review corporate records filed with the state, as well as records of the state environmental agency and the state health department, local records including tax assessors' files, and proprietary databases. The agency should investigate not only the ownership and use history of the site itself, but also that of abutting properties from which hazardous material may have migrated to the site. A list of resources for identifying PRPs is provided in the discussion of Phase I investigation in Section 3.C.2.

2. Cost Recovery Under CERCLA

a. Prima Facie Case

To recover costs from a PRP under CERCLA, a transportation agency must prove that (i) the contaminated site is a facility; (ii) at which a release of hazardous substances occurred; (iii) which caused the incurrence of response costs; and (iv) that the defendant is a responsible party.[85] These four elements constitute a prima facie case under CERCLA for state transportation agencies. However, as discussed below, city, county, or regional agencies must also prove a fifth element: That their response costs were consistent with the NCP.[86]

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[77] *Id.* at 17–18.

[78] *See Id.* at 18.

[79] *Id.* at 17. *See e.g.*, MASS. GEN. L. ch. 21E, § 3A(j).

[80] 60 Fed. Reg. 34792 (July 3, 1995); *see also* Model Prospective Purchaser Agreement (September 30, 1999).

[81] 40 C.F.R. § 300.415(a)(2).

[82] *Id.*

[83] *See, e.g.*, Town of Munster v. Sherwin-Williams, Co., 825 F. Supp. 197, 203 (N.D. Ind. 1993), *vacated and remanded* 27, F.3d 1268 (7th Cir. 1994).

[84] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 21E § 4A.

[*] This Section updates, as appropriate, and relies in part upon the discussion of this subject in DEBORAH L. CADE, TRANSPORTATION AGENCIES AS POTENTIALLY RESPONSIBLE PARTIES AT HAZARDOUS WASTE SITES (Legal Research Digest No. 34, Nat'l Coop. Highway Research Program, 1995).

[85] CADE, *supra* note 20, at 19.

[86] *See* United States v. Northernaire Plating, 670 F. Supp. 742, 746–47 (W.D. Mich. 1987), *aff'd.,* 895 F.2d 1497 (6th Cir. 1989); City of Philadelphia v. Stepan Chemical Co., 713 F.

b. Jurisdiction

Federal courts have exclusive original jurisdiction over CERCLA cost recovery actions.[87] The action must be brought in the district court where the release occurred or in which the defendant resides, has its principal place or business, or may be found.[88] A federal cost recovery action must be brought within 3 years of completing a removal action at a site or within 6 years of initiating a remedial action at the site.[89]

c. Recoverable Costs

Response costs that may be recovered include any costs incurred to investigate the site, analyze remediation alternatives, and implement remediation and perform any ongoing groundwater monitoring.[90] A transportation agency may recover remediation costs already expended and may obtain a declaratory judgment against a PRP on liability for future costs.[91] However, response costs that may be recovered do not include the consequential economic impacts that remediation may entail, such as delay costs or inflation costs.

Transportation agencies should also seek recovery of attorneys' fees incurred in bringing and litigating a cost recovery action. CERCLA expressly authorizes the federal government to seek reimbursement for legal costs.[92] However, since the Supreme Court's 1994 ruling in *KeyTronic Corp. v. United States* resolved the issue, private parties have only been entitled to attorneys' fees if they are incurred in the process of identifying responsible parties.[93] A recent Ninth Circuit Court of Appeals case affirming an award of attorneys' fees to the federal government under CERCLA, however, concluded that CERCLA "evinces an intent to provide for attorneys' fees" in actions brought by the government.[94]

A transportation agency should also consider providing a written demand for specified response costs to a PRP prior to initiating a cost recovery action. Courts have reached different conclusions as to whether a written demand is required prior to initiating a lawsuit in order to recover prejudgment interest at trial. Some state cost recovery provisions require a written demand as a precedent to bringing a cost recovery action.[95]

3. Defenses to a Transportation Agency Cost Recovery Action

A PRP has a number of defenses it may assert to defend a transportation agency's cost recovery action under CERCLA. Some of the defenses potentially most relevant to transportation agencies as plaintiffs or defendants are set forth below.

a. Not Consistent with the NCP

Even if a PRP is held liable under CERCLA, it may assert that response costs incurred by the plaintiff are not consistent with the NCP. Differences between the language of CERCLA Section 107(a)(4)(B), which addresses private party cost recovery actions, and 107(a)(4)(A), which addresses the recovery of costs by the government, allow a transportation agency that can prosecute a claim as a state or federal government agency a potential advantage over a private plaintiff. In cost recovery actions brought by "any other persons" under Section 107(a)(4)(A), recoverable costs include those that are "necessary" and "consistent with the National Response Plan."[96] Defendants to a private party cost recovery action typically assert that the response costs were not "necessary" costs of response "consistent with the National Contingency Plan," thereby putting on the plaintiff the burden of demonstrating the necessity and consistency of each itemized expense.[97] Defendants raising this response cause every detail of a cleanup project to be scrutinized as to its "necessity" under the Plan.[98]

By contrast, in cost recovery actions brought under Section 107(a)(4)(A), government agencies may seek recovery of costs that are "not inconsistent with" the NCP and there need be no demonstration of whether the costs were "necessary."[99] This language creates a presumption that a responsible defendant is liable for all response costs incurred unless the defendant overcomes the presumption by presenting evidence that the costs are inconsistent with the NCP.[100] In making

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Supp. 1484 (E.D. Pa. 1989). *See also* Washington State Dep't of Transp. v. Washington Natural Gas Co., 59 F.3d 793 (9th Cir. 1995) (state transportation agency is the "State" for purposes of 42 U.S.C. § 9607(a)(4)(A)).

[87] 42 U.S.C. § 9613(b) and 28 U.S.C. § 1331.

[88] 42 U.S.C. § 9613(b).

[89] 42 U.S.C. § 9613(g)(2).

[90] 42 U.S.C. §§ 9601(23) and (24), and 42 U.S.C. § 9607(a)(4)(B). *See* United States v. Bogas, 920 F.2d 363, 369 (6th Cir. 1990) (remediation costs recoverable under CERCLA include "not only the direct cost of removal, but of site testing, studies, and similar 'response costs,' direct and indirect").

[91] 42 U.S.C. § 9613(g)(2).

[92] 42 U.S.C. § 9604(b)(1).

[93] Key Tronic Corp. v. United States, 511 U.S. 809 (1994).

[94] United States v. Chapman, 146 F.3d 1166, 1175 (9th Cir. 1998); *see also* B.F. Goodrich v. Bethoski, 99 F.3d 505 (2d Cir. 1996) *cert. denied*, 524 U.S. 926 (1998); Comment: Jason Northett, *Reviving CERCLA's Liability: Why Government Agencies Should Recover Their Attorneys' Fees in Response Cost Recovery Actions*, 27 B.C. ENVTL. AFF. L. REV. 779 (2000).

[95] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 21E § 4A (West 1994).

[96] 42 U.S.C. § 9607(a)(4)(B). This Response Plan is known as the National Contingency Plan.

[97] SUSAN M. COOKE, THE LAW OF HAZARDOUS WASTE (1987) at §§ 16.01[9][a], [b]; O'Neil v. Piccilo, 682 F. Supp. 706, 728 (D.R.I. 1988), *aff'd,* 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990).

