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# HOW THE CERCLA NOTIFICATION REQUIREMENTS FACILITATE THE CREATION OF BROWNFIELDS AND WHAT EPA CAN DO TO ADDRESS THIS PROBLEM

by Larry Schnapf\*

## INTRODUCTION

Three decades after the passage of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”),<sup>1</sup> this country is still adding to its inventory of contaminated sites. Many of these contaminated properties have been transferred or sold a number of times since CERCLA was passed, yet regulators have not been notified of the environmental conditions uncovered during due diligence. Regulators and community officials often only learn about contamination after the owner has filed for bankruptcy or abandoned the property—leaving the taxpayers to pay for the cleanups.

This article argues that the CERCLA reporting obligations and similar state laws contribute to creating and delaying remediation of brownfields, and proposes administrative solutions that EPA could adopt to accelerate the pace of cleanups and allow the public to access information about the potential risks posed by sites in their communities.

## OVERVIEW OF CERCLA

CERCLA was enacted to address the problems associated with improper disposal of hazardous substances. The statute imposes strict and joint liability on four categories of potentially responsible parties (“PRPs”) and provides the federal government with sweeping authority. To establish liability under CERCLA, a plaintiff must show that there has been:

- a release<sup>2</sup>
- of a hazardous substance<sup>3</sup>
- from a facility<sup>4</sup>
- that has resulted in the response costs that were incurred consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (“NCP”).<sup>5</sup>

## GOVERNMENT CERCLA RESPONSE AUTHORITY

Under section 104 of CERCLA, EPA has broad investigatory powers to inspect sites where there may be a release or threatened release, to obtain information about the materials at the site, to determine the nature of the release, to evaluate the ability of the facility’s owner to pay for a cleanup, and to copy records or documents.<sup>6</sup> Under CERCLA section 105, EPA is authorized to compile a list of sites that it believes pose the greatest danger.<sup>7</sup> These sites are placed on the National Priorities List (“NPL”), also known as the Superfund List, which is published as Appendix B to the NCP.<sup>8</sup> There are three ways that a site may be listed on the NPL. The principal method is by investigating and evaluating the danger posed by the release using

the Hazardous Ranking System (“HRS”), which is attached to the NCP as Appendix A.<sup>9</sup> Sites that do not score high enough on the HRS may also be placed on the NPL if a state where the site is located designates that site as the top priority site in that state, presenting the greatest danger to the public health or the environment.<sup>10</sup> Finally, a site may be added to the NPL if: 1) the Agency for Toxic Substances and Disease Registry (“ATSDR”) issues a “public health advisory” recommending that individuals be isolated from the release of hazardous substances; 2) the EPA determines that the release poses a significant threat to the public; and 3) that a remedial action will be more cost effective than removal action.<sup>11</sup>

When EPA first learns that a release of hazardous substances may have occurred at a facility, the release and the facility may be recorded in the CERCLA Information System (“CERCLIS”), a database that EPA has developed to inventory and manage sites where releases of hazardous substances are known to have occurred.<sup>12</sup> However, adding a site to CERCLIS does not represent a finding of liability for a particular party or a determination that a response action is necessary.<sup>13</sup> An NPL listing is not, by itself, a determination of CERCLA liability nor does it require site owners or operators to undertake response actions. Moreover, the EPA may undertake a removal action and pursue enforcement actions against PRPs even when the site is not on the NPL. However, Superfund-financed remedial actions may not be undertaken unless the site is on the NPL.<sup>14</sup> Private parties may pursue cost recovery and contribution actions even for non-NPL sites.

To determine if a site should be placed on the NPL using the HRS, EPA will first take the site through a two-stage site assessment. The first step is a preliminary assessment (“PA”) which consists of an office review of the existing information on the site and possibly a visual observation of the site. The second step is a site investigation (“SI”), where more detailed information is collected, including soil and groundwater sampling.<sup>15</sup> Nearly half of the CERCLIS sites that are evaluated are eliminated

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from further consideration after the PA. If the EPA determines that a site does not require further investigation, a “No Further Response Action Planned” (“NFRAP”) designation will be placed in CERCLIS for that site which means that no additional actions will be taken by the federal government under CERCLA unless additional information becomes available which suggests more investigatory steps are warranted at the site.<sup>16</sup> It is important to understand that NFRAP designation does not necessarily mean a hazard does not exist but simply that EPA does not plan to take any action based on the available information. A NFRAP determination does not preclude a state from initiating enforcement action under its own environmental laws. Indeed, a small percentage of NFA sites do eventually become active CERCLIS sites after EPA notifies states of an NFRAP decision. If a site receives a HRS score of 28.5 or more, EPA will place the site on the NPL using the process required under the Administrative Procedures Act for promulgating regulations. The NPL must be revised annually. The procedure that EPA usually follows is that it will first propose placing a group of sites on the NPL. This notice of proposed inclusion on the NPL will be published in the Federal Register. Then, after a public comment period, EPA will issue a final rule in the Federal Register formally adding sites to the NPL. Listing of a site on the NPL may be challenged only in the Court of Appeals for the District of Columbia. Petitions challenging the listing of a site must be filed within ninety days of the final notice to list the site on the NPL.

