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Proactive Evaluation of PRP Status at Hazardous Waste Disposal Sites

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Two keys to avoiding potentially responsible party (PRP) status at future Superfund sites are to manage all waste with appropriate care and to perform appropriate inquiries into the history of new properties prior to acquisition. However, corporations can become PRPs because of their ownership and/or operation of historically contaminated property, their historical waste management practices, or their historical disposal of hazardous substances at nonowned disposal sites, such as landfills. This article describes a method by which insurance companies, waste producers, and property owners can proactively evaluate their potential liability associated with environmental response action costs at contaminated sites.

INTRODUCTION

Based on the Comprehensive Environmental Response, Compensation, and Liability Act\(^1\) (CERCLA, or more commonly referred to as Superfund), an entity deemed to be a responsible party for a release or threatened release of hazardous substances to the environment is liable for the cleanup of that release. Many states have statutes with analogous liability schemes. Contrary to popular belief, this liability extends to thousands of contaminated sites that are not on the U.S. Environmental Protection Agency’s National Priority

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\(^1\) 42 USC §§ 9601 et seq.
List (NPL) of major contaminated sites. Superfund liability can apply to small wooded areas with just a few abandoned waste drums, to old industrial properties with historical contamination, or to gigantic municipal landfills.

The National Contingency Plan (NCP)\(^2\) allows cost recovery actions to be brought against a PRP by both private parties and/or governmental agencies seeking reimbursement of costs for past response actions.

**EVALUATING CURRENT OPERATIONS TO AVOID FUTURE PRP STATUS**

There are two key aspects associated with avoiding future PRP status: (1) conduct appropriate due diligence prior to acquisition\(^3\) of any new property, and (2) implement an appropriately robust waste management and environmental compliance program.

Due diligence is crucial prior to acquiring commercial or industrial property. In order to avoid liability as a new owner or operator of historically contaminated property, CERCLA requires the acquirer to show that it “did not know and had no reason to know” of contamination present prior to acquisition. To establish that the acquirer had no reason to know, the acquirer must have conducted “all appropriate inquiries” into the previous ownership and uses of the property.\(^4\) Even after performing “all appropriate inquiry,” the innocent landowner defense can be difficult to raise successfully. The brownfields amendments to CERCLA offered some liability protection to “bona fide prospective purchasers”\(^5\) of previously contaminated properties who met certain conditions; however, state law often has significant cleanup requirements that affect even new owners not responsible for historical contamination.

The second key aspect to avoiding future PRP status is to develop and implement a robust environmental compliance program\(^6\) that aims to prevent releases of hazardous substances on owned property and to ensure that waste sent to nonowned disposal sites is managed according to all appropriate regulations. This environmental compliance program should include regular audits of both on-site environmental activities and nonowned disposal sites.

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\(^2\) 40 CFR 300. The National Contingency Plan is the regulatory framework under which USEPA manages the Superfund program.

\(^3\) The term *acquisition* is used as a general term in this article and is meant to include purchase, lease, take-over of operations, or any other manner of control such that the entity could be considered an owner or operator of the property.

\(^4\) *All Appropriate Inquiries Fact Sheet*, EPA 500-F-03-019 (USEPA, 2003).

\(^5\) “Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (‘Common Elements’)” (USEPA, March 6, 2003).

EVALUATING HISTORICAL INFORMATION TO ASSESS POTENTIAL PRP STATUS

There are two approaches that an entity can use to evaluate their potential environmental liability due to historical operations: (1) the proactive approach, or (2) the reactive approach.

The proactive approach requires a self-directed evaluation to determine if an entity has either:

- Owned or operated a property at which hazardous substances may have been managed, either historically or currently, in a manner that caused or threatens to cause a release of hazardous substances to the environment; or
- Directly or indirectly transported or disposed of waste at a site undergoing assessment and/or cleanup response actions under state or federal regulatory programs.

An entity can evaluate their potential association with a hazardous waste site by reviewing internal documents, such as waste manifests, purchase orders, invoices, affidavits, and sales agreements, to determine whether or not hazardous substances released, generated, or transported by the entity can be associated with the contaminated site. Further, the U.S. Environmental Protection Agency (USEPA) maintains a master list of responsible parties at Superfund sites in its CERCLIS (Comprehensive Environmental Response, Compensation, and Liability Information System) database (also known as “List 11”). The CERCLIS database contains sites that are either proposed to be, or are on, the NPL and sites that are in the screening and assessment phase for possible inclusion on the NPL. As stated previously, a site’s absence on the NPL or in the CERCLIS database does not guarantee that the site is free from potential future liabilities.

During the review process, it is important to keep in mind that corporate names change as a result of acquisitions, mergers, divestitures, and bankruptcies. Thus, names and legal associations of corporate predecessors to a current company need to be carefully reviewed.

