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To mark the 25th anniversary of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, BNA is publishing a series of articles on how the statute has shaped environmental cleanup policy and on how that policy is changing. This article by Karl S. Bourdeau and Steven M. Jawetz is the fourth in this series of articles about the superfund law, which was enacted in December 1980. In this article, they examine the evolution of certain private party and government expectations and practices under the CERCLA liability scheme, focusing on three challenges facing superfund today—resolving potential liability to the government for response costs and natural resource damages, obtaining cost recovery through contribution actions, and resolving liability concerns to promote the redevelopment of contaminated sites.

25 Years of Superfund Liability: Progress Made, Progress Needed

BY KARL S. BOURDEAU AND STEVEN M. JAWETZ

First and foremost, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or superfund)[1] is a liability statute. Over the 25 years since President Carter signed it into law on December 11, 1980, CERCLA has affected private party expectations and behavior far more because of its expansive liability scheme than because it created a fund to pay for the cleanup of certain hazardous substance sites. Loosely modeled on Section 311 of the Federal Water Pollution Control Act,[2] CERCLA imposed strict liability—liability without any need to show fault or legal culpability—not only on current facility owners and operators, but on past owners and operators at the time of disposal and on persons who ''arranged for disposal or treatment, or arranged with a transporter for trans-

[1] 42 U.S.C. §§ 9601-9675.

[2] 33 U.S.C. § 1321.

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port for disposal or treatment, of hazardous substances'' at a facility owned or operated by a third party.[3]

So, with the stroke of a pen, CERCLA required everyone to worry about superfund liability, whether they were currently involved with hazardous substance releases or waste disposal activities, had sent commercial trash to a municipal landfill 30 years earlier, had operated a mine 100 years earlier, or simply currently owned land contaminated by the actions of others. Operators of illegal disposal sites, major corporations in compliance with all applicable laws, and ''mom and pop'' retail establishments were all in the same legal boat.

At the same time that it cast the liability net far and wide, the superfund law raised the stakes to an unprecedented level. As interpreted by the courts, CERCLA imposed joint and several liability in situations where the environmental harms were ''indivisible.''[4] As a practical matter, because most superfund sites involved commingled compounds and little documentary evidence, this liability scheme meant a government plaintiff frequently had the ability to compel any one liable party to perform all of the response actions or pay all of the response costs required at a site. Companies facing joint and several liability also came to learn the potential extent of response action or government response costs at a site could be astronomical.

In addition to strict joint and several liability for response action and response costs, CERCLA imposed liability for injuries to natural resources resulting from hazardous substance releases.[5] The potential scope of this liability for natural resource damages (NRD) was virtually unknown for most of the first decade of the superfund program, and as discussed later in this article, it remains a huge uncertainty at many sites.

Much has been written during this silver anniversary year about the birth, growth, maturation and, by some, the possible death of the superfund program. This article will not review all of that history here. Instead, it will focus on a key legal and social impact of the superfund program—the evolution of certain private party and government expectations and practices under the CERCLA liability scheme.

Necessity is the mother of invention, and those dealing with the CERCLA liability scheme, on all sides of the table, have responded and adapted. However, despite these adaptations, the program suffers from critical flaws that prevent the most important goals of the program from being fully realized.

This article surveys the evolution of expectations and practices by addressing selected issues in three illustrative areas: (1) resolving potential liability to the government for response costs and natural resource damages; (2) obtaining cost recovery from other potentially responsible parties (PRPs) through contribution actions; and (3) resolving liability concerns to promote the redevelopment of contaminated sites.

In the course of the discussion, this article will provide practice tips to enhance everyone's continuing adaptation to changing circumstances. The article also proffers some suggestions regarding program improvements that, despite their political challenges, could help to move the program into the 21st century.

Resolving CERCLA Liability to the Government

The Early Years: 1981-1989.

As a result of the creation of the sweeping new CERCLA liabilities and the absolute lack of legislative guidance on many key statutory terms, along with the need for the Environmental Protection Agency to build a hazardous substance response action program from the ground up, litigation was inevitable. In fact, lengthy litigation between government plaintiffs and PRPs became the hallmark of the first several years of the superfund program, while the details of the definitions, liability rules, and defenses were being fleshed out and cleanup approaches were being developed. Given the novelty of the liability scheme and the tremendous uncertainties and potential exposure associated with superfund liability, PRPs had substantial incentives to litigate, and few guideposts to mark the way to a reasonable and prompt settlement.

EPA and the Department of Justice also faced or contributed to circumstances that favored litigation and disfavored early settlement. The agencies needed to establish favorable legal precedents to maximize the number of PRPs at the table and their negotiating leverage with such PRPs. In some cases, to minimize the government's litigation burden, the agencies pursued only a handful of the many PRPs associated with the site. In addition, the agencies lacked uniform approaches to settling with PRPs for remedial investigations, feasibility studies, remedial designs, remedial actions, and past response costs. The expectations of the parties varied with every site, and the mutual distrust of the agencies and PRPs made every settlement difficult. Moreover, in the early years of the program, the agencies struggled to find methods that would protect settling parties at multiparty sites against the risk of contribution actions by non-settlors. Without such protection, PRPs at these sites had limited incentive to settle with the government absent the participation of all parties.

By 1985, superfund was a dirty word in the corporate community. It symbolized large liabilities, high transaction costs, government inflexibility, delay, controversy, and unfairness. A number of local communities and states were also unhappy with the delays and controversy surrounding the program. Partly in response to such pressures, the Superfund Amendments and Reauthorization Act of 1986 (SARA)[6] included several provisions designed to promote prompt settlements rather than litigation, while confirming the basic elements of the liability scheme consistent with the victories won by the United States in court.