Many states are increasingly reluctant to add contaminated sites to the NPL due to their concerns that listed sites may become stigmatized and scare away developers. In response to this concern, Congress authorized EPA under the Small Business Liability Relief and Brownfields Revitalization Act (“2002 CERCLA Amendments”) to make a determination to defer final listing of an “eligible response site” on the NPL if a state requests the deferral under certain circumstances.<sup>17</sup>

The federal government is authorized to perform cleanups known as response actions<sup>18</sup> and then may seek to recover its costs against PRPs.<sup>19</sup> The federal government may also seek injunctive relief by ordering PRPs to perform response actions for hazardous substance releases that pose “imminent and substantial endangerment” to human health or the environment.<sup>20</sup> Private parties and states that incur response costs may also seek to recover those costs either in cost recovery actions<sup>21</sup> or contribution actions.<sup>22</sup>

#### CERCLA LIABLE PARTIES AND LIABILITY DEFENSES

The four categories of PRPs are: 1) past and current owners of facilities and vessels (i.e., tanks, equipment, etc.);<sup>23</sup> 2) past and current operators of facilities and vessels;<sup>24</sup> 3) generators of hazardous substances;<sup>25</sup> and 4) transporters of hazardous substances.<sup>26</sup>

A party may avoid CERCLA liability by asserting one of the CERCLA affirmative defenses such as the third party defense,<sup>27</sup> the innocent landowner (“ILO”),<sup>28</sup> bona fide prospective purchaser (“BFPP”),<sup>29</sup> and contiguous property owner (“CPO”)<sup>30</sup> defenses. To assert the third party defense, a defendant must establish that:

- the release was caused solely by a third party;

- the third party was not an employee or agent of the defendant, or the acts or omissions of the third party did not occur in connection with a direct or indirect “contractual relationship” with the defendant;
- the defendant exercised due care with respect to the hazardous substances; and
- the defendant took precautions against foreseeable acts or omissions of the third party.<sup>31</sup>

CERCLA does not indicate what types of actions would constitute the exercise of “due care” that would satisfy the third party defense. The legislative history indicates that a person must demonstrate that its actions were consistent with those that a “reasonable and prudent person would have taken in light of all relevant facts and circumstances.”<sup>32</sup> The due care requirement has been interpreted to include “those steps necessary to protect the public from a health or environmental threat.”<sup>33</sup> Because a person’s actions will be evaluated based on the “relevant facts and circumstances,” the due care analysis is a fact-intensive inquiry and will be evaluated on a case-by-case basis.<sup>34</sup> In one such case, a shopping center was able to demonstrate that it exercised due care because it took steps such as maintaining water filters, sampling drinking water, instructing tenants to avoid discharging into the septic system, inserting use restrictions into leases, and conducting periodic inspections.<sup>35</sup> In contrast, parties who did not take any affirmative measures have been held to have failed to satisfy their due care obligations.<sup>36</sup> Some courts have even held that a party who does not *inquire* about past environmental practices failed to exercise the requisite due care necessary to assert the defense, on the grounds that Congress intended CERCLA to provide incentives for private parties to investigate potential sources of contamination and initiate remediation efforts.<sup>37</sup> As part of this line of cases, some courts have held that CERCLA “does not sanction willful or negligent blindness.”<sup>38</sup>

The ILO liability exemption excludes from the definition of “contractual relationship” a person who, at the time they acquired the facility, *did not know and had no reason to know that any* past or current release or threatened release of a hazardous substance at the facility.<sup>39</sup> To establish that it did not know or had no reason to know of the contamination, a defendant must demonstrate that it took “appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability.”<sup>40</sup> Since the innocent purchaser defense is technically a part of the third party defense, a landowner would still have to satisfy the due care and precautionary elements of the third party defense.<sup>41</sup> In addition, the landowner must demonstrate that it exercised appropriate care by taking reasonable steps to stop any continuing releases, prevent threatened future releases, and prevent or limit any human, environmental, or natural resource exposure to previously released hazardous substances.<sup>42</sup>

The BFPP liability protection applies to purchasers (and tenants) that acquired ownership or possession of property after January 11, 2002.<sup>43</sup> A person may knowingly acquire contaminated property under the BFPP defense if the party conducts an

“all appropriate inquiry” prior to acquisition and complies with certain post-closing “continuing obligations,” including the exercise of appropriate care with respect to a previously released hazardous substance.<sup>44</sup>

Owners or operators of properties impacted by off-site releases may be able to assert the CPO if they can establish that they conducted an all appropriate inquiry when they first acquired the property and still did not know or have reason to know that it was or could be contaminated. In addition, the owners of affected property seeking to invoke the CPO must also demonstrate compliance with their “continuing obligations” after taking title to the affected property, including taking reasonable steps to stop continuing releases, preventing future threatened release and otherwise preventing or limiting exposure to a hazardous substance released on or from property owned by that person.<sup>45</sup>

Under EPA’s 2003 “Common Elements Guidance,”<sup>46</sup> the agency indicated that the “due care” case law of the CERCLA third party defense provides a reference point for evaluating the “reasonable steps” and appropriate care requirements.<sup>47</sup> The guidance goes on to state that when courts have examined the due care requirement in the context of the pre-existing innocent landowner defense, they have generally concluded that a landowner should take some positive or affirmative step(s) when confronted with hazardous substances on its property.<sup>48</sup> Based on the similarity of the concepts, the kinds of actions that owners and operators of properties must take to satisfy the “reasonable steps/appropriate care” obligations of the ILO, BFPP, and CPO liability protections will probably be similar to those required under the “due care” obligation of the third party defense.