[98] CADE, *supra* note 20, at 22.

[99] 42 U.S.C. § 9607(a)(4)(A).

[100] COOKE, *supra* note 97, at § 16.01[9][b], *citing* United States v. NEPACCO, 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd*

such a showing, a PRP may have to demonstrate that quantifiably greater costs were incurred as a result of the deviation from the NCP.[101]

A state transportation agency may benefit from this presumption; however, local agencies may not. In *WSDOT v. Washington Natural Gas Co.*, the Court of Appeals for the Ninth Circuit upheld the trial court's holding that the WSDOT, as an agency of the state, was entitled to the presumption of consistency with the NCP.[102] However, a municipal or regional agency may not be afforded this presumption and may have to prove consistency with the NCP as part of their prima facie case.[103] Courts have held that a city or county must prove consistency with the NCP because the definition of person includes a "political subdivision of a state," such as a city or region, whereas the definition of state does not.[104]

For years, it was uncertain whether the standard for consistency was "substantial compliance" or "strict compliance" in order to recover. Under the 1990 version of the NCP, substantial compliance was required,[105] whereas prior versions of the NCP had required strict compliance.[106] Courts have generally held that the applicable version of the NCP is the one that is in effect at the time remediation costs are incurred.[107] The only difficulty with this interpretation arises where the regulations change during the remediation process.

In *City of Philadelphia v. Stepan Chemical*, the NCP changed after investigation of the contaminated site had been completed and remediation was underway.[108] The District Court for the Eastern District of Pennsylvania held that response activities that had taken place prior to publication of the new rule would be evaluated under the prior rule and response activities that occurred subsequent to publication would be evaluated under the new rule.[109] Because of the court's holding, a transportation agency needs to take account of whether the NCP is undergoing revision while it is conducting a remediation.

b. Discharge in Bankruptcy

Another concern for a transportation agency seeking cost recovery or contribution under CERCLA or related state laws is that PRPs may seek to avoid liability by filing for bankruptcy. At the time a claim for response costs arises, it is very important for an agency to consider whether any of the PRPs have filed or are likely to file for bankruptcy.[110] Likewise, a group of PRPs may include an entity that has come through a bankruptcy proceeding and reorganized but is now being pursued for environmental liability relating to its pre-bankruptcy activity, as to which claims may in fact have been discharged. In either case, it is important to consider the effects of bankruptcy law on the ability to recover response costs.

The two main forms of relief under the federal bankruptcy code are known as "Chapter 7" and "Chapter 11" bankruptcy.[111] In Chapter 7 proceedings, the debtor's assets are collected, sold, and equitably distributed to claimants. In the case of individual Chapter 7 debtors, remaining debts are discharged, but for corporate debtors, the debts not satisfied "remain with the assetless corporate shell that emerges from Chapter 7 proceedings."[112] Under Chapter 11, the goal is to reorganize the debtor's business and restructure its debt to preserve for debtors the value of the business as an ongoing concern, and debts not satisfied are for the most part discharged except as provided in the reorganization plan.[113]

There are three categories of bankruptcy claims: secured, priority, and unsecured. A secured claim is one as to which the claimant has a lien on the debtor's property such as a mortgage or security interest.[114] A secured claimant will be paid in full if the value of the collateral subject to the security interest exceeds the value of the secured claim. Priority claims are unsecured claims that are entitled to payment ahead of unsecured claims. These include particular claims identified by the bankruptcy statute, including among other types of claims, those that arise between the filing of a petition for involuntary bankruptcy and the entry of an order for relief and those pertaining to expenses for the administration of the bankrupt estate.[115] Unsecured claims are all other claims that are not secured and not entitled to priority, and they stand last in line for repayment.[116] Cost recovery claims brought by a buyer of property from a debtor's estate may be treated as priority claims on the grounds that they are actual and necessary costs of preserving the debtor's

in part, rev'd in part, 810 F.2d 726 (8th Cir. 1986), *cert. denied,* 484 U.S. 848 (1987).

[101] O'Neil v. Piccilo, 682 F. Supp. 706, 728.

[102] Washington State Dep't of Transp. v. Washington Natural Gas Co., 59 F.3d 793 (9th Cir. 1995).

[103] City of Philadelphia v. Stepan Chemical, 713 F. Supp. 1484 (E.D. Pa. 1989).

[104] *See* Town of Bedford v. Raytheon Co., 755 F. Supp. 469, 475 (D. Mass. 1991).

[105] 55 Fed. Reg. 8793 (March 8, 1990).

[106] 50 Fed. Reg. 47,930 at 47, 934 (1985).

[107] Versatile Metals Inc. v. Union Corp., 693 F. Supp. 1563, 1575 (E.D. Pa. 1988); N.L. Industries v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986); Wickland Oil Terminals v. ASARCO, Inc., 792 F.2d 887, 891 (9th Cir. 1986).

[108] 748 F. Supp. 283 (E.D. Pa. 1990).

[109] *Id.* at 292.

[110] *See Environmental Claims in Bankruptcy Proceedings* in SUSAN M. COOKE, THE LAW OF HAZARDOUS WASTE, at ch. 20, for a detailed treatment of this subject.

[111] 11 U.S.C. §§ 701, 1101 *et seq.*

[112] COOKE, *supra* note 97, at § 20.01[3][g].

[113] COOKE, *supra* note 97, at §§ 20.01[3][a], [3][b], and [3][g].

[114] 11 U.S.C. § 506.

[115] 11 U.S.C. § 507(a).

[116] *See* COOKE, *supra* note 97, at § 20.01[3][d].

estate, and some but not all courts have held likewise even as to claims for cleanup costs incurred with respect to property that the debtor never owned but may have occupied or operated.[117]

It is important to know when a claim for environmental costs "arises" for purposes of determining whether it may be presented in a bankruptcy proceeding or whether it may have been discharged by a prior bankruptcy. Courts have applied a variety of approaches to this analysis, but more recently appear to have settled on a "fair contemplation" standard.

A leading case adopting this standard is *Matter of Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, in which the Court of Appeals for the Seventh Circuit addressed the issue of when a CERCLA claim arises for the purpose of filing a claim in bankruptcy.[118] The factual context was a train derailment that had resulted in the release of contamination to a right-of-way later acquired for highway construction. The highway agency undertook site investigation at a time when the railroad company was in bankruptcy. The results of the site investigation, disclosing the contamination, were available to the highway agency 3 weeks before the last date for filing claims in the bankruptcy proceedings, but no claim was filed. The agency argued that it had not yet incurred response costs, and therefore that its claims were not barred by the bankruptcy court deadline. Although the agency had not yet incurred response costs at the time of the bar, the court held that the WSDOT had at least a contingent claim at that time and that it was required to file a claim in the bankruptcy proceedings, or else lose that claim.[119]

Under this "fair contemplation" approach, where a CERCLA claimant has adequate information as to the connection between the release of hazardous substances and the bankrupt party and as to the likelihood of incurring costs for which the bankrupt party should be responsible, the claimant must either file in bankruptcy or lose the right to pursue that claim.[120] As one commentator notes, this standard "appears to be emerging as the accepted standard in determining the dischargeability of environmental claims," and even where the standard has not been adopted as such, a proof of claim should be filed where a creditor has knowledge of or can reasonably foresee environmental liability, lest a dischargeable claim arise.[121]