The new Section 113(f) of CERCLA ensured that settling parties would have a right of contribution against other PRPs and would be protected against contribution actions by other PRPs at multiparty sites.[7] Section 122 explicitly noted the twin goals of expediting remedial action and minimizing litigation[8] and included multiple

[3] 42 U.S.C. § 9607(a).

[4] *See*, *e.g.*, *United States v. Chem-Dyne*, 572 F. Supp. 802, 19 ERC 1953 (S.D. Ohio 1983).

[5] 42 U.S.C. § § 9607(a)(4)(C), 9607(f).

[6] Pub. L. No. 99-499, 100 Stat. 1613 (1986).

[7] 42 U.S.C. § 9613(f).

[8] Section 122(a) specified that ''[w]henever practicable and in the public interest . . . , the President shall act to facilitate

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provisions intended to make settlement more attractive for all parties, such as provisions relating to mixed public/private funding of response actions,[9] the legal effect of cleanup agreements,[10] defined opportunities for negotiation,[11] preliminary allocations of responsibility,[12] covenants not to sue,[13] and *de minimis* settlements.[14]

These and other evolutionary changes pointed the agencies and the PRP community more strongly in the direction of using settlement rather than litigation to resolve potential CERCLA liabilities. The latter part of the decade also saw a wave of guidance documents flood out of EPA, based in part on the growing body of experience with the program. This guidance, and the growth of agency experience that it reflected, led to more certainty regarding how particular sites and issues should be handled, and provided more routine procedures for implementing the program.

The natural resource damages program under CERCLA lagged behind the response action program in terms of issuing regulations and pursuing cases. The Department of the Interior issued rules for NRD assessment in 1986, and after a challenge to those rules, revised them in 1988. During this period relatively few NRD cases were brought, and very few judicial decisions were issued. Throughout the 1980s and into the 1990s, therefore, tremendous uncertainty existed regarding the likelihood of an NRD claim and the potential extent of such liability at any given site. Perhaps because even government lawyers characterized the Interior Department rules as a ''cookbook for litigation,'' PRPs often chose to leave NRD questions unsettled rather than to incur the risk of involving state and federal trustee agencies in settlement negotiations.

The Middle Years: 1990-2000.

Because of its very high transaction costs and the extremely slow pace of cleanup, the superfund program continued to be controversial into the early 1990s, and the relationship between EPA and PRPs continued to be somewhat confrontational. In his 1993 State of the Union address, President Clinton declared, ''We'll use the Superfund to clean up pollution, not just increase lawyers' incomes.''

Between 1989 and 1995, EPA undertook several internal studies to identify ways in which to improve the effectiveness and speed of the program, including a 90-day management review in 1989 that led to a formal EPA policy of ''Enforcement First'' to increase the amount of cleanups managed and funded by PRPs.

The ongoing controversy over the program culminated in intensive legislative efforts to amend CERCLA in 1994, through the Superfund Reform Act (H.R. 3800). Although these legislative efforts failed, EPA was spurred to undertake a series of administrative reforms in 1995 to increase the effectiveness, speed, and fairness of the program. Several of these ''reforms'' involved the expanded implementation of authorities that SARA had provided almost a decade previously, such as increased use of *de minimis* settlements, mixed funding, and other authorities intended to spur prompt settlements.

By 1991, EPA and the Justice Department had adapted to the tight negotiation time frames in SARA and implemented the ''enforcement first'' doctrine by issuing ''model'' administrative orders and consent decrees from which site-specific settlements could be fashioned. Counsel for all parties also had gained more experience in negotiating over these types of documents. At the same time, PRP and agency technical personnel had become more comfortable negotiating over investigation and remedy issues, EPA had included certain ''management principles'' and ''expectations'' in the National Contingency Plan that guided the use of treatment and containment technologies and institutional controls,[15] and all parties had somewhat greater certainty regarding the costs associated with particular types of settlement agreements.

At this time, PRPs also had become more organized, largely through the efforts of industry groups such as the Superfund Settlements Project and the Information Network for Superfund Settlements.[16] The former group had opened a dialogue with EPA to seek program improvements, and the latter group had prepared and published guidance documents for the PRP community on how to organize at sites and negotiate agreements with EPA.[17] PRPs also had become more experienced in allocating response costs among themselves through mechanisms other than litigation, such as through the use of neutral allocators, mediators, negotiation, and arbitration. This ability to allocate costs without litigation was essential to allow PRP groups to settle with EPA for the performance of major remedial actions. Because the relevant settlement agreements obligated all signatories jointly and severally to undertake the work and incur the necessary response costs, most PRPs would sign remedial action agreements only if their shares of responsibility had been determined.

By the late 1990s, the foregoing evolutions and adaptations inside and outside the superfund program had resulted in the virtual disappearance of significant public controversy and legislative reform efforts. Companies generally regarded EPA information requests and notices of potential liability with resignation rather than trepidation, and for the most part, litigation efforts had shifted toward pursuing other PRPs at sites rather than litigating with the government. Many PRPs had learned how to work within the CERCLA framework to negoti-

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agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation.'' 42 U.S.C. § 9622(a).

[9] 42 U.S.C. § 9622(b).

[10] 42 U.S.C. § 9622(c), (d).

[11] 42 U.S.C. § 9622(e).

[12] 42 U.S.C. § 9622(e)(3).

[13] 42 U.S.C. § 9622(f).

[14] 42 U.S.C. § 9622(g).

[15] 40 C.F.R. § 300.430(a)(1).

[16] First organized in 1987, the Superfund Settlements Project is a nonpartisan group of several major corporations (membership has hovered around nine to ten companies) that work together to reduce litigation, facilitate settlements, and reduce transaction costs in the superfund program. The Project has worked with EPA and DOJ and provided testimony to Congress on settlement and liability issues. The Information Network for Superfund Settlements is a much larger membership-based group of companies, law firms, consultants, public agencies, and other institutions (more than 170 entities at one point) that share information and model documents intended to expedite settlements and reduce transaction costs at superfund sites.