### CERCLA REPORTING OBLIGATIONS

Section 103(a) of CERCLA provides that any person in charge of a vessel or facility shall immediately notify the National Response Center as soon as the person has knowledge of a release of hazardous substances that exceeds the reportable quantities (“RQ”) promulgated by EPA.<sup>49</sup> The primary purpose of the notification obligation is to inform the federal government of potentially serious releases of hazardous substances so that it can determine if a response is necessary and evaluate the adequacy of any cleanup action implemented by others.<sup>50</sup>

When EPA first developed its RQs, the agency decided to use a 24-hour period for determining if a reportable release had occurred.<sup>51</sup> The statute did not mandate this approach. Instead, EPA adopted the 24-hour RQ because this approach was used for section 311 of the Clean Water Act<sup>52</sup> and the agency as well as the regulated community had experience with this framework. This framework made sense in the early 1980s, when improper management of hazardous waste was rampant. However, management practices have improved significantly since then, and the principal concern now is not *new* discharges but the threat posed by the thousands of sites that have historical contamination from *past* practices. Yet, because the notification obligation is linked to the RQs, the presence of historical contamination exceeding applicable standards may not be reportable. Owners

and sellers of historically contaminated property often take the position that they have no obligation to disclose the contamination because they do not know if the contamination was a result of a release that exceeded the RQ or simply the result of de minimis leaking over an extended period. Moreover, because the reporting obligation is limited to a “person in charge,” potential purchasers of property have no obligation to report contamination discovered during due diligence. In essence, EPA has created a “don’t look, don’t tell” policy that encourages parties not to report historical contamination. However, without accurate information about the existence or extent of contamination, regulators cannot effectively administer their remedial programs or protect communities from unacceptable risks.

The problem with the structure of the release reporting requirements is not limited to the CERCLA program. Nearly all states have adopted their own CERCLA-like programs and the overwhelming majority of cleanups in this country are performed under state remedial programs. Not surprisingly, most states have followed the CERCLA RQ approach for reporting obligations.

Remedial programs are built upon self-reporting, but market forces discourage parties from volunteering adverse environmental information. As rational economic actors, property owners are loathe to generate information about environmental conditions much less share that information with other parties, since they are uncertain what the sampling will reveal and how it may impact asset values. Moreover, if the buyer walks away from the transaction, the owner will not only lose a sale, but also face an accelerated cleanup obligation without the benefit of the sale’s proceeds to fund the cleanup. Finally, owners are concerned that tort liability could arise from disclosure.

Mainstream economic theory assumes that all participants have equal access to materially important information. However, because contamination is usually not easily discoverable and information about contamination is costly to obtain, contaminated properties operate in a distorted market. Often, the seller possesses superior or private knowledge about the environmental conditions.

Some academics and government regulators have expressed the view that reporting obligations are not a problem because a buyer can always require a seller to disclose or cleanup a site. However, this view ignores the practical market reality that buyers often do not have the leverage to extract such concessions, and may not realize that they need such information or that they may even want to know. In the absence of a regulatory driver, sellers often employ “no look” contracts that contractually prohibit the buyer from further investigating or disclosing contamination. Since the buyer will only be compelled to remediate the site if the regulator becomes aware of the contamination, the buyer has little incentive to voluntarily clean up the site. In the meantime, the unknown contamination can migrate from a site and expose the community to unknown risks.

The conventional narrative has been that it was concerns over CERCLA liability that led to the creation of brownfields because purchasers and lenders were concerned about

remediation costs. However, the reality is far more complex and intertwined with the economic dislocations and globalization over the past three decades. The primary reason for the creation of brownfields was that property owners were allowed to abandon sites without first being required to remediate them.<sup>53</sup> If the CERCLA reporting obligations required historical contamination to be disclosed, many of these viable companies that relocated their operations would have been forced to remediate the facilities at that time. It is impossible to say how much of the \$14 billion in brownfield funding that EPA has awarded in the past fifteen years would have been necessary if the CERCLA reporting obligations applied to historical contamination, though we do know that many contaminated sites were abandoned in the past two decades—well after the passage of CERCLA. Indeed, it appears that EPA does not track or maintain information on whether brownfield funding is being used for sites with viable responsible parties. By not pursuing responsible parties for the costs of the assessment and cleanup grants, EPA has actually created a moral hazard by incentivizing companies to continue to abandon their old and contaminated facilities.<sup>54</sup>

### NEW PERILS FROM OLD RELEASES

The HRS scoring system is heavily weighted towards contaminated groundwater that is used for drinking water purposes. Groundwater in urban areas is often impacted from former commercial uses and long-forgotten underground storage tanks. Because urban groundwater is typically not used for potable purposes, regulators have usually allowed responsible parties to leave contaminated water at a site, as long as institutional controls are recorded to prevent the groundwater from being used.<sup>55</sup> Indeed, many local governments have enacted ordinances that prohibit the use of groundwater to help reduce the cleanup costs and encourage reuse of contaminated properties.

Because of the RQ approach for release notification, the discovery of contaminated groundwater in urban areas is frequently not reported to regulatory agencies. As a result, there are scores of what are known as “rogue plumes” in urban areas that environmental lawyers may be aware of from due diligence, but have not been reported to regulators or do not appear on any databases of known releases. If the drinking water pathway is the only pathway for exposure to these unknown plumes, then the existence of these plumes would not pose a significant risk to human health. However, during the past decade, federal and state regulators have learned that residual contaminants in soil and groundwater can act as source for contaminated vapors to migrate into building structures.<sup>56</sup> Scientists and regulators now realize that the behavior of contaminated vapors in the subsurface, which is known as “vapor intrusion,”<sup>57</sup> is far more complex than previously understood and the potential for vapors migrating into buildings may be far greater than previously assumed. As a result, these unreported groundwater plumes might be causing the accumulation of unacceptable levels of contaminated vapors in occupied buildings.