The reactive approach is the do nothing approach. Some companies wait until an inquiry or notification from USEPA, a state environmental agency, or a private party is received before investigating potential liability for cleanup actions at a hazardous waste site. A reactive approach relies on the hopeful assumption that the entity’s association with a hazardous waste site will not be discovered. Yet USEPA typically casts a wide net when attempting to identify PRPs, sometimes implicating companies that have legitimate reasons

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7 A copy of “List 11,” which provides a list of known PRPs for all CERCLIS sites, can be found at www.epa.gov/superfund/sites/phonefax/products.htm
to believe they are not liable. If a company does not have their exculpatory documentation at the ready (i.e., they previously gathered information using the proactive approach), that company will suddenly be working on USEPA's schedule and may not be able to find or obtain the documents necessary to extricate themselves from liability.

EXTRICATION METHODS

Whether identified as a PRP proactively or reactively, there are a number of approaches that an entity can use to minimize environmental risk. Remember, PRP means potentially responsible party. Furthermore, there are additional strategies that can be used to mitigate financial exposure, if in fact the company is found to be a responsible party. Entities can evaluate the following strategies to determine if they have a defense against liability under CERCLA:

(a) Demonstrating that the current entity is not a corporate successor;
(b) Locating prior settlements or indemnifications executed with other PRPs;
(c) Understanding the provisions of financial coverage by the owner/operator of the active or former treatment, storage, and disposal facilities (TSDFs);
(d) Demonstrating that the company is an innocent landowner (if applicable);
(e) Demonstrating that the release of hazardous substances was the result of an act of war or an act of God; and
(f) Assessing whether the company can limit financial liability due to expiration of the statute of limitations.

These mechanisms are described further in the sections that follow.

(A) Demonstrating That the Current Entity is Not a Corporate Successor

The first and perhaps most common approach used to extricate a company as a PRP is to demonstrate that a company is not a corporate successor of interest of the entity that was actually responsible for causing the contamination to be released. This is determined via a legal review of corporate history and successorship between predecessor and current corporate entities. Such an analysis can be quite complex and is sometimes disputed between various parties. Ultimately, the determination of whether or not a company is a corporate successor may need to be resolved by legal proceedings.

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This type of review can clarify the relationship of each corporation to one another so that, if necessary, the judiciary can make a fact-specific determination as to the extent (if any) of liability for the corporate successor. This type of review can also be helpful when evaluating liability stemming from parent-corporation/subsidiary relationships.

(B) Settlements or Indemnifications from Other PRPs

In some instances, a company has reached prior settlements with a regulator or has received indemnification from private parties as part of corporate restructuring or property sales. In such instances, the company may be able to shield itself from a contribution action from a fellow PRP by demonstrating that it is no longer legally liable based on contractual indemnity provisions. Locating and maintaining copies of such agreements and associated payments is critical to withstanding the scrutiny of other parties seeking additional cost contribution. Of course, indemnity provisions such as these are only effective to the extent that the indemnitor is solvent and willing to pay without further judicial intervention.

(C) Financial Coverage by Former or Active Waste Treatment, Storage or Disposal Facilities

Former and active waste treatment, storage, or disposal facilities (TSDFs) are subject to the regulatory requirements set forth under the Resource Conservation and Recovery Act (RCRA). Under these regulations, owners/operators of TSDFs must show they have adequate financial resources for potential remediation (if necessary), eventual closure, and postclosure care. Typically, this financial test is met with combinations of insurance, trust funds, letters of credit, surety bonds, escrow accounts, corporate resources, or other approved financial instruments.

If an entity is identified as a PRP due to its generation of wastes that were transported to a permitted TSDF that is also subject to a CERCLA claim, it may have protection under USEPA’s RCRA Priority policy, which requires that such facilities be remediated under RCRA first, if at all possible. Under a RCRA Corrective Action, the TSDF financial assurance instruments will be used to clean up any release of hazardous substances. However, there have been several instances where the financial resources of the TSDF owner have not been adequate to remediate the contamination and claims against generators and transporters of waste under CERCLA have gone forward.

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10 42 USC §§ 6901.
(D) Demonstrating Innocent Landowner Status

If an entity is identified as a PRP due to previous or current ownership or control of a property where there was a historical release of hazardous substances, the entity may be able to demonstrate that it was an innocent landowner, if in fact it did not contribute to the release of the hazardous substances. Added to CERCLA in 1986, the innocent landowner defense requires that an acquirer of property “did not know and had no reason to know” of contamination present prior to acquisition. To establish that the acquirer had no reason to know, the acquirer must have conducted “all appropriate inquiries” into the previous ownership and uses of the property.

In recent years, specific requirements for Phase I Environmental Assessments have been available to meet the “all appropriate inquiries” standard (i.e., ASTM E1527), making use of the defense a straightforward yes-or-no issue (assuming the Phase I is done in accordance with the standards). However, property acquisitions and/or corporate mergers that took place prior to about 1980 and/or for which no environmental assessment was performed may or may not qualify as innocent acquisitions, depending on a review of site-specific details.