[17] *See*, *e.g.*, The Information Network for Superfund Settlements, *PRP Organization Handbook: A Guide for Potentially Responsible Parties at Superfund Sites* (June 1989).

ate remedies and remedy modifications with EPA and state response agencies, and routines had been established to enable PRPs to manage their potential liabilities with lower transaction costs.

By 2000 (and into the present), PRPs were providing about 70 percent of the funds spent every year on CERCLA cleanups. Although the superfund taxes had expired in December 1995, the General Accounting Office estimated PRPs spent over $2.6 billion on cleanup work—17 percent of all PRP expenditures on cleanup activities at National Priorities List (NPL) sites since 1980—in the three years following expiration of the taxing authority.[18] CERCLA had become part of the overall business landscape.

The natural resource damages program, however, remained a source of mystery to most PRPs throughout the 1990s. A few large cases were being litigated by federal and/or state trustee agencies, a handful of settlements in excess of $10 million occurred, and a relatively small number of formal natural resource damages assessments were underway. Few PRPs had direct experience with the NRD program. Although most presettlement interactions between trustee agencies and PRPs were highly adversarial, little pressure existed for reform or innovation in the NRD program.

The most significant evolution occurred in 1996, when the National Oceanic and Atmospheric Administration (NOAA) issued natural resource damage assessment rules under the Oil Pollution Act of 1990.[19] The NOAA rules deviated from the approach adopted by the Department of the Interior by focusing on resource restoration planning early in the assessment process (rather than pursuing a strictly sequential process beginning with injury identification and proceeding through quantification and damages determination), and by seeking to scale restoration to the amount of lost ecological and human use services instead of monetizing damages.

Over time, both the Interior Department and PRPs began to incorporate some of the NOAA concepts into the assessment practices under CERCLA, particularly in the context of settlement discussions. Even with that change, however, trustee agency staff were relatively unfamiliar (and uncomfortable) with the approach of having PRPs perform NRD assessment work under trustee supervision, despite the fact that PRPs had been performing remedial investigations, risk assessments, and feasibility studies under EPA oversight for more than a decade.

The 21st Century: Continuing Challenges.

The ''enforcement first'' policy remains a cornerstone of the superfund program today,[20] particularly in light of superfund budgets and appropriations that are diminishing. No major changes to the liability scheme are reasonably foreseeable. EPA continues to add sites to the NPL at an average rate of 20-30 per year, and many sites not on the National Priorities List are being addressed with removal actions. EPA's and the Justice Department's model administrative orders and consent decrees are updated intermittently to address emerging issues (such as the impacts of the decision in *Cooper Industries Inc. v. Aviall Services Inc.*, discussed below), and PRPs continue to resolve their potential liability to the government in most cases through negotiation rather than litigation. PRPs are continuing to fund the lion's share of the superfund cleanup work. Given this landscape, do significant problems remain from the perspective of those dealing with the superfund liability scheme?

In a word, yes. Today's superfund program still exhibits serious flaws, and some of them may be getting worse rather than better. A few of the more significant issues relating to the enforcement scheme are discussed below.

Sediment Sites and Other Mega-Sites. There are a number of sites on or proposed for the National Priorities List that involve huge geographic areas, many sources of impairment, and potentially astronomical remediation costs. Some of these are sediment sites involving major watersheds, harbors, or areas with long histories of heavy industry (e.g., the Passaic River in New Jersey, Portland Harbor in Oregon, Grand Calumet River in Indiana, and Lower Fox River in Wisconsin). Others involve areas of large commingled groundwater plumes (e.g., the San Gabriel Valley in California). There are many similar sites that are not on the National Priorities List, but remain potential targets for superfund action. For example, EPA's 2004 National Sediment Quality Survey identified 96 watersheds containing areas of probable concern for sediment contamination, most of which are not on the list.[21]

Typical application of the superfund enforcement scheme at such sites targets only a subset of the universe of PRPs that could be named, even when the existence of other sources of impairment, including discharges from publicly operated treatment works and combined sewer overflows, non-point source runoff, and miscellaneous industrial sources exist. Even the costs of investigating such areas can be tremendous, let alone the costs of implementing a remedial action involving millions of cubic yards of sediment or billions of gallons of groundwater. This scenario not only raises serious fairness issues, but also requires PRPs to exert all possible efforts to protect themselves against liability and response costs, resulting in controversy and delay.

If the underlying goal of the superfund program is to protect human health and the environment through prompt actions to reduce risk, the superfund liability scheme is poorly suited to address such sites. (The typical superfund methods of assessing risks and evaluating remedial actions also are poorly suited to such sites, because these methods tend to disregard broader watershed issues, focus on traditional remediation methods, and disfavor innovative approaches to resource restoration.) A better approach would be to recognize the contribution of many sources, including diffuse sources and habitat destruction, to the health or environmental impacts in issue, and to create a mechanism to address such sites at a watershed level through a

[18] General Accounting Office, *Superfund: Information on the Program's Funding and Status*, GAO/RCED-00-25 (October 1999).

[19] *See* 15 C.F.R. Part 990.

[20] *See, e.g.*, Memorandum from J.P. Suarez and M.L. Horinko to Regional Administrators, *Enforcement First for Remedial Action at Superfund Sites* (Sept. 20, 2002).

[21] U.S. EPA, *The Incidence and Severity of Sediment Contamination in Surface Waters of the United States, National Sediment Quality Survey*, Second Edition (November 2004).

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combination of private and public funding and action. To the extent that it prevents public/private partnerships and cooperative approaches, the continuing rhetoric of ''the polluter must pay'' stands squarely in the way of achieving prompt environmental gains and public benefits at such sites.