Moreover, because the concentrations of contaminated vapors that can trigger remedial obligations are extremely low,

unacceptable levels of vapors may be present in a building from releases that do not exceed reportable quantities.<sup>58</sup> To combat the risk posed by “rogue plumes,” New York adopted legislation that requires responsible parties to notify adjacent property owners if vapor intrusion sampling detects concentrations above acceptable thresholds.<sup>59</sup> The owners, in turn, are required to share the results with their tenants.<sup>60</sup>

### PROPOSED ADMINISTRATIVE AMENDMENTS

During the past fifteen years, EPA and states have increasingly relied on their brownfield and voluntary cleanup programs to remediate contaminated sites. These programs are essentially a market-based approach to remediation, where the market decides which sites have sufficient value to remediate. While these state programs have encouraged the remediation of contaminated sites, they are not robust enough to substantially whittle down the nation’s inventory of such sites. Studies have estimated that there are between one quarter and one million contaminated sites in the country.<sup>61</sup> Many of these sites and the risks they pose are unknown. Yet, according to a study by the Northeast-Midwest Institute, approximately six to seven thousand sites were cleaned annually prior to 2006.<sup>62</sup> Even at the height of the real estate bubble from 2007 to 2008, the pace may have increased to ten thousand remediated sites annually. Clearly, if we continue to rely primarily on the current incremental market-based approach in addressing these sites, the inventory of contaminated legacy sites will not be cleaned up for another generation.

Given the sharp decline in the real estate market, communities should not have to wait years for conditions to improve before their sites are cleaned up. One way to accelerate the pace of cleanups is to impose a mandatory obligation on property owners to investigate suspected releases and disclose the existence of contamination that exceeds unrestricted cleanup standards. Because contamination can impact human health and public resources, information about contamination should be regulated as a public good that should not be hidden behind archaic notions of *caveat emptor*. EPA could implement this recommendation by adopting one or more of the following administrative reforms.

#### REVISE REPORTABLE QUANTITY TO ELIMINATE THE 24-HOUR PERIOD

EPA could close the historic contamination loophole by eliminating the 24-hour period from its section 103(a) reporting obligations. Instead, contamination would have to be disclosed if it exceeds applicable soil or groundwater standards. Once this information is in the public domain, decisions can be made about who is responsible for cleanup. Many current landowners or prospective purchasers who discover historical contamination would be able to assert a liability defense. Indeed, disclosure could be the *quid pro quo* for the liability relief.

The CERCLA legislative history indicated that EPA has broad authority to revise the reporting requirements if underreporting was occurring.<sup>63</sup> Because delays in reporting could exacerbate an already serious condition, Congress said EPA should

err on the side of protecting human health and the environment when administering this authority.<sup>64</sup>

The current RQ reporting framework has contributed to the proliferation of so-called “self-directed” or “at-risk” cleanups where parties perform cleanups without any regulatory oversight.<sup>65</sup> Developers and property owners concerned about the costs and time delays associated with regulatory oversight often simply remediate contamination that is uncovered during construction activities, and use their own environmental consultants or in-house staff to determine when the spill has been adequately remediated.<sup>66</sup> Frequently, these clean-ups do not involve sampling soil or groundwater to determine the true extent of the contamination, but simply removing the visibly contaminated soil and then covering it with a new building foundation or parking lot.<sup>67</sup> In doing so, the developer or owner is betting that the understaffed regulatory agency will not learn about the contamination and if it does, the development will have been completed and the regulator will not take any action. Without regulatory oversight, there can be no assurance that the cleanup was adequately performed and that the site does not pose unacceptable risks to human health.

Some might argue that enhanced disclosure will discourage redevelopment of contaminated properties, thereby pushing development to undeveloped land, or “greenfields.” However, many states and local governments have countered this potential threat by adopting “smart growth” initiatives that make it increasingly difficult to build on undeveloped sites.<sup>68</sup>

Others might also assert that mandatory reporting will stigmatize properties. This rationale has often been used to discourage purchasers from reporting or investigating historical contamination. While the contamination goes unreported, it might also migrate and later become an NPL site because the contamination was not addressed earlier. However, there are plenty of opportunistic investors who are willing to purchase contaminated sites that their proprietary models tell them are undervalued. Indeed, empirical information from the New York Brownfield Cleanup Program indicates that cleanup costs are only one to five percent of the potential redevelopment value—with most of the sites around one percent.<sup>69</sup> Often, the remediation costs are simply a “delta” over the construction costs.<sup>70</sup> In addition, several states have established reporting obligations that do not use the RQ approach and many states impose affirmative obligations on owners or operators of underground storage tanks to investigate suspected releases.<sup>71</sup> There is no evidence that these disclosure schemes have disrupted the real estate markets in those states.<sup>72</sup>

The structure of the CERCLA reporting obligations allows many sellers of corporate property to keep the presence of contamination secret. In the absence of a regulatory driver, the owner-seller can then contractually prohibit the buyer from disclosing the contamination unless an overburdened regulatory agency somehow stumbles across the contamination. Indeed, transactional documents often contain a so-called “No Look” or “No Hunt” clause that prevents the buyer from conducting further investigations on the property if the purchaser wants to

maintain contractual protections obtained from the seller.<sup>73</sup> In fact, it is not uncommon for environmental lawyers to spend a significant amount of time negotiating and drafting what and how contamination information should be disclosed.

The excuses for maintaining the current “hide the ball” trick do not stand up under any analysis. Mandatory disclosure would level the playing field among known contaminated sites and unknown contaminated sites, while eliminating the moral hazard created by the current approach. Currently, property owners who disclose historical contamination because of corporate aspirational goals are at a disadvantage since the sites with unreported contamination and therefore thought to be clean, are comparatively overvalued. Furthermore, if the buyer walks away from a disclosed property, the seller is still obligated to clean up the site under either CERCLA or a state brownfield program. Once the contamination is disclosed, the risk posed by the contamination can be assessed and sellers will be forced to either remediate sites or convey the property at discount to encourage a buyer willing to remediate the sites as part of a redevelopment plan. One way or the other, the site will be remediated without the need to spend public funds.