A second approach followed by some courts has been called the "relationship" approach. This approach establishes the date of a claim "at the earliest point in a relationship between a debtor and a creditor."[122] This approach has been used to completely bar recovery of response costs by regulatory agencies from bankrupt debtors on the theory that the relationship between the regulatory agencies and the entities subject to regulation is such that any contingency based on pre-petition conduct comes within the definition of a "claim."[123] An alternate formulation of this approach holds that a dischargeable environmental claim arises when the hazardous waste was first released, regardless of when the response costs are actually incurred.[124] Such an approach has been criticized as adopting too broad a definition of claim.[125]

A third approach to determining when a claim arises is called the "response costs" approach and holds that a dischargeable claim under CERCLA does not arise until response costs have been incurred. Under this approach, where cleanup activities are delayed until after the close of bankruptcy proceedings so that response costs have not yet been incurred, it would be possible to later pursue the reorganized debtor with a cost recovery action. Not surprisingly, this approach has been criticized as frustrating the purpose of the bankruptcy code, as well as CERCLA's goal of promptly cleaning up waste disposal sites.[126]

A further concern is how a transportation agency with a contingent environmental claim is to receive notice of a bankruptcy sufficient to prompt it to file any claims it might have against the debtor. Unfortunately for the agency, actual notice of the bankruptcy proceeding is not required for creditors, such as contingent environmental claimants, who are not known to the trustee. Rather, constructive notice by publication is sufficient.[127] However where the debtor had considerable contacts with the agency's jurisdiction, a failure to publish notice in that jurisdiction may not suffice.[128]

Where a plaintiff has a cost recovery claim based on the activities of a debtor that has reorganized pursuant to Chapter 11, it typically will not be possible to pursue the reorganized successor to the bankrupt entity. This is because such claims are typically discharged in the

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[117] *See* COOKE, *supra* note 97, at § 20.04[2][b].

[118] 974 F.2d 775 (7th Cir. 1992); *see* CADE, *supra* note 20, at 23.

[119] *Id.* at 778. The court noted that the transportation agency also failed to make a motion within a reasonable time for leave to file a late claim. *Id* at 788.

[120] *See also* In re Jensen, 995 F.2d 925, 930 (9th Cir. 1993).

[121] COOKE, *supra* note 97, at § 20.05[2][c].

[122] In re Jensen, 929 F.2d. at 930.

[123] In re Chateaugay Corp., 944 F.2d 997, 1005 (2d Cir. 1991).

[124] *See* In re Jensen, 995 F.2d at 929 (distinguishing this approach based on the debtor's conduct from the "relationship" approach, but describing both similarly as relating to the time of the act that gives rise to the relationship).

[125] COOKE, *supra* note 97, at § 20.05[2][b].

[126] COOKE, *supra* note 97, at § 20.05[2][a]; In re Jensen 995 F.2d at 930; Matter of Chicago, Milwaukee, St. Paul & Pacific Railroad, 974 F.2d 775, 787 (7th Cir. 1987).

[127] Matter of Chicago et al., 974 F.2d at 788; Chemetron Corp. v. Jones, 72 F.3d 341 (2d Cir. 1995).

[128] In re Buttes Gas & Oil Co., 182 B.R. 493 (S.D. Tex. 1994); *but see* Chemetron Corp,. 72 F.3d 341, 348–49 (3d Cir. 1995) (debtor not required to publish notice in Ohio despite knowledge of contamination issues at Cleveland facility).

course of the bankruptcy proceedings. Where, however, the bankruptcy took place prior to the enactment of CERCLA in 1980, it has been held that a CERCLA claim could not have arisen at that time and therefore could not have been discharged by the bankruptcy.[129] Other exceptions would be in the unusual circumstance where the debt is, for some reason, specifically excepted from discharge, or where the acts or omissions giving rise to the environmental claim are found to be "willful and malicious injury by the debtor to another entity or to the property of another entity."[130] Additionally, if the reorganized successor corporation has become a party with statutory liability as an owner, operator, or arranger on its own account, it may be subject to suit in that capacity without the need to demonstrate that it succeeds to the predecessor company's liability.[131] Finally, under certain circumstances, a successor entity that has purchased the assets of a bankrupt corporation may be deemed to have succeeded to the liabilities of that corporation under exceptions to the usual rule that an asset purchaser does not take on the liabilities of the seller. These exceptions include where the purchasing corporation has expressly or impliedly agreed to assume the seller's debts, where the transaction amounts to a de facto consolidation or merger of the corporations, where the purchaser is merely a continuation of the seller business, and where the transaction is entered into fraudulently to escape liability.[132]

c. Other Defenses

There are many other defenses PRPs may raise to a cost recovery action brought by a transportation agency or that a transportation agency may raise as a defendant PRP. Although mentioning all possible defenses for any PRP is beyond the scope of this text, the following are some additional defenses that have specific implications for cases involving transportation agencies.

i. Use of Federal Funds by State and Local Transportation Agency.—A defendant to a cost recovery action brought by a transportation agency may argue that the transportation agency is not the "real party in interest" because it did not fund the remediation. Since a transportation agency may be substantially aided by Federal-Aid Highway Funds or other federal, state, or local sources of funds for the remediation, the transportation agency is arguably not the only entity with a vested interest in obtaining recovery from PRPs. In *Washington State Department of Transportation v. Washington National Gas Co.*,[133] a PRP unsuccessfully raised this argument in defense of the WSDOT's cost recovery action.[134] The District Court for the Eastern District of Washington held that the WSDOT was the real party in interest even where FHWA had funded the remediation and was to receive reimbursement for any costs recovered. Since the WSDOT was obligated to reimburse FHWA for any costs recovered, FHWA would be estopped from pursuing the defendant and there would be no double recovery.[135]

ii. State Immunity From Suit—Discussion of Seminole Tribe of Florida v. Florida, et al.—Any state transportation agency that is named as a PRP in cost recovery action in federal court may and should raise the defense of sovereign immunity. As a result of the United States Supreme Court's decision in *Seminole Tribe of Florida v. Florida*,[136] the federal courts lack the power to hear causes of action brought under CERCLA against a state and its agencies. *Seminole Tribe* is one of several recent Supreme Court pronouncements in the complicated field of Eleventh Amendment jurisprudence. A brief discussion of Eleventh Amendment law will be helpful in understanding *Seminole Tribe* and the immunity available to a transportation agency.

The Eleventh Amendment itself states that: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."[137]

Prior to *Seminole Tribe*, two exceptions had developed to this rule of state immunity from suits by private citizens in federal court. First, states may consent to sue and thereby waive their Eleventh Amendment rights.[138] Second, Congress may in the same circumstances abrogate state sovereign immunity, if it has expressed a clear intent to do so and is legislating

[129] Matter of Penn Central Transp. Co., 944 F.2d 164, 168 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1262 (1992).

[130] 11 U.S.C. § 523(a)(6); *see* COOKE, *supra* note 97, at § 20.05[4].

[131] CADE, *supra* note 20, at 23–24.