There are a few locations where ''polluter pays'' rhetoric has been overcome and both public and private funding have achieved settlement and remediation. For example, in January 1999, the city of Rockford, Illinois entered into a voluntary settlement with the Justice Department and the State of Illinois in which the city and more than 130 property owners agreed to pay over $17 million for past and future response costs related to the contamination of an aquifer. The municipality took the lead in negotiating the settlement and in promoting an equitable allocation of costs. A combination of public and private funding is also being brought to bear in the investigation of the Passaic River in New Jersey by EPA, the U.S. Army Corps of Engineers, and other federal and state entities, although the future of that effort is being threatened by the New Jersey Department of Environmental Protection's recent unilateral directive to a small subset of PRPs to fund a sediment cleanup plan independent of the cooperative effort.[22] The Ashtabula River Partnership in Ohio also was formed to take advantage of opportunities to obtain both public and private funding to address harbor sediment issues. Unfortunately, however, there are very few examples where the single-minded ''polluter pays'' mantra has been subordinated to the broader social goal of achieving prompt protection of human health and the environment.

PRPs must take it upon themselves to continue pressing for mixed funding or public-private partnership approaches regarding mega-sites and other types of sites involving large geographic areas, multiple sources of impairment, and very high response costs. With or without such innovative approaches, however, there remain certain steps PRPs can take within the context of the superfund program to mitigate the impact of involvement in large and costly superfund sites:

1. Press for issuance of general notice letters to as many PRPs as possible, but do not let allocation battles among PRPs distract from the main objective of working with the relevant agencies to obtain a remedy that is both protective and cost-effective.

2. Maximize options through PRP performance of the remedial investigation and feasibility study, which enables the establishment of a reasonable range of remedial alternatives and cleanup criteria.

3. Avoid extreme ''all or nothing'' approaches, which tend to result in agency selection of the ''all'' option.

4. Develop combinations (''packages'') of technical approaches to address the relevant risk pathways, and describe those options in language that speaks to the agencies' underlying concerns. Explain in detail how such approaches will fully satisfy the CERCLA remedy selection criteria, and understand that ''too expensive,'' without more, is not an available rationale under CERCLA for rejecting a remedial option.

5. If necessary, take advantage of negotiation opportunities following issuance of the Record of Decision, including opportunities at both the remedial design and remedial action stages. Once the Record of Decision has been issued and the remedy is somewhat out of the public eye, EPA and state agencies may become more flexible.

6. Be attentive to relationships with agency personnel, since it remains a fact of life that relationships can affect an outcome as much as engineering analyses.

The foregoing kinds of steps can be taken at all sites to help mitigate the financial burdens of the superfund liability scheme, but are particularly important at sites where remedial costs are routinely measured in tens or even hundreds of millions of dollars.

Fairness of CERCLA Liability Scheme. Even at typical superfund sites, no one disputes the basic proposition that the CERCLA liability scheme is unfair. Both EPA and Congress have previously recognized that the unfairness of the system should be addressed. To date, however, basic steps to reduce the unfairness of the system still are not being taken. For example, notwithstanding current budget limitations, EPA could still forgive past costs or future oversight costs much more freely than it does to address the existence of ''orphan shares'' that impose inequitable burdens on settling PRPs. Moreover, in situations where EPA has collected or will collect funds from *de minimis* parties or other parties who are not doing the work at the site, the agency could make, but is not routinely making, those funds available to the settling PRPs who are actually implementing the work. PRPs should be attentive to opportunities to negotiate over past and future EPA costs on fairness grounds, and should consider assisting EPA with *de minimis* settlements in order to retain at least a portion of the settlement funds for work at the site.

Oversight Costs Charged by EPA. The costs EPA charges PRPs to oversee their work under administrative orders and consent decrees are still very high and are aggravated by the multiplier EPA charges to reflect its ''indirect costs'' (overhead). Although one of the administrative reforms in 1995 suggested EPA would reduce its oversight costs when parties are cooperative and competent, such reductions rarely have occurred. As GAO routinely indicates in its reports on the superfund program, contractors continue to milk EPA, and hence PRPs, through inefficient practices and unnecessary work. Inappropriate expenditures of this type, together with EPA demands for reimbursement of such expenditures, remain a serious problem with EPA past costs as well. If there is a history of a cooperative relationship at a site, PRPs should not hesitate to pursue some sort of limitation on their exposure to EPA oversight costs at the site.

Natural Resource Damage Assessments. Over the last several years, NOAA and other natural resource trustees have been pursuing the concept of ''cooperative'' natural resource damage assessments. In a cooperative assessment, PRPs and trustees enter into an agreement to perform all or part of an assessment in a collaborative fashion, using agreed-upon methodologies wherever possible. A cooperative damage assessment may enable the parties to establish the technical basis for a settlement in a non-adversarial fashion, potentially yielding the following types of benefits: more predictability and certainty regarding the scope, methodologies, and cost of the assessment process; reduced trans-

[22] *See* ''State Regulators Sue Three Companies Over Dioxin Pollution in Passaic River'' (36 ER 2657, 12/23/05).

action costs; an opportunity to improve the coordination of cleanup work and restoration work; a focus on restoration projects rather than monetary damages; more rapid resolution of potential liability; stronger relations among all stakeholders; up-front PRP funding of agency participation in the assessment; and restoration of contaminated sites that might not otherwise be addressed or might be addressed more slowly.

These goals seem valuable and well worth pursuing. Unfortunately, institutional obstacles, such as a reluctance to depart from standard trustee and EPA procedures, appear to be preventing the actual implementation of cooperative assessments at many sites. Only a handful of CERCLA sites nationwide have undergone or are undergoing cooperative assessments. If there appears to be a significant likelihood of substantial NRD exposure at a site, PRPs should consider discussing a cooperative assessment with the relevant trustee agencies to obtain some of the benefits discussed above.