Mandatory disclosure could also encourage buyers to perform more thorough due diligence actions since the information will be available at a more cost-effective price and the information could be used to gain an advantage during the negotiations. Furthermore, greater disclosure will facilitate lending since uncertainty over environmental risks will be reduced.

The federal Emergency Planning and Community Right to Know Act (“EPCRA”) and California’s Proposition 65 law serve as examples of the environmental benefits that inure for the public when greater disclosure is required. When EPCRA was enacted in 1986, commentators warned that the information would result in a wave of litigation. Not only did the dramatic increase in toxic tort lawsuits never materialize, but also the disclosures motivated facilities to substantially reduce their emissions.<sup>74</sup> Likewise, Proposition 65 has been credited with causing companies to significantly lower the content of dangerous chemicals in their products.<sup>75</sup>

Recognizing the mischief that the current RQ framework allows, a number of states have recently begun to move away from the RQ approach.<sup>76</sup> For example, the Maryland Department of Environment (“MDE”) has proposed new reporting obligations that are targeted to the discovery of “historical contamination.”<sup>77</sup> Under this proposed rule, any responsible party in possession of sampling data or other environmental assessment that indicates the presence of a release of a hazardous substance into the environment above an applicable standard must immediately report the information to the MDE.<sup>78</sup> The proposed rule emphasizes that the reporting obligation is triggered even if the responsible party cannot link the information to any known release or discharge.<sup>79</sup> In addition, Connecticut has proposed amendments to its reporting obligations that would impose notification obligations for past releases based on a number of factors including proximity to sensitive receptors, as well as the nature of the material released and the threat it poses.<sup>80</sup>

Washington state enacted legislation that extended its residential disclosure requirements to commercial properties.<sup>81</sup>

To further encourage property owners to disclose historical contamination, EPA could adopt an amnesty program for property owners who voluntarily disclose contamination within one year of the reforms, much like what EPA has done with its audit policy.<sup>82</sup> Property owners who voluntarily disclose their sites would be treated as Bona Fide Prospective Purchasers (“BFPP”), provided they did not cause the contamination and would only be responsible for complying with appropriate care/continuing obligations, and the sites do not pose an imminent and substantial endangerment to human health or the environment. Owners could take actions such as installing vapor intrusion mitigation systems to cut off human exposures, and remove floating products or grossly contaminated soils that serve as a source of groundwater contamination.

#### CLARIFY GUIDANCE ON REPORTING OBLIGATIONS UNDER 103(C)

Section 103(c) contains a notification requirement that is a separate and distinct reporting obligation.<sup>83</sup> This section required that owners or operators notify EPA by June 9, 1981 of the existence and location of facilities where hazardous waste had been stored, treated, or disposed of prior to December 1980, unless the facility obtained interim status under the Resource Conservation and Recovery Act (“RCRA”).<sup>84</sup> Persons who knowingly failed to comply with this notification obligation were precluded from asserting any of the affirmative defenses contained in section 107 of CERCLA.<sup>85</sup>

EPA’s 1981 guidance indicated the reporting obligations applied to inactive facilities that did not previously file a notice under RCRA section 3010 and that frequent spills or leakage over a period of years could create de facto disposal facilities that would be subject to the 103(c) notification requirement.<sup>86</sup>

EPA subsequently issued three interpretative documents indicating that the reporting obligation under 103(c) was not a single time obligation but was a “lasting” obligation when an owner or operator discovered pre-1981 disposal.<sup>87</sup> The only reported decision involving 103(c) appears to be *City of Toledo v. Beazer Materials & Services, Inc.*<sup>88</sup> As part of its claim under the citizen suit provision CERCLA section 310, the plaintiff asserted the defendant (former owner) failed to comply with section 103(c).<sup>89</sup> In dismissing this count, the court ruled that section 103(c) imposed a one-time reporting obligation that had expired on June 9, 1981.<sup>90</sup> Since the violation was a wholly past violation, the plaintiff could not maintain an action under section 310.<sup>91</sup>

The court did not address whether the reporting requirement could apply to landowners, purchasers, or operators who discover the existence of pre-1981 hazardous waste after June 9, 1981. Moreover, since 103(c) imposes an affirmative duty on owners and operators to examine reasonably available records, failure to review reasonably available records that could have shown or prevented a release of hazardous substances might be construed to be a failure to exercise due care or appropriate care necessary to assert the landowner liability protections.<sup>92</sup>

EPA should reaffirm its earlier guidance that section 103(c) imposes a continuous reporting obligation on owners or operators of facilities but allow such parties a one-year amnesty to disclose such historical hazardous waste activity without incurring any penalties so long as they are not active polluters.

#### ISSUE GUIDANCE ON SECTION 111(G)

Section 111(g) required EPA to promulgate regulations requiring owners or operators of facilities where there has been a release of hazardous substances to provide notice to persons potentially injured parties by such releases of a hazardous substance.<sup>93</sup> Until the regulations were issued, owners or operators of a facility or vessel were required to “provide reasonable notice to potential injured parties by publication in local newspapers serving the affected area” of a hazardous substances release from that facility or vessel.<sup>94</sup> In the preamble to its 103(a) regulations, EPA stated that the 111(g) notification was independent from the reporting requirements of section 103(a).<sup>95</sup>

EPA has never proposed or promulgated any regulations under section 111(g). Just as EPA is correcting its omission to issue financial assurance regulations under section 108,<sup>96</sup> EPA should promulgate regulations under 111(g) if it declines to revise the 103(a) RQs.