(E) Demonstrating an Act of God or an Act of War Caused the Release

CERCLA provides defenses against liability for cleanup of releases of hazardous substances caused by either an act of God or an act of war. Both these defenses have very high bars to success, but they are worth being aware of.

The act of God defense, to our knowledge, has never been successfully used in a CERCLA case. It requires the release to have been caused by “an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.” Courts have declared that even hurricanes, floods, and storms do not qualify for the act of God defense under CERCLA because they typically can be anticipated in certain parts of the country and their effects (i.e., the release of hazardous substances) can typically be prevented or avoided with due care.

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13 USEPA. March 6, 2003, “Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (‘Common Elements’).”


The act of war defense against CERCLA liability has only been used successfully once: for the 9/11 World Trade Center attacks. Though rarely used, it could be helpful at sites in instances of future terrorist attacks.

(F) Applicable Statute of Limitations

Under CERCLA, parties seeking cost recovery must initiate cost recovery action before the applicable statute of limitations expires. The statute of limitations varies based on the stage and type of remedial activity, as summarized in Table 1.

<table>
<thead>
<tr>
<th>Remedial Activity</th>
<th>Statute of Limitations</th>
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<tbody>
<tr>
<td>Removal Action (Short-Term)</td>
<td>Three years from when the removal action was completed</td>
</tr>
<tr>
<td>Remedial Investigation/Feasibility Study</td>
<td>Three years from the date the Record of Design was signed</td>
</tr>
<tr>
<td>Remedial Design</td>
<td>Three years from when the design was completed</td>
</tr>
<tr>
<td>Remedial Action (Long-Term)</td>
<td>Six years from when the remedial construction began on the site</td>
</tr>
</tbody>
</table>

REDUCING COST

Once an entity is determined to be a PRP at a hazardous waste site by USEPA or a state regulatory agency, or is pursued for cost recovery by a private party, one key strategy to manage potential liability and cleanup cost is to apportion the costs among the PRPs in a reasonable and equitable manner based on technical facts and legal principles.

Where there are multiple PRPs, USEPA and the state agency almost never apportion liability amongst the PRPs. Typically, the government will allow the PRP group to perform its own apportionment using whatever methods the group finds acceptable. For ease, many PRP groups at landfills and similar contaminated sites use a volumetric method, apportioning liability according to the volume of waste disposed by each entity. In instances where the PRPs were all owners of the same contaminated property, the PRPs sometimes use relative years of ownership as a proxy for liability share. Some PRP groups will use volumetric methods or ownership years as a starting point, but then make adjustments to liability shares based on the so-called Gore Factors.

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17 Id.
18 CERCLA §107(a) and 42 USC, section 9613(g)(2)(B).
(including distinguishability of contamination, volume and toxicity of waste, degree of culpability, and degree of cooperation with regulators)\textsuperscript{20}.

In 2009 the U.S. Supreme Court opened the door to additional methods to apportion liability with a decision involving Burlington Northern Railroad, Union Pacific Railroad, and Shell Oil.\textsuperscript{21} In essence, the Court recognized the use of “reasonable methods” to apportion liability for seemingly indivisible environmental contamination.\textsuperscript{22} Prior to this decision, the USEPA had considered the railroads jointly and severally liable. In this case, one of the key results was that the railroads avoided liability for “orphan shares” of the cleanup, thereby deflecting 85 percent of the environmental response costs back onto the government.\textsuperscript{23} The case in point used area of ownership, time of ownership, and a “safety factor” in calculating relative liability for cleanup at the site. Other factors that would likely prove useful in apportionment calculations include technical information, such as timing of releases, volume of releases, mechanisms of releases, chemical types, toxicity, waste mass, waste solubility, waste stability, chemical transportability, biodegradability, and various cost drivers (e.g., one chemical cost more to sample or clean up than the others). Though legal scholars disagree on the future ramifications of the Burlington Northern decision,\textsuperscript{24} it is imperative that technical experts be retained to develop a reasonable method of allocation and to potentially refute the technical assumptions that other parties use in their apportionment methods.

CONCLUSIONS

Ignoring or avoiding a portfolio-wide evaluation of potential environmental liabilities in the hope that no government enforcement action or third-party claims will present themselves is a self-deceiving exercise and is imprudent. A proactive approach should be considered to understand and establish potential environmental liabilities for current or past associations with all properties with the potential to require environmental cleanup. Analysis of corporate succession, legal settlements, insurance coverage, other financial instruments, and statute of limitations can potentially demonstrate a legal or technical basis

\textsuperscript{20} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
to avert PRP status or perhaps be apportioned a minor percentage of cleanup costs.

A proactive approach to evaluating potential PRP status can also be a key ingredient of any estimate of future environmental liabilities prepared to set environmental reserves. The conclusions reached during such a study can also be key documents that should be reviewed during the application process for environmental liability insurance or when evaluating legacy environmental insurance claims.