The CERCLA liability scheme has undoubtedly resulted in the cleanup of hundreds of superfund sites, and will result in the cleanup of hundreds more. It has fundamentally altered the business practices of large and small companies alike, and, to its credit, has increased everyone's awareness of the environmental problems that discarded or discharged hazardous substances can cause. Unless the shortcomings in the superfund liability scheme are addressed, however, it will continue to impose unnecessarily heavy burdens on PRPs and will retard rather than accelerate the achievement of CERCLA's public health and environmental protection goals.

Resolving Potential Liability Among PRPs

Before the United States Supreme Court decision at the end of 2004 in *Cooper Industries Inc. v. Aviall Services Inc.* (*Cooper Industries*),[23] PRPs' expectations about their ability to recover response costs from other PRPs had become well-settled. Virtually all federal appellate courts that had addressed the question had held that a party that itself is liable under CERCLA cannot bring a cost recovery action under Section 107(a) of the statute.[24] At the same time, despite language in Section 113(f) to the contrary,[25] the courts had uniformly held that PRPs incurring response costs could seek contribution for such costs from other PRPs even in the absence of a civil action under Section 106 or 107 of CERCLA or an administrative or judicially approved settlement that ''resolved [that party's] liability to the United States or a State'' for the response actions or costs at issue.

The U.S. Supreme Court shattered these expectations, by holding in *Cooper Industries* that a party may seek contribution under Section 113(f)(1) for response costs it has occurred only if it is or has been the subject of a ''civil action'' under Section 106 or 107. PRPs that had ''voluntarily'' incurred response costs, or had incurred costs under statutory authorities other than CERCLA, were left scrambling as to how to recover those costs, especially in light of the formidable case law barring such parties from pursuing cost recovery under Section 107. Parties contemplating beneficial response actions have been compelled to pause and examine the extent to which they still have cost recovery opportunities under CERCLA and, if such opportunities are uncertain, whether and how to proceed.[26]

More Questions Than Answers.

Much has been said and written about the extent to which *Cooper Industries* may inhibit PRPs from undertaking ''voluntary'' cleanups or other response actions by calling into question their ability to recover response costs from other liable parties. While the extent of its impact in this regard remains to be seen, *Cooper Industries* clearly leaves more questions unanswered than it resolves. These questions include the following:

1. Does a unilateral administrative order under Section 106(a) constitute a ''civil action'' under Section 106 for purposes of Section113(f)(1) contribution rights?

2. Does an administrative consent order under Section 106 of CERCLA constitute an administrative ''settlement'' for purposes of Section 113(f)(3)(B) contribution rights and, if so, under what circumstances?

3. Can a consent order or agreement under state law constitute an ''administrative settlement'' that has ''resolved liability'' to the state for Section 113(f)(3)(B) purposes?

4. Must a party seeking contribution have ''resolved its liability'' under CERCLA, or is ''resolution of liability'' to the United States under other federal cleanup authorities, or to a state under a state superfund-like statute, sufficient?

5. What precisely does it mean to ''resolve'' one's liability to the United States or a state, if, as is typical, a settlement contains provisions that authorize the United States or a state to ''reopen'' a party's liability under certain circumstances?

6. What cost recovery rights, explicit or implied, exist under Section 107(a) for parties liable or potentially liable under CERCLA?

7. Does a federal common law right of contribution exist for recovery of a PRP's response costs?

8. What impact, if any, does *Cooper Industries* have on contribution rights under state law?

9. What impact does *Cooper Industries* have on the running of the applicable statutes of limitations for CERCLA contribution actions?

The body of post-*Cooper Industries* jurisprudence that has emerged indicates that the lower courts are aligned on certain of these issues, are far apart on others, and have yet to grapple with a few. As a general matter, to date, the federal district courts appear (i) reluctant to ''sidestep'' pre-existing Circuit case law finding no right to Section 107 cost recovery for PRPs, but willing to find some such right in the absence of Circuit law to the contrary;[27] (ii) unwilling to conclude that a Section 106 unilateral administrative order constitutes a ''civil action'' for purposes of Section 113(f)(1);[28] and (iii) concur that it is *CERCLA* liability, and not liability under some other federal or state statute, that must be

[23] 543 U.S. 157, 59 ERC 1545 (2004).
[24] 42 U.S.C. § 9607(a).
[25] *See* 42 U.S.C. § 9613(f)(1), (3)(B).

[26] *See* 239 DEN A-1, 12/14/04.
[27] *Compare*, *e.g.*, *Elementis Chemicals Inc. v. TH Agriculture and Nutrition L.L.C. et al.* 373 F. Supp. 2d 259, 59 ERC 2071 (S.D.N.Y. 2005) *with Viacom Inc. v. United States* , 2005 WL 1902849 (D.D.C. July 19, 2005).
[28] See, *e.g.*, *Pharmacia Corp. v. Clayton Chem. Acquisition LLC*, 382 F. Supp. 2d 1079, 60 ERC 2141 (S.D. Ill. 2005).

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''resolved'' to perfect Section 113(f)(3)(B) contribution rights.[29]

Other than with respect to the need to resolve CERCLA liability in some ''definitive'' manner, the courts appear to be of different minds with respect to the attributes that a federal or state administrative settlement must possess for purposes of Section 113(f)(3)(B).[30] Meanwhile, as of this writing, the courts have yet to really scratch the surface with respect to the impact of *Cooper Industries* on the statute of limitations for contribution actions, or on state law contribution rights, and the availability of a federal common law right to contribution.

Wartime Claims.