#### REVISE ALL APPROPRIATE INQUIRES TO REQUIRE SAMPLING OF RELEASES

In 1986, Congress added the ILO defense, which was actually a subset of the third party defense.<sup>97</sup> The ILO provides that a person would not be considered to be in a “contractual relationship” (one of the four elements of the third party defense) if the owner performed an “appropriate inquiry” into the past uses of the property and as a result of that inquiry did not know or have any reason to know of releases of hazardous substances.<sup>98</sup> Courts were instructed to consider the following factors in evaluating if the owner satisfied the ILO: 1) any specialized knowledge or expertise of the defendant, owner; 2) if the purchase price indicated awareness of the presence of a risk of contamination, commonly known, or reasonable information about the property; 3) the obviousness of the presence of contamination at the property; and 4) the ability to detect such contamination by appropriate inspection.<sup>99</sup> The case law interpreting what might be called “little all appropriate inquiries” (“aai”) has not been uniform, but a preponderance of cases have held that a party must at least perform some sampling to qualify as an ILO.<sup>100</sup>

When CERCLA was amended in 2002, Congress added the BFPP and CPO defenses and modified the ILO (collectively the “Landowner Liability Protections” or “LLPs”).<sup>101</sup> As part of these amendments, Congress added five criteria to the “aai” factors and instructed EPA to promulgate a rule based on those ten factors,<sup>102</sup> which was called the All Appropriate Inquiries (“AAI”) rule.

When EPA promulgated its AAI rule, the agency said a purchaser did not have to conduct sampling but simply had to identify if there were any releases to comply with AAI.<sup>103</sup> Thus, if a purchaser learned of a release during its investigation but did not disclose or remediate the release, it would still be considered to

have performed an all appropriate inquiry. EPA felt that sampling should be related to compliance with the post-closing continuing obligations.<sup>104</sup> However, EPA did acknowledge that sampling might be appropriate in some cases, such as to plug data gaps.<sup>105</sup> EPA also suggested that a court could conclude that sampling should have been conducted, depending on the obviousness of the contamination and the ability to detect the contamination.<sup>106</sup>

EPA should revise the language of AAI to incorporate an affirmative obligation to sample suspected releases identified in phase one investigation. If a phase two investigation identifies contamination above cleanup standards, the information would then have to be disclosed. If an owner wants to qualify for one of the LLPs, the *quid pro quo* should be disclosure of the results of due diligence so that regulators can decide if and how to address the contamination. To motivate owners to disclose the information, EPA should borrow from its audit policy and only require owners to comply with continuing obligations if they were not an active polluter. Thus, even if the deal fell through, the owner would be rewarded for disclosing the due diligence results.

Some have suggested that such mandatory sampling and disclosure would frustrate the purposes of the 2002 CERCLA Amendments to encourage redevelopment of brownfields. However, Congress actually added to the obligations of landowners when it modified “aai” and created the continuing obligations.<sup>107</sup> Moreover, when enacting CERCLA, Congress deliberately cast a wide liability net to protect human health and the environment. In promulgating AAI, EPA appeared to have lost sight of the principal goal of CERCLA. It seems to have focused more on protecting property owners and not enough on protecting local communities by providing them with timely information about conditions identified in phase one and phase two reports.

Objective data on how well AAI is facilitating cleanups is scarce. Unfortunately, EPA does not track the number of cleanups performed under state brownfield programs but only cleanups completed by EPA Brownfields grantees. Thus, we only have anecdotal accounts that are generally used to support unexamined assumptions about the impact of disclosure on transactions. We know from industry sources that the average number of phase one reports during the past seventeen years ranged from 200,000 to 250,000 annually. However, we do not know how many of those reports identified releases, how many such reports proceeded to phase two reports, and how many of those then proceeded to cleanups. Such data could help EPA evaluate the effectiveness of its brownfield program and AAI.

#### REQUIRE STATES TO ADOPT THE NEW REPORTING OBLIGATIONS TO QUALIFY AS A “STATE RESPONSE PROGRAM” UNDER SECTION 129

Unlike other environmental laws, CERCLA does not provide for the delegation of CERCLA authority to states.<sup>108</sup> Indeed, state brownfield programs proliferated in the 1990s largely in response to the perceived liability concerns posed by CERCLA. Even with these state initiatives, brownfield developers and their lenders remained concerned that EPA might determine that a site cleanup performed under a state program was

inadequate. This fear of federal enforcement is probably more theoretical than real since brownfield sites are not as seriously contaminated as NPL sites and are therefore usually not on the federal enforcement radar screen.

To address this concern, the 2002 CERCLA Amendments added a new section 128 to CERCLA that bars EPA from bringing enforcement actions under CERCLA when a cleanup is performed at an “eligible response site” and the state response program meets the minimum standards established in this section.<sup>109</sup> An “eligible response site” under section 128 includes sites that fall within the definition of a brownfield site and those sites that EPA determines are eligible for brownfield financial assistance on a case-by-case basis.<sup>110</sup> Sites specifically excluded from this definition are NPL sites, as well as sites where EPA has conducted or is conducting a preliminary assessment and site inspection and determines, after consulting with the state, that the preliminary score of the site makes it eligible for inclusion on the NPL.<sup>111</sup> However, if EPA determines not to take any further action, the property may be classified as an eligible response site.<sup>112</sup> In addition, a site that pose a threat to a “sole-source drinking water aquifer or a sensitive ecosystem” may not be considered an “eligible response site.”<sup>113</sup>