[132] *See, e.g.* Chicago Truck Drivers, Helpers and Warehouse Workers Union Pension Fund v. Tasemkin, 59 F.3d 48 (7th Cir. 1995); The Ninth Avenue Remedial Group v. Allis Chatmers Corp., 195 B.R. 716 (N.D. Ind. 1996). *See also* COOKE, *supra* note 97, at § 18.03[6][d]; citing inter alia, United States v. Mexico Feed & Seed Co., Inc. 980 F.2d 478, 487 (8th Cir. 1992) (setting forth the tests for successor liability).

[133] WSDOT v. Washington Natural Gas Co. et al, U.S.D.C. No. C89-415TC (W.D. October 22, 1992), *aff'd*, 59 F.3d 793 (9th Cir. 1995), discussed in CADE, *supra* note 20, at 22.

[134] *Id.*

[135] *Id.*

[136] Seminole Tribe of Florida v. Florida, et al., 517 U.S. 44 (1996).

[137] U.S. CONST. AMEND. XI.

[138] Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984).

under Section 5 of the Fourteenth Amendment[139] or the power of the Commerce Clause.[140]

In *Pennsylvania v. Union Gas,* the United States Supreme Court upheld CERCLA's provisions as permitting a private right of action against states.[141] The court found that CERCLA fell within the second exception to Eleventh Amendment immunity as Congress in passing CERCLA had expressed a clear intent to abrogate state sovereign immunity and to allow such suits.[142]

In *Seminole Tribe*, the court revisited the issues of Congressional abrogation and explicitly overturned the *Union Gas* decision.[143] The court held that Congress does not have the power, when legislating pursuant to the Commerce clause, to abrogate states' Eleventh Amendment sovereign immunity from suit by private citizens.[144] Although *Seminole Tribe* did not specifically involve CERCLA, it overturned the grounds on which private citizens had been allowed to sue states under statutes like CERCLA. Later cases have followed *Seminole Tribe* in the CERCLA context and made clear that the state and its agencies cannot be subjected to suit by private parties in federal court.[145] In the wake of *Seminole Tribe*, it seems that absent a waiver by the state, or Congressional legislation pursuant to the Fourteenth Amendment, state sovereign immunity cannot be abrogated.

Seminole Tribe and other recent Supreme Court cases[146] mark a substantial change in the sovereign immunity doctrine, with a movement toward increasing states' rights.[147] Because a state transportation agency may be affected by this movement, state transportation agencies should make an effort to stay abreast and informed of subsequent developments in this area.

iii. Counterclaims by Defendants Against Agency.— Defendants in a cost recovery action may assert counterclaims against a transportation agency.[148] Such counterclaims are particularly likely where the agency has owned or conducted remediation at the site. Although counterclaims (otherwise known as recoupment) are permitted against agencies, such claims may be subject to dismissal where the agency handled the hazardous substances with due care and acted in accordance with the NCP.[149]

d. Recovery from Superfund

Transportation agencies may be able to recover remediation costs from the federal Superfund rather than initiating lawsuits against PRPs. Section 106 of CERCLA permits a party who has been ordered to perform a removal or remedial action and who has completed such action to apply for reimbursement from the federal Superfund.[150] Recovery would be available to an agency where it can prove that either it is not a responsible party or it is not a current owner or operator because it acquired the site involuntarily.

e. Cost Recovery Under State Law

Many states have environmental remediation statutes allowing for cost recovery actions. A transportation agency may be able to also employ a state's remediation statute to pursue PRPs. State environmental remediation statutes may differ from CERCLA on a number of issues, as discussed more fully in the following section. Recovery from state remediation funds, instead of private parties, may also be available under these state statutes.

C. STATE HAZARDOUS WASTE LAWS*

It is not enough to simply be aware of CERCLA. A transportation agency also needs to be familiar with the state hazardous waste laws for the state or states in which it is operating. State hazardous waste laws often supplement or facilitate the objectives of the federal hazardous waste statutes, specifically RCRA and CERCLA. There are often aspects of hazardous waste management and remediation that are not covered by the federal statutes. Furthermore, state hazardous waste cleanup laws also create new remedies, as well as new sources of liability exposure, for transportation agencies involved in acquiring right-of-way or other facilities.

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[139] Fitzpatrick v. Bitzen, 427 U.S. 445 (1976).

[140] Pennsylvania v. Union Gas Co., 491 U.S. 1, 14–15 (1989).

[141] *Id*. at 13.

[142] *Id*.

[143] Seminole Tribe, 517 U.S. at 72.

[144] *Id*.

[145] *See, e.g*., Burnette v. Carothers, 192 F.3d 52 (2d Cir. 1999), *cert. denied*, 121 S. Ct. 657 (2000).

[146] *See, e.g*., Alden v. Maine, 527 U.S. 706 (1999) (applying *Seminole Tribe* to age discrimination claim; College Sav. Bank v. Fla. Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Fla. Prepaid Postsecondary Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); Cour d'Alene Tribe v. Idaho, 521 U.S. 261 (1997) (suit in federal court against state to quiet title to submerged lands of a lake and river is barred by the Eleventh Amendment); Kimel v. Fla. Board of Regents, 528 U.S. 62 (2000).

[147] *See* "Environmental Law Division Notes," *Can States Squirm out of Liability?: The 11th Amendment and CERCLA*, March 2000 *ARMY LAW* 36; Courtney E. Flora, *An Inapt Fiction: The Use of the Ex Parte Young Doctrine for Environmental Citizen Suits Against States After Seminole Tribe,* 37 ENVTL. L. 935 (1997); David Milton Whalin, JOHN C. CALHOUN BECOMES THE TENTH JUSTICE: STATE SOVEREIGNTY, JUDICIAL REVIEW AND ENVIRONMENTAL LAW AFTER JUNE 23, 1999, 27 B.C. ENVTL. AFF. L. REV. 193 (2000); *See also*, Steven G. Calabresi, *A Constitutional Revolution*, *WALL ST. J.*, July 10, 1997, at A14 (these cases "mark the beginning of a quiet revolution in American constitutional law").

[148] CADE, *supra* note 20, at 24.

[149] *Id*.

[150] *Id.*

* This section relies, in part, upon the discussion of this subject in DANIEL P. SELMI & KENNETH A. MANASTER, STATE ENVIRONMENTAL LAW, ch. 9 (2001).

This section examines a selection of state hazardous waste laws to emphasize why transportation agencies must have familiarity with their state's hazardous waste laws. However, a comprehensive analysis of all existing statutes or planned developments of state hazardous waste laws is beyond the scope of this chapter.