Cooper Industries also has created major uncertainty with respect to many so-called CERCLA ''wartime'' claims of private parties against the United States based on wartime conduct of federal entities contributing to site contamination. Because Section 113(f)(1) and Section 113(f)(3)(B) prerequisites to contribution rights often are not met with respect to such claims (a fact well known to the United States when, as an amicus, it supported the position ultimately taken by the Supreme Court in *Cooper Industries*), private PRPs asserting such claims have been forced to pursue other legal theories to sustain them.[31] At the same time, despite its position in *Cooper Industries* that parties liable under CERCLA have no Section 107(a) cost recovery rights, the United States has taken the position that federal agencies can pursue cost recovery under Section 107(a) even when they are liable parties under the statute.[32]

It is likely to take some time before federal appellate courts sort out the considerable uncertainty created by *Cooper Industries*.[33] Even then, in the absence of legislative clarification, differences may well remain among the federal circuits, especially with respect to the nature of any rights PRPs have to recover costs under Section 107. Such differences may ultimately result in U.S. Supreme Court review of that issue, which the Court avoided in *Cooper Industries*.

Responses to Cooper Industries Decision.

In the face of such confusion, and its potential impact upon the willingness of parties to move forward ''voluntarily'' with cleanups absent clear contribution or cost recovery rights, it might be hoped that Congress would step into the breach to clarify matters. While parties from various quarters seek legislation that would permit CERCLA contribution or cost recovery actions without the current prerequisites for such suits in Section 113(f)(1) and 113(f)(3)(B) (together with clarification as to the applicable statute of limitations for such actions), at least three factors stand in the way of swift action by Congress. First, although efforts are under way for a legislative ''fix,'' Congress may decide to wait and see whether the courts will craft acceptable ''remedies'' to fill the gaps in contribution rights created by *Cooper Industries*. Second, federal agencies and departments that clearly have benefited from *Cooper Industries*'s limitation on contribution rights in the wartime claims context will oppose vigorously such Congressional action, thereby making it difficult for the Bush Administration to support such action. Finally, other parties may oppose reopening CERCLA to address *Cooper Industries*, fearful that other contentious issues might arise that such parties would prefer to keep dormant.

In the meantime, parties facing potential CERCLA liability should evaluate a menu of options to enhance their prospects for recovering their response costs. Possible options, depending on the jurisdiction and facts, include the following:

1. Pursue a Section 107(a) cost recovery claim by demonstrating ''non-liability'' under CERCLA, *e.g.*, by virtue of a party's status as a ''bona fide prospective purchaser'' (a liability exemption discussed below);

2. Demonstrate that a Section 113(f)(1) contribution claim is being brought during or following a civil action under Sections 106 or 107(a) of CERCLA;

3. Demonstrate that a Section 113(f)(3)(B) contribution claim is being brought by a party that has already ''resolved'' its liability to the United States or a state in an ''administrative or judicially approved settlement;''

4. Seek and obtain modifications to an existing settlement agreement so that it qualifies as a Section 113(f)(3)(B) settlement;

5. Enter into a new ''administrative or judicially approved settlement'' that qualifies as a Section 113(f)(3)(B) settlement;

6. Evaluate the viability of an argument that ''voluntary'' cleanup under a state ''brownfields'' program, coupled with the enforcement bar under Section 128(b) of CERCLA (discussed below), should enable a party to bring a Section 107(a) cost recovery action of some sort;

7. Bring a Section 107(a) action based on the argument that the plain language of Section 107(a), which states that ''*any* other person'' may bring an action to recover ''necessary'' response costs consistent with the National Contingency Plan, creates an explicit right of action even for liable parties;

8. Bring a cost recovery action on the theory that there is an implied right of cost recovery or contribution under Section 107(a);

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[29] *See*, *e.g.*, *Consolidated Edison Co. of New York v. UGI Utilities*, 423 F.3d 90, 61 ERC 1321 (2nd Cir. 2005) (*Con Ed*).

[30] Even judges in the same federal district court have disagreed on this important issue. *Compare W.R. Grace & Co. v. Zotos Int'l Inc.*., 2005 WL 1076117, 61 ERC 1474 (W.D.N.Y. May 3, 2005) with *Benderson Dev. Co. Inc. v. Neumade Products Corp*., 2005 WL 1397013 (W.D.N.Y. June 13, 2005).

[31] *See*, *e.g.*, *E.I. DuPont de Nemours et al. v. United States*, *appeal docketed* No. 04-2096 (3rd Cir. April 27, 2004).

[32] *See*, *e.g.*, *Reply of the United States in Support of Its Motion to Dismiss for Failure to State a Claim* in *Hercules, Inc. v. United States*, No. 1:03CV01475(RWR) (D.D.C. March 9, 2005).

[33] Early returns are not encouraging. In the one appellate court decision as of this writing to address meaningfully PRP cost recovery rights under Section 107(a) in the wake of *Cooper Industries*, the Second Circuit concluded that ''section 107(a) permits a party that has *not been* sued or *made to participate in an administrative proceeding*, but that, if sued, would be held liable under section 107(a), to recover necessary response costs incurred voluntarily, not under a court or administrative order or judgment.'' *Con Ed*, 423 F.3d. at 100 (emphasis supplied). That decision leaves open the question of when a party is properly viewed as having been ''made to participate in an administrative proceeding.'' For example, a PRP pursuing a voluntary cleanup under a state brownfield program is arguably ''made to participate in an administrative proceeding'' to obtain whatever liability assurances result from participating in that program. Does the decision to participate in that proceeding invalidate a Section 107(a) right otherwise available? If so, is that a justifiable result?