Congress did not impose any extensive standards for state response programs in order for the federal enforcement bar to apply at eligible response sites. The only state program requirement is that a state maintains an inventory of sites where response actions have been completed in the previous year and that are planned in the upcoming year.<sup>114</sup> Specifically, the inventory must be updated at least annually and be made available to the public.<sup>115</sup> Each site must be identified by name and location.<sup>116</sup> The inventory must also indicate if a site will be remediated for unrestricted use or if institutional controls will be used.<sup>117</sup> The specific land use controls that will be used must also be identified in the inventory.<sup>118</sup>

Consistent with the general movement towards greater transparency, EPA should require states to adopt the proposed notification reforms discussed in this article. In addition, states interested in qualifying for a “state response program” that is eligible for the federal enforcement deferral under CERCLA section 128 should be required to establish and maintain centralized databases of sampling results under their cleanup programs,<sup>119</sup> and provide the information to the public.<sup>120</sup> Significant financial resources and time are expended duplicating phase two investigations at sites that have been investigated in past transactions. If there was a centralized database, local governments and private purchasers seeking to redevelop sites would not have to waste money repeating investigative work.

Some consultants have expressed concern that creating databases could expose them to liability. It is unclear how a repository would pose any different liability than reports now made available to the public for remedy selection by responsible parties or parties participating in voluntary cleanup programs. In any event, the concern could be easily addressed by requiring persons seeking access to the database to acknowledge a disclaimer that the repository was for informational purposes

without any warranty of accuracy. By acknowledging the disclaimer persons would also waive any claim of reliance upon the information. Indeed, consultants already insert such disclaimer language in their reports.

#### CLARIFY CONTINUING OBLIGATIONS

EPA's 2003 Common Elements memorandum was not particularly helpful on what constituted reasonable steps/appropriate care, although it did suggest that landowners that qualify for the LLPs must take "some positive or affirmative steps" about releases of hazardous substances.<sup>121</sup> EPA should therefore issue additional guidance elaborating on the kinds of actions that would be considered in compliance with the continuing obligations. In particular, EPA should reiterate the language in the preamble to AAI that sampling is a critical component of exercising appropriate care.<sup>122</sup> After all, it is hard to exercise care about contamination if one does not know of its existence. In addition, EPA should indicate that source removal (e.g., removal of leaking tanks and impacted soil) and other measures to eliminate potential exposures (e.g., installation of sub-slab depressurization systems to eliminate vapor intrusion) should be considered to fall within the scope of the continuing obligations.

#### CONCLUSION

The practice of environmental law for transactions involving contaminated properties has devolved to the point where lawyers are facilitating a moral hazard. If the nation is going to finally move beyond this legacy of contaminated sites, we need to raise the level of what is considered customary due diligence and disclosure. It is time to reject antiquated notions that arose from our agrarian heritage and encourage practices that lead to greater transparency reflecting the twenty-first century society's values in promoting public well-being.

Mandatory reporting of historical contamination is the best long-term, sustainable approach to remediating these legacy sites

and reintroducing them into mainstream commerce. We need to swing the pendulum back from reliance on a market-based approach to cleanups towards a system with more enforcement mechanisms, which provide the public with meaningful opportunities to discover contamination early and shape remedial decisions in their communities.

Justice Brandeis once wrote that "sunlight is said to be the best of disinfectants; electric light the most efficient policeman."<sup>123</sup> A recent *New York Times* article on contaminated meat illustrates the potential power of improved disclosure.<sup>124</sup> In covering shoddy oversight by the U.S. Department of Agriculture, the article revealed that slaughterhouses had adopted their own version of "no look" contracts that prohibited their customers from sampling the meat for *E. coli*, at the risk of being cut off from further supplies.<sup>125</sup> Once the existence of these agreements was disclosed, several large food chains discontinued this practice.<sup>126</sup>

Contractual prohibitions on sampling, whether they are imposed by slaughterhouses or sellers of contaminated property, should be void as a matter of public policy and simply have no place in the 21st century since they allow withholding of information that impacts the public's health and welfare. Society prohibits landlords from renting substandard properties, manufacturers from making defective products, and new housing from voiding implied warranties. Similarly, EPA should lift current provisions that prevent sampling of potential and existing property contamination as a matter of public policy.

We can list a "parade of horrors" why these suggestions may not work, but it is clear that the current system is not working. We need to try some new and creative approaches. The existing CERCLA reporting system is broken. Who would have ever dreamed that thirty years after the passage of CERCLA we would still be discovering sites contaminated decades ago? If we do not change the system, our grandchildren will be discovering sites contaminated by our grandfathers.

## Endnotes: How the CERCLA Notification Requirements Facilitate the Creation of Brownfields and What EPA Can Do To Address this Problem

<sup>1</sup> Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2006).

<sup>2</sup> § 9601(22). CERCLA broadly defines a release to include any conceivable contact of a hazardous substance with the environment. There is no minimum amount to qualify as a release. A "threatened release" is even more broadly defined and includes abandonment of drums, improper storage of materials, lack of experience of a facility owner in handling hazardous substances, the mere presence of contaminated dust on the floor of a warehouse that could be carried outside on the clothes or shoes of workers, and the absorption of hazardous substances into a concrete floor.

<sup>3</sup> § 9601(14). CERCLA hazardous substances are those that EPA has specifically designated as such under § 311 of the Clean Water Act, a toxic pollutant under § 307(a) of the Clean Water Act, any RCRA Hazardous Waste or hazardous air pollutants under § 112 of the Clean Air Act and any imminently hazardous chemical which the EPA has taken action on under § 7 of the Toxic Substances Control Act ("TSCA"). The definition of hazardous substances

contains the so-called "petroleum exclusion" that excludes petroleum or any fractions (e.g. gasoline) thereof. Thus, property owners may not use CERCLA to recover the cleanup costs associated with the cleanup of releases at gas stations even where the gasoline may contain lead or other hazardous substances. In its guidance interpreting the scope of the petroleum exclusion, EPA said that if the petroleum has been contaminated with hazardous substances that are not normally added during the refining process such as used oil that is mixed with solvents or PCBs, the petroleum exclusion no longer applies.