1. State Approaches to Site Cleanup[151]

A majority of states have enacted legislation that parallels the objectives of CERCLA and promotes the remediation of abandoned hazardous waste sites.[152] However, state cleanup laws vary considerably in both their approaches and complexity.[153] Some states exactly mirror CERCLA, while others differ substantially. The statutes generally define categories of responsible parties that are held liable for site investigation and remediation. A state may order a private party to remediate a site or may itself undertake remediation and then seek reimbursement from the responsible parties for its costs. Many states have a special fund analogous to the Federal Superfund, which may be drawn on for remediation costs. Some states permit private cost recovery actions, whereas other states only permit the state environmental agency to pursue parties responsible for the release or disposal of hazardous wastes.[154] To illustrate some of the possible variations in how the states treat this subject, three different states' laws are discussed below.[155]

a. New Jersey

The cleanup of hazardous waste in New Jersey is in substantial part controlled by the Spill Compensation and Control Act (the Spill Act).[156] The Spill Act generally prohibits the discharge of hazardous substances.[157] However, the Spill Act does not apply to discharges of hazardous substances pursuant to and in compliance with the conditions of a federal or state permit.[158] The Spill Act requires any party who may be subject to liability for a discharge of a hazardous substance, including petroleum, to immediately notify the state's Department of Environmental Protection and Energy (DEP).[159] Failure to notify DEP can result in a myriad of problems for responsible parties, including administrative civil penalties, a civil lawsuit, a temporary or permanent injunction, and liability for the costs of cleanup and the costs of restoring and replacing natural resources damaged or destroyed by the discharge.[160] Liability for remediation is strict, joint, and several.[161]

The financial mechanism for cleaning contaminated sites is the Spill Compensation Fund.[162] The Fund is strictly liable for the costs of restoring, repairing, and replacing any real or personal property damaged or destroyed by a discharge, lost income from the loss of use of the property, costs of restoring or replacing natural resources, and loss of state or local tax revenues.[163] However, parties found responsible for contaminated sites must reimburse the Fund.[164] The Spill Act also allows private parties to seek reimbursement from responsible parties for remediation costs.[165] Costs expended to remediate discharged petroleum products are therefore recoverable by both the DEP and by private parties.

The second key component of New Jersey's hazardous waste cleanup law is the Industrial Site Recovery Act (ISRA).[166] As a precondition to the sale or transfer of industrial facilities, the ISRA requires the owner or operator of the facility to make a written certification that there has been no discharge of hazardous waste at a site or to remediate the site prior to the transfer.[167]

b. California

In California, cleanup of hazardous waste is governed by the Hazardous Substance Account Act (the Act).[168] The stated intent of this legislation is to (a) establish a program to provide authority for responses to releases of hazardous substances, including spills and hazardous waste disposal sites that pose a threat to the public health or the environment; (b) compensate persons, under certain circumstances, for out-of-pocket medical expenses and lost wages or business income resulting from injuries proximately caused by exposure to releases of hazardous substances; and (c) make available adequate funds in order to permit the State of California to assure payment of its 10 percent share of the costs mandated by CERCLA.[169] The Act is modeled after CERCLA.[170] In fact, the Act uses cross references

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[151] DANIEL P. SELMI & KENNETH A. MANASTER, STATE ENVIRONMENTAL LAW, at § 9:2 (2001).

[152] *Id*.

[153] *Id.*

[154] *See, e.g*., MASS. GEN. LAWS ANN. ch. 21E, § 5 and TEX. HEALTH & SAFETY CODE § 362.344.

[155] This discussion follows SELMI & MANASTER, *supra* note 151, at § 9.2-9.5.

[156] N.J. STAT. ANN. § 58:10-23.11 (West 1992).

[157] N.J. STAT. ANN. § 58:10-23.11c (1992, 2002 Supp.).

[158] N.J. STAT. ANN. § 58:10-23.11c.

[159] N.J. STAT. ANN. § 58:10-23.11e and N.J. Stat. Ann. § 58:10-23.11b.

[160] N.J. STAT. ANN. § 58:10-23.11e.

[161] N.J. STAT. ANN. § 58:10-23.11g.c.1.

[162] N.J. STAT. ANN. § 58:10-23.11o.

[163] N.J. STAT. ANN. § 58:10-23.11g.

[164] N.J. STAT ANN. § 58:10-23.11g.

[165] N.J. Stat. Ann. § 58:10-23.11f(2); *See* SELMI & MANASTER, *supra* note 151, at § 9:3, n.4; *See* N.J. STAT. ANN. § 58:10-23.11g.

[166] N.J. STAT. ANN. § 13:1K-6 *et seq*.; *See* 2 JAMES T. O'REILLY ET AL., RCRA AND SUPERFUND § 15.20 (2d ed. 2001).

[167] N.J. STAT. ANN. § 13:1K-6; *See* O'REILLY ET AL., *supra* note 166 at § 15.21.

[168] CAL. HEALTH & SAFETY CODE § 25300 *et seq*. (West 1999, 2003 Supp.).

[169] CAL. HEALTH & SAFETY CODE § 25301(a)–(c) (West 1999, 2003 Supp.).

[170] O'REILLY ET AL., *supra* note 166, at § 15.11.

to CERCLA in identifying PRPs.[171] Its definition of certain terms, including the definition of "hazardous substances,"[172] also mirrors CERCLA's.

Under California's Act, strict liability is applied to responsible parties. But, unlike the New Jersey statute, responsible parties are not jointly and severally liable.[173] Instead, responsible parties are liable only for the proportion of damages that they cause.[174] The Act contains authority for the Department of Toxic Substances Control within the California Environmental Protection Agency to initiate removal or response actions.[175] The Act also grants the Department of Toxic Substances Control the authority to allow a city or county to initiate a removal or remediation action if the city or county first obtains the Department's approval for its proposed remedial actions.[176] State, city, and county cleanups are financed through the Hazardous Substance Account.[177] Like the New Jersey Spill Act, California's Act also provides for a private right of action.[178] Further, the Act permits contribution claims for cost recovery among responsible parties identified by the state.[179]

c. Colorado

Colorado lacks a separate state statutory scheme for assessing and allocating liability for the cleanup of hazardous waste contamination. Instead, Colorado has authorized its Department of Public Health and Environment to cooperate with EPA in the implementation of CERCLA in that state to the extent that the federal response action is consistent with state interests.[180] The authorization includes accepting the state's share of CERCLA response costs for cleanup and post cleanup monitoring and maintenance.[181] A hazardous substance response fund is funded with a solid waste disposal fee, and used to provide Colorado's share of response costs for cleaning up federal disposal sites, state cleanups at natural resource damage sites, remediation activities under the federal CWA that are necessary to prevent a site from being added to the federal NPL, and clean up of brownfields sites where there is no responsible party and remediation will allow site redevelopment.[182]

2. Implications for State Transportation Agencies

As evidenced by the examples discussed above, state analogs to CERCLA vary substantially and will impact transportation agencies differently. For example, some states, such as New Jersey and Massachusetts, address substances such as petroleum products within their state schemes, even though the substances are not encompassed by CERCLA's definition of hazardous substance.[183] Some, such as New Jersey, adopt comprehensive programs restating and expanding upon the federal law provisions, while others, such as Colorado, rely largely on the federal statute as the vehicle for addressing disposal site concerns. Consequently, a transportation agency should not simply assume that a state hazardous substance control law is analogous to CERCLA. Rather, a transportation agency should carefully examine each state's statutory and regulatory provisions to avoid unnecessary exposure or liability.

3. Liability Standards Under State Laws

Under CERCLA, strict liability is imposed on parties who are responsible for the release or threatened release of hazardous substances.[184] Among the state statutory schemes, some follow the strict liability model of CERCLA, whereas others impose different standards of liability. This section examines the various standards employed.

a. Strict Liability or Fault

Liability is strict under CERCLA, which means parties are liable regardless of fault or negligence.[185] Most states utilize this approach,[186] and generally either parallel the CERCLA language[187] or specifically incorporate CERCLA provisions by reference.[188] One

[171] CAL. HEALTH & SAFETY CODE § 25323.5.