9. Pursue a federal common law right of contribution claim;

10. Pursue available rights of contribution under state law; and

11. In a transactional context, seek contractual or insurance rights that will provide risk or cost transfer mechanisms in the absence of other cost recovery or contribution claims.[34]

In many cases, and for several reasons, the most readily available, cost-effective, and otherwise valuable path forward may well be an ''administrative settlement'' that ''resolves'' liability with the United States or a state and that otherwise passes judicial muster as a Section 113(f)(3)(B) settlement. EPA went a long way to ensuring that administrative orders on consent that it enters for CERCLA removals, remedial investigation/feasibility studies, and remedial designs qualify as Section 113(f)(3)(B) settlements with its recent guidance establishing new model language for such consent orders.[35] Differences among the courts as to what constitutes an acceptable administrative settlement with a state for Section 113(f)(3)(B) purposes make the task more difficult where settlement is with a state, dictating caution in the drafting of consent orders/agreements with states. Based on the case law thus far, such settlements should at least resolve CERCLA liability through a formal covenant not to sue or release, and make clear that contribution rights under Section 113(f)(3)(B) are effective upon the effective date of the settlement.

In sum, *Cooper Industries* has unsettled CERCLA liability and response cost recovery expectations in ways that are potentially detrimental to the fundamental statutory objective of providing incentives for prompt cleanup by responsible parties through equitable allocation of cleanup costs among all responsible parties. Until Congress or the courts clarify response cost rights and obligations, parties wishing to preserve rights to recover their costs will need to evaluate carefully how they might best do so.

Resolving Liability Concerns to Promote Sale, Redevelopment of Contaminated Sites

In the earlier years of the superfund program, scant attention was paid to redevelopment and beneficial use of contaminated sites as they were being cleaned up. Ultimately, however, this dynamic was altered in response to pressure from various groups seeking the cleanup and revitalization of contaminated urban sites to enhance economic opportunities, to expand the job and tax base, and to reduce development sprawl. In particular, most states adopted so-called ''voluntary cleanup'' programs to expedite and facilitate cleanup of sites, to account for current and reasonably anticipated land and groundwater uses when making cleanup decisions, and to provide some level of liability ''relief'' for those willing to remediate such sites. Though some of these programs have been beset by obstacles (not the least of which is a lack of sufficient resources for implementation), the states generally have become innovative laboratories creating and testing new approaches to timely and cost-effective, yet protective, cleanups that better account for the realities of real estate development.

The federal government arguably came late to the altar of site redevelopment. That said, the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (the Act)[36] and a number of recent EPA administrative initiatives represent a meaningful federal effort to promote and enhance the redevelopment of contaminated property.[37] In addition to offering a number of financial and other incentives for such redevelopment, the Act addresses one of the largest roadblocks to the willingness of many property developers to purchase, clean up, and redevelop contaminated sites — the strict CERCLA liability for response costs that comes with current ownership of property containing hazardous substances.

The relief afforded in the Act by the ''bona fide prospective purchaser'' (BFPP) exemption from CERCLA liability[38] potentially represents a significant breakthrough in the CERCLA liability scheme. At last, parties can purchase property with the knowledge that it is contaminated and yet escape CERCLA (but not toxic tort) liability, provided certain conditions governing both pre- and post-purchase behavior on the part of the new owner are met.

Though touted as a ''safe harbor'' for those purchasing contaminated sites, the BFPP exemption poses at least two formidable obstacles for those wishing to avail themselves of the protection it affords. First, post-purchase obligations extend for as long as the purchaser owns the property, calling for constant vigilance and due diligence to ensure statutory obligations are continually met. Second, although EPA's recent ''all appropriate inquiry'' rule[39] clarifies the steps that must be taken to meet the pre-purchase due diligence conditions of the exemption, the BFPP provision is drafted in such a fashion that considerable uncertainty exists as to what it takes to meet certain of the post-purchase conditions.

This lack of clarity is perhaps most troubling with respect to the ''reasonable steps'' a purchaser must take

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[34] A fulsome discussion of these options and their challenges, together with a circuit-by-circuit analysis of post-*Cooper Industries* jurisprudence through September 2005, may be found in ''Options for Potentially Responsible Parties to Pursue Recovery of Response Costs in the Wake of the *Cooper Industries* Decision,'' available at http://www.brownfields2005.org.

[35] *See* EPA and DOJ, *Interim Revisions to CERCLA Removal, RI/FS, and RD AOC Models to Clarify Contribution Rights and Protection Under Section 113(f)*, Aug. 3, 2005, available at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-rev-aoc-mod-mem.pdf.

[36] Pub. L. No. 107-118, 115 Stat. 2356 (2002).

[37] For a discussion of these various initiatives and ways in which EPA might further promote cleanup and redevelopment of contaminated property, *see* Bourdeau, *Ways in Which the U.S. Environmental Protection Agency Might Further Encourage Redevelopment of RCRA Corrective Action Facilities and Other Contaminated Sites*, available at http://www.rtmcomm.com/rtmcomm/articles.php?page=3&ArticleID=5.

[38] *See* 42 U.S.C. § 9601(40). In addition to requiring that all disposal of hazardous substances occurred before a person acquired a site and that the purchaser have adequately investigated the property prior to its purchase to determine its environmental conditions, the BFPP liability relief provision establishes five post-purchase conditions for qualifying for the exemption, as well as a requirement that the purchaser not be potentially liable or affiliated with a potentially liable party.

[39] *See* 70 Fed. Reg. 66069 (Nov. 1, 2005).

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to ''*stop any* continuing releases,'' ''*prevent any threatened* future release,'' and ''*prevent or limit* human, environmental, or natural resource exposure to *any* previously released hazardous substance.''[40] Although EPA's March 2003 *Common Elements* Guidance was intended to clarify this and other conditions of the three principal landowner liability protection provisions of the Act,[41] that guidance does not clearly set forth what actions would constitute ''reasonable steps'' with respect to the releases being addressed. Therefore, if pursued as a liable party under CERCLA by either the government or a private party, a purchaser seeking BFPP status might not know whether it has satisfied the ''reasonable steps'' condition until the reviewing court so decides.

To promote purchase, cleanup, and beneficial redevelopment of contaminated property, EPA arguably can and should do more to clarify what actions constitute ''reasonable steps.'' In particular, without doing violence to any congressional mandates, EPA could issue guidance which indicates that if releases of hazardous substances are addressed in compliance with the requirements imposed by a state ''brownfields'' or ''voluntary cleanup'' program, those response actions will be considered by EPA to constitute ''reasonable steps.'' Such guidance would help provide prospective purchasers the sensible and discernible ''safe harbor'' from landowner liability that Congress presumably sought to establish.

Although EPA might be tempted to limit any such guidance to cleanups occurring under state programs subject to a ''Memorandum of Understanding'' between EPA and the state regarding the program's adequacy, there should be no need to do so. When Congress established the CERCLA enforcement bar in the Act to prohibit EPA from using CERCLA enforcement authorities in most instances at ''eligible response sites'' being cleaned up under state ''response action programs,''[42] it saw no reason to limit that prohibition to sites being addressed under state programs that met some federal litmus test of ''adequacy.''[43]

Two other aspects of the BFPP provisions also potentially limit the salutary nature of the BFPP exemption. First, the exemption does not extend to tenants of parties who purchased the property involved prior to the enactment of the Act in January 2002, even if their tenancy commenced after the enactment of the Act. To its credit, EPA has been examining ways to extend BFPP status to such tenants in certain circumstances (e.g., where tenants enter long-term leases evidencing an ''ownership'' interest). Nonetheless, the confining statutory language may necessitate legislative amendments to effectuate fully this beneficial result.

Second, although BFPPs are not liable for CERCLA response costs, the property they acquire may be subject to a ''windfall lien'' where a response action by the United States has increased the fair market value of the property.[44] While windfall liens are only of moment at the relatively limited number of sites where the federal government has taken response action, previous or potential future use of a windfall lien could chill the interest of prospective purchasers in moving forward. Although EPA has sought to allay such concerns through guidance designed to avoid undue disincentives to investment in contaminated property,[45] that guidance leaves EPA ample discretion to deviate from its general principles, and does not apply to other federal agencies. As such, prospective purchasers would do well to assess how, and in what circumstances, the windfall lien provision has been employed by the federal government and will typically need to resolve any existing lien, and may want to resolve any potential future lien, at the time of purchase. For its part, EPA should employ windfall liens judiciously so as not to unduly inhibit the investment interest of developers, including purchasers of sites contaminated by hazardous substances released from contiguous property not owned by such purchasers.

Some analysts of the BFPP exemption argue that the vagaries of BFPP liability relief will leave plenty of room for the insurance market to continue to address lingering liability concerns. It is also worth noting that the exemption does nothing to stem concern among developers regarding private toxic tort suits.[46] Nonetheless, the value of qualifying for the BFPP exemption may have been enhanced by the limits now placed by *Cooper Industries* on the ability of PRPs to recover even a portion of their cleanup costs from other liable parties.

Conclusion

Over its 25 years, the superfund liability scheme has been instrumental in achieving the statutory objectives of encouraging protective cleanups of contaminated property by liable parties and discouraging behavior leading to future contamination. At the same time, the unduly harsh nature of the system has necessitated periodic adjustments to avoid untoward disincentives that retard cleanup and redevelopment of sites. In many re-

[40] 42 U.S.C. § 9601(40)(D) (emphasis supplied).

[41] The Act also clarified liability defenses available to so-called ''innocent landowners'' and ''contiguous property owners.'' *See* 42 U.S.C. §§ 9601(35), 9607(q).

[42] With limited exceptions, Section 128(b) of CERCLA, 42 U.S.C. § 9628(b), prohibits the United States from using its administrative or judicial enforcement authorities under Sections 106 and 107 of CERCLA at ''eligible response sites'' at which a person ''is conducting or has completed a response action regarding the specific release that is addressed by the response action that is in compliance with the State program that specifically governs response actions for the protection of public health and the environment.'' Although ''eligible response sites'' do not include certain sites of particular federal interest, see 42 U.S.C. § 9601(41), EPA has long recognized that cleanups of some such sites under alternative state authorities, such as state ''voluntary cleanup'' programs, can fulfill federal requirements.

[43] EPA's oft-voiced proclamation that it has virtually never chosen to further remediate a site cleaned up in compliance with state program authorities also bears witness to the merits of the approach suggested here.

[44] *See* 42 U.S.C. § 9607(r).

[45] *See* EPA and DOJ, *Interim Enforcement Discretion Policy Concerning ''Windfall Liens'' Under Section 107(r) of CERCLA*, July 16, 2003, available on the Web at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf.

[46] Potential toxic tort liability continues to be an impediment for prospective sellers of contaminated property as well. Moreover, because the liability of sellers of property is unaffected by the BFPP provision, prospective sellers of contaminated property are often reluctant to sell, fearful that loss of control over management of environmental conditions on their property may exacerbate liability risks.

spects, PRPs have reached an accommodation with the system, adapting their behavior in ways to account for liability exposure.

That said, many challenges confront superfund as it enters its second 25 years, and liability issues remain at the forefront of those challenges. Equitable and productive approaches must be fashioned to manage responsibility for complex ''mega-sites'' and to promote resolution of natural resource damages claims, and creative solutions are needed to address the issues raised by *Cooper Industries* and to enhance the landowner liability protections afforded by the 2002 amendments to CERCLA. Hopefully, the collective energy and shared interests of various stakeholders will forge a path forward that yields a workable mix of incentives for protective cleanup and beneficial redevelopment of contaminated property.

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