[172] O'REILLY ET AL., *supra* note 166, at § 15.11; CAL. HEALTH & SAFETY CODE § 25316.

[173] SELMI & MANASTER, *supra* note 151, at § 9:4.

[174] CAL. HEALTH & SAFETY CODE §§ 25363(a)–(b), (d).

[175] CAL. HEALTH & SAFETY CODE § 25358.3.

[176] CAL. HEALTH & SAFETY CODE § 25351.2; *See* SELMI & MANASTER, *supra* note 151, at § 9:4.

[177] CAL. HEALTH & SAFETY CODE § 25330; *See* SELMI & MANASTER, *supra* note 151, at § 9:4.

[178] CAL. HEALTH & SAFETY CODE § 25372; O'REILLY ET AL., *supra* note 166, at § 15.11. Under California law, a person may apply to the State Board of Control for reimbursement.

[179] CAL. HEALTH & SAFETY CODE § 25363(e).

[180] COLO. REV. STAT. § 25-16-103.

[181] COLO. REV. STAT. § 25-16-104.

[182] COLO. REV. STAT. §§ 25-16-104.5, 25-16-104.6.

[183] 42 U.S.C. § 9601(14), MASS. GEN. L. ch. 21E, § 4; N.J. STAT. ANN. § 58:10-23.11b (definition of "hazardous substances").

[184] 42 U.S.C. §§ 9601(32); 9607(a).

[185] *Id.*

[186] O'REILLY ET AL., *supra* note 166, at § 15.07.

[187] *See*, *e.g.*, DEL. CODE ANN. tit. 7, § 9105(b) ("Each person who is liable…is strictly liable, jointly and severally, for all costs associated with a release from a facility."); IOWA CODE ANN. tit. XVII, § 455B.392.1 ("A person having control over a hazardous substance is strictly liable to the state for all of the following"); MASS. GEN. L. ch. 21E, § 5(a) (Responsible parties "shall be liable, without regard to fault"); OR. REV. STAT. § 465.255(1) ("The following persons shall be strictly liable for those remedial action costs incurred by the state or any other person that are attributable to or associated with a facility and for damages for injury to or destruction of any natural resources caused by a release"); and discussion in SELMI & MANASTER, *supra* note 151, at § 9:7, n.3.

[188] IND. CODE ANN. § 13-25-4-8 ("A person that is liable under Section 107(a) of CERCLA…is liable, in the same

benefit to a state of using a strict liability standard is conservation of agency resources.[189] A state environmental agency need only establish that a release occurred and that the PRP contributed to the release.[190] To prove the additional element of fault could cause considerable expense, because evidence of fault is often both more subjective and within the control of the PRP.[191]

In some states, the environmental cleanup laws do not specify the basis of liability.[192] In these states, "it is left for government agencies, and ultimately for the courts to determine whether strict liability or some other standard will apply."[193]

b. Categories of Liable Parties

i. State Changes to the Pool of Liable Parties.—Some state hazardous waste laws broaden the categories of PRPs included in CERCLA, and some state hazardous waste laws address narrower categories of PRPs.[194]

ii. Treatment of Particular Categories.

1. Involuntary Owners and Fiduciaries.—CERCLA generally protects involuntary owners of property from liability.[195] Pursuant to CERCLA, state or local governmental units that acquire ownership or control of contaminated property through bankruptcy, tax delinquency, abandonment, or by the exercise of eminent domain are relieved from liability under CERCLA as long as the governmental entity did not cause or contribute to the release of the hazardous waste.[196] Similarly, individuals who acquire contaminated property "by inheritance or bequest" are exempt from CERCLA liability.[197] For the most part, state hazardous waste laws protect involuntary owners from liability as well.[198]

For transportation agencies, acquisition by condemnation or eminent domain may be an available defense to a cost recovery action brought under a state hazardous waste law.[199] To determine whether such a defense may be available to a transportation agency, the facts concerning the condemnation in issue should be analyzed in light of the particular state's hazardous waste law.

2. Innocent Landowners.—Under CERCLA, innocent landowners are those who demonstrate that they acquired a site that turned out to be contaminated despite the exercise of due diligence in making a preacquisition inquiry into the characteristics of the site.[200] Although CERCLA contains a defense for such landowners, the defense, with its unspecified and almost contradictory criteria, is difficult to meet. It is factually difficult, although not conceptually impossible, for a defendant to demonstrate that a careful preacquisition investigation of the site was adequate, yet did not produce any reason to know of the contamination.

Many state hazardous waste laws contain the innocent landowner defense.[201] However, some states' statutes, such as New Jersey's, do not provide for this defense.[202] Where the defense is available, its scope and criteria differ from state to state.[203] Transportation agencies should be aware of the nuances of this defense in their particular state.

3. Transporters.—Under CERCLA, a transporter of hazardous substances is liable only if the transporter "selected" the facility from which there is a release.[204] Some states have expanded transporter liability beyond this limited category. For example, Montana's hazardous waste statute imposes liability on "a person who accepts or has accepted a hazardous or deleterious substance for transport to a disposal treatment facility."[205] Even more broadly, Massachusetts' hazardous waste statute imposes liability on "any person who, directly or indirectly, transported any hazardous material to transport, disposal, storage or treatment vessels on sites from or at which there is or

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manner and to the same extent, for the state under this section."); CAL. GOV'T CODE § 53314.7 ("The scope and standard of liability for any costs recoverable…shall be the scope and standard of liability set forth in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. Section 6901 *et seq*.")).

[189] SELMI & MANASTER, *supra* note 151, at § 9:7.

[190] *Id.*

[191] *Id.*

[192] *See*, *e.g.*, N.Y. ENVTL. CONSERV. LAW § 27-1313(4) (Statute authorizes Commissioner of the Department of Environmental Conservation to determine which persons may be subject to an administrative order to remediate a hazardous waste site according to "applicable principles of statutory common law liability."); KY. REV. STAT. ANN. §§ 224.01-400(15)(a) (Statute authorizes cost recovery action from "persons liable therefor"), and discussion in SELMI & MANASTER, *supra* note 151, at § 9:8.

[193] SELMI & MANASTER, *supra* note 151, at § 9:8.

[194] SELMI & MANASTER, *supra* note 151, at § 9:11.

[195] SELMI & MANASTER, *supra* note 151, at § 9:14.

[196] 42 U.S.C. § 9601(35)(A). For a discussion of the use of the eminent domain defense and its application to transportation agencies, see § 4.A.2.

[197] 42 U.S.C. § 9601(20)(D).

[198] SELMI & MANASTER, *supra* note 151, at § 9:14; citing MASS. GEN L. ch. 21E, § 2 (definition of "owner" and "operator," subsection (b)); 35 PA. STAT. ANN. § 6020.103 (definition of "owner or operator").

[199] *See*, *e.g.,* N.J. STAT. ANN. § 58:10-23.11g.d.(4); KY. REV. STAT. ANN. § 224.01-400(25) (defenses and limitations to liability are deemed to be those of CERCLA and Clean Water Act); MASS. GEN. L. ch. 21E, § 5(j) (conditional exemption for state agencies and public utility company rights-of-way).

[200] 42 U.S.C. § 9601(35).

[201] *See* SELMI & MANASTER, *supra* note 151, at § 9:12.

[202] SELMI & MANASTER, *supra* note 151, at § 9:12.

[203] O'REILLY ET AL., *supra* note 166, at §15.06.

[204] 42 U.S.C. § 9607(a)(4).

[205] MONT. CODE ANN. § 75-10-715(1)(d); *See* SELMI & MANASTER, *supra* note 151, at § 9:13.

has been a release or threat of release of such material."[206]

A transportation agency named as a PRP under a state statute as a "transporter" of hazardous substances needs to examine the particular statutory provisions at issue for possible safe harbors from liability. For example, under Iowa's state hazardous waste laws, liability as a transporter is avoided if it was misrepresented to the transporter that the substance was not hazardous.[207]

4. Lenders.—In 1996, Congress amended CERCLA by adding protections for lenders who hold a security interest in contaminated property.[208] The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 protects lenders from liability as long as the lender did not actively participate in the management of the property.[209] This protection extends to situations where the lender is forced to foreclose and resells or re-leases the property.[210] A number of states have likewise addressed concerns for lender protection by incorporating similar provisions into their own hazardous waste legislation.[211]

5. Cleanup Contractors.—Under CERCLA, cleanup contractors and consultants who perform cleanup related activities at a facility are protected from liability under an exemption for rendering care and advice.[212] State hazardous waste statutes generally include this protection from liability for cleanup contractors and consultants.[213] However, a cleanup contractor may be held liable if its malfeasance leads to further damage.[214] Depending upon the state, the level of wrongdoing must rise to either negligence or gross negligence for a cleanup contractor to be held liable.[215]

6. Miscellaneous Parties.—Some state statutes exempt from liability other categories of PRPs, some of which may encompass some transportation agencies under certain circumstances. For example, Pennsylvania's Hazardous Sites Cleanup Act protects from liability generators of household hazardous waste, as well as generators of certain scrap metals and certain lead acid storage businesses.[216] Transportation agencies involved in or anticipating involvement in cost recovery actions, whether as plaintiffs or as PRPs at a waste disposal site, should be aware of any exceptions contained in applicable statutes.

c. Joint and Several Liability

State hazardous waste laws also vary as to whether they follow CERCLA's joint and several liability standard. The majority of states employ joint and several liability or joint and several liability with apportionment for allocating remediation costs among responsible parties.[217] However, a minority of states, such as California and Arkansas, employ proportional liability, while others provide no statutory guidance at all.[218]

Joint and several liability with apportionment permits a party to prove its proportionate contribution to a site.[219] The evidentiary burden is usually on the responsible party seeking apportionment to prove that the remediation costs are divisible.[220]

Under a proportionate liability scheme, a responsible party is held liable only for a share of the response costs corresponding to its individual fractional share of responsibility for the contamination.[221] Because in certain circumstances it will be difficult to establish which party is responsible for which waste, some states clarify that proportionality is to be followed "to the extent practicable."[222]

d. State Variations on Enforcement

Under CERCLA, the EPA is provided with an arsenal of administrative and civil orders, penalties, liens, and injunctive relief that it may employ against a PRP.[223] State hazardous waste laws do not always provide state environmental agencies with the same set of tools.[224] This section briefly examines the variations among state hazardous waste laws with respect to enforcement, liens, and citizen suits.

i. Enforcement.—In most states, there are three basic mechanisms for enforcing state CERCLA laws. A state agency can issue an administrative order requiring the property owner or the party responsible for the discharge of hazardous waste to conduct remediation of

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[206] MASS. GEN. LAWS ANN. ch. 21E, § 5(a)(4); *See* SELMI & MANASTER, *supra* note 151, at § 9:13.

[207] IOWA CODE ANN. § 455B.392(4).

[208] SELMI & MANASTER, *supra* note 151, at § 9:15; Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub. L. No. 104-208 (Sept. 30, 1996), 110 Stat. 3009-462, 42 U.S.C. §§ 6991b(h)(9), 9601(20)(E)-(G).

[209] 42 U.S.C. § 9601(20)(D)(i).

[210] 42 U.S.C. § 9601(20)(D)(ii).

[211] SELMI & MANASTER, *supra* note 151, at § 9:15 citing ARK. CODE ANN. § 8-7-403(b)(2); CAL. HEALTH & SAFETY CODE § 25548.2; MASS. GEN. L. ch. 21E, § 2 (definition of "owner" and "operator," subsection (c)).

[212] 42 U.S.C. §§ 9607(d)(1), 9607(d)(2).

[213] SELMI & MANASTER, *supra* note 151, at § 9:16.

[214] *See*, *e.g.,* ARK. CODE ANN. § 8-7-413(b)(2).

[215] SELMI & MANASTER, *supra* note 151, at § 9:16.

[216] PA. STAT. ANN. tit. 35, § 6020.701(B)(3), (5).

[217] SELMI & MANASTER, *supra* note 151, at § 9:19; O'REILLY ET AL., *supra* note 166, at § 15.08.

[218] SELMI & MANASTER, *supra* note 151, at § 9:18.

[219] SELMI & MANASTER, *supra* note 151, at § 9:20, citing as an example, MASS. GEN. LAWS ANN. ch. 21E, § 5(a).

[220] *Id. See*, *e.g.,* MASS. GEN. LAWS ANN. ch. 21E, § 5(b); ALASKA STAT. § 46.03.822(i).

[221] CAL. HEALTH & SAFETY CODE § 25363(a); ARK. CODE ANN. § 8-7-414(a)(1); SELMI & MANASTER, *supra* note 151, at § 9:21.

[222] CAL. HEALTH & SAFETY CODE § 25363(b); ARK. CODE ANN. § 8-7-414(a)(2).

[223] 42 U.S.C. § 9706 and § 9797.

[224] SELMI & MANASTER, *supra* note 151, at § 9:22.

the pollution,[225] a state can assess a responsible party a monetary fine for failing to comply with an administrative order,[226] or a state can act on its own to clean the site.[227] If a state remediates the site itself, it can seek cost reimbursement from the responsible party or parties, as the case may be.[228]

Administrative orders cannot be reviewed prior to enforcement under CERCLA.[229] A party wishing to challenge the order prior to its implementation and enforcement has no available relief. Some states also prohibit any pre-enforcement review.[230] However, many states allow for pre-enforcement review of orders.[231] Depending on the state, the pre-enforcement review may be conducted by an administrative tribunal or cabinet agency official,[232] or it may be a judicial review.[233]

One major enforcement tool usually available to states is monetary penalties.[234] Although monetary penalties are included in nearly all of the state hazardous waste laws, there is variation as to their application and magnitude.[235] The primary use of monetary penalties is for failure to comply with an administrative order. For example, Massachusetts provides for civil penalties of up to $25,000 per day or criminal fines of the same amount along with imprisonment for a violation of any order under the cleanup statute.[236]

Under CERCLA, punitive damages may be imposed for a failure "without sufficient cause to properly provide removal or remedial action."[237] The punitive damages may be imposed "in an amount at least equal to, and not more than three times, the amount of any costs incurred."[238] Many states also allow punitive damages but differ as to the amounts allowed.[239]

ii. Cleanup Cost Liens.—Since the CERCLA Superfund and state remediation funds expend resources when removal or remedial actions are undertaken, there must be avenues available for the state to seek reimbursement of the fund. In recognition of the fact that many responsible parties may not have the funds or assets to pay response costs and penalties, CERCLA and many states have enacted lien provisions.[240] The lien provisions allow the governmental entity to assert a lien against the contaminated property or other assets of a responsible party. A local transportation agency should be aware of the possibility that a lien has been placed on property that it intends to acquire. A local transportation agency should also be aware that two types of liens exist—a "conventional" lien and a "superlien."

Conventional liens take priority over all claims except those secured by a prior perfected security interest.[241] Examples of conventional lien provisions include the lien provision contained in CERCLA,[242] and the lien provision in the Minnesota statutory scheme.[243]

In contrast, a superlien imposed on the property of persons liable for cleanup costs takes priority over all earlier claims and encumbrances.[244] The superlien has substantial implications for creditors, purchasers, mortgagors, and title insurers.[245] Where the amount of a superlien exceeds the value of the property at issue, other lien holders are unable to recover on their liens.[246] Such liens usually cover only the contaminated property itself.[247] Other property owned by the debtor, such as residential property, is usually subjected to only a conventional lien. Liens, including superliens, must typically be recorded in the land registry to be effective.[248]

State lien statutes may be vulnerable to attack on constitutional grounds given an interpretation of the federal CERCLA lien provision by the appeals court in *Reardon v. United States*.[249] In *Reardon,* the First

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[225] SELMI & MANASTER, *supra* note 151, at § 9:22; O'REILLY ET AL., *supra* note 166, at § 15.10.

[226] SELMI & MANASTER, *supra* note 151, at § 9:25.

[227] SELMI & MANASTER, *supra* note 151, at § 9:22.

[228] *Id.*

[229] 42 U.S.C. § 9613(h); O'REILLY ET AL., *supra* note 166, at § 15.10; SELMI & MANASTER, *supra* note 151, at § 9:24.

[230] SELMI & MANASTER, *supra* note 151, at § 9:24, citing WASH. REV. CODE ANN. § 70.105D.060; Flanders Indus., Inc. v. State of Michigan, 203 Mich. App. 15, 512 N.W.2d 328 (1993) (court held that Michigan Environmental Response Act does not provide for pre-enforcement judicial review of administrative orders).

[231] O'REILLY ET AL., *supra* note 166, at § 15.10.

[232] *See*, *e.g.*, KY. REV. STAT. §§ 224.01-400(15)(c), 224.10-420(1).

[233] SELMI & MANASTER, *supra* note 151, at § 9:24; *See*, *e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 361.322(a); *See also* MASS. GEN. LAWS ch. 21E, § 10, providing for either administrative appeal or judicial review, at the environmental agency's option.

[234] SELMI & MANASTER, *supra* note 151, at § 9:25.

[235] *Id*.

[236] MASS. GEN. L. ch. 21E, § 11.

[237] 42 U.S.C. § 9607(c)(3).

[238] *Id*.

[239] SELMI & MANASTER, *supra* note 151, at § 9:25; *See also* CONN. GEN. STAT. ANN. § 22a-133g (punitive damages up to 1 ½ times the remediation costs incurred may be assessed against a responsible party who "negligently caused a hazardous waste disposal site").

[240] 42 U.S.C. § 9607(l); SELMI & MANASTER, *supra* note 151, at § 9:25.

[241] SELMI & MANASTER, *supra* note 151, at § 9:27.

[242] 42 U.S.C. § 9607(1)(l).

[243] MINN. STAT. ANN. §§ 514.671-514.672.

[244] SELMI & MANASTER, *supra* note 151, at § 9:28.

[245] *Id.*

[246] *Id.*

[247] SELMI & MANASTER, *supra* note 151, at § 9:29.

[248] *Id*.

[249] SELMI & MANASTER, *supra* note 151, at § 9:31; Reardon v. United States, 947 F.2d 1509 (1st Cir. 1991).

Circuit Court of Appeals held that CERCLA's lien against a piece of property amounted to a deprivation of private property without due process and was therefore unconstitutional because the lien provision in the statute failed to require that the property owner be notified and given a hearing before the EPA imposed its lien.[250] Despite this successful challenge to the CERCLA lien provision, the provision has not yet been amended to respond to the court's criticism; however EPA has implemented its authority to impose liens so as to provide adequate process.[251] A state environmental lien statute that fails to afford adequate due process protections would also be vulnerable to challenge on constitutional grounds.

iii. Citizen Suits.—In addition to cost recovery actions brought by the state, transportation agencies may be subject to suits brought by private citizens. Some states permit private citizens to initiate suits to compel cleanup or redress contamination problems as part of their hazardous waste statutes.[252] However, in states that allow private suits, some states limit the parties eligible to bring suit. These states impose "standing" limitations that require a party to have actually suffered harm from the discharge of hazardous waste.[253] In states without standing requirements, a transportation agency could conceivably be subject to a suit by individuals completely unassociated with the contaminated site in issue.

A transportation agency involved in an action brought under state CERCLA analogues should also assess the potential for the involvement of additional parties under statutory provisions authorizing third party intervention in a pending state enforcement proceeding, or state intervention in a pending citizens suit.[254] Either scenario can complicate and increase the difficulty of extracting oneself from the litigation. Although intervention may be permitted, it may be the case that private citizen suits are not permitted when the state has already commenced an enforcement action. Pennsylvania, for example, bars a citizen suit "when the department has commenced and is diligently prosecuting" an enforcement action.[255]

State private citizen suit provisions vary not only as to standing requirements but also as to the remedies offered.[256] Depending upon the state, remedies include monetary penalties, injunctive relief, and litigation costs, including reasonable attorney and witness fees to the prevailing (or substantially prevailing) party.[257] The ability to recover litigation costs provides an additional incentive to the bringing and facilitating of private citizen suits. The potential for facing litigation of this sort over the cleanup of a contaminated right-of-way, for example, is just one of many reasons why it is important for a transportation agency to understand applicable state CERCLA enactments in addition to the federal statute.

[250] *Id.*

[251] *See* United States v. Glidden Co., 3 F. Supp. 2d 823 (N.D. Ohio 1997).

[252] SELMI & MANASTER, *supra* note 151, at § 9:32.

[253] *Id.*

[254] In Pennsylvania, for example, both types of intervention are explicitly permitted by statute. PA. STAT. ANN. tit. 35, § 6020.1115(b).

[255] PA. STAT. ANN. tit. 35, § 6020.1115(b).

[256] SELMI & MANASTER, *supra* note 151, at § 9:31.

[257] SELMI & MANASTER, *supra* note 151, at § 9:37; *See, e.g.*, PA. STAT. ANN. tit. 35, § 6020.1115(b); WASH. REV. CODE ANN. § 70.105D.050(5)(a); N.J. STAT. ANN. § 2A:35A-10 (fee awards against a local agency capped at $50,000).