<sup>4</sup> § 9601(9). A CERCLA "facility" includes any building, structure site, land area, pipe, equipment, pit, lagoon, storage container, motor vehicle, railcar, or aircraft where hazardous substances have been "deposited, stored, disposed of, or placed" or area where hazardous substances have "come to be located."

<sup>5</sup> 40 C.F.R. § 300 (2010). The NCP contains procedures that must be followed in responding to oil spills and releases of hazardous substances.

**Endnotes:** How the CERCLA Notification Requirements Facilitate the Creation of Brownfields *continued on page 63*

<sup>6</sup> 42 U.S.C. § 9604 (2006).

<sup>7</sup> § 9605.

<sup>8</sup> 40 C.F.R. § 300, app. B (2006). The NPL must be revised annually. EPA's usual procedure for this is to, propose placing a group of sites on the NPL through publication in the Federal Register; then, after a public comment period, issue a final rule in the Federal Register formally adding sites to the NPL. The listings of a site on the NPL may be challenged only in the Court of Appeals for the District of Columbia and must be filed within 90 days of the final notice to list the site on the NPL. (42 U.S.C. § 9613(a)). EPA will defer listing a site on the NPL or may delete a site from the NPL if the site can be fully remediated under the Resource Conservation and Recovery Act ("RCRA") corrective action program. However, EPA may decline to defer a site if the RCRA corrective action may not apply to all of the contamination at a site.

<sup>9</sup> 40 CFR § 300, app. A. The HRS is a scoring system that is used to assess the relative threat associated with actual or potential releases of hazardous substances.

<sup>10</sup> § 300.425(c).

<sup>11</sup> *Id.*

<sup>12</sup> EPA: THE CERCLIS INFORMATION SYSTEM ("CERCLIS") PUBLIC ACCESS DATABASE, <http://cfpub.epa.gov/supercpad/cursites/srchsites.cfm> (last visited Oct. 6, 2010).

<sup>13</sup> 40 C.F.R. § 300.5 (2010).

<sup>14</sup> § 300.66(c)(2).

<sup>15</sup> § 300.420.

<sup>16</sup> § 300.5.

<sup>17</sup> 42 U.S.C. § 9605(h)(1)(2006).

<sup>18</sup> There are two types of response actions. "Removal Actions" are interim or short-term measures designed to contain or stabilize releases of hazardous substances but not eliminate all contamination at a site. Removal actions are to be used when a prompt response is necessary to minimize the immediate effects of a release of hazardous substances. 42 U.S.C. § 9601(23). "Remedial Actions" consist of long-term work designed to permanently eliminate the risk posed by the release or threatened release such as soil excavation, groundwater treatment, offsite disposal of contaminated materials, and permanent relocation of residents and businesses affected by the hazardous substances. 42 U.S.C. § 9601(24).

<sup>19</sup> 42 U.S.C. § 9607 (2001).

<sup>20</sup> § 9606.

<sup>21</sup> § 9607(a)(4)(A)-(D).

<sup>22</sup> § 9613(f).

<sup>23</sup> § 9607(a)(1).

<sup>24</sup> *Id.*

<sup>25</sup> § 9607(a)(3).

<sup>26</sup> § 9607(a)(4).

<sup>27</sup> § 9607(b)(3).

<sup>28</sup> § 9601(35)(A).

<sup>29</sup> § 9601(40).

<sup>30</sup> § 9607(q).

<sup>31</sup> § 9607(b)(3).

<sup>32</sup> H.R. REP. NO. 253, at 187 (1986).

<sup>33</sup> *New York v. Lashins Arcade*, 91 F.3d 353 (2d Cir. 1992).

<sup>34</sup> *Foster v. United States*, 922 F. Supp. 642 (D.D.C. 1996); *Lashins*, 91 F.3d at 353.

<sup>35</sup> *Lashins*, 91 F.3d at 353. For other examples of owners who were held to have exercised due care, see *Lincoln Properties*, 823 F. Supp. 1528 (E.D. Cal. 1992); *In re Sterling Steel Treating, Inc.*, 94 B.R. 924 (Bankr. E.D. Mich. 1989).

<sup>36</sup> See *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321 (7th Cir. 1994); *United States v. DiBase Salem Realty Trust*, No. 91-11028, 1993 U.S. Dist. WESTLAW 729662 (D. Mass. Nov. 19, 1993).

<sup>37</sup> See *A&N Cleaners & Launderers, Inc. v. St. Paul Fire & Marine Ins. Co.*, 842 F. Supp. 1543 (S.D.N.Y. 1994) (discussing the failure to inquire about past use of floor drain, not communicating with local environmental authorities or inquiring about environmental compliance of commercial tenants).

<sup>38</sup> *Westfarm Assocs. v. Wash. Suburban Sanitary Comm'n*, 66 F.3d 669 (4th Cir. 1995); *United States v. Monsanto*, 858 F.2d 160 (4th Cir. 1988); *New York v. Shore Realty*, 759 F.2d 1032 (2d Cir. 1985).

<sup>39</sup> 42 U.S.C. § 9601(35)(A).

<sup>40</sup> § 9601(35)(B). EPA promulgated its "all appropriate inquiries" ("AAI") rule on November 1, 2005. *Standards and Practices for All Appropriate Inquiries*, 70 Fed. Reg. 66,069 (Nov. 1, 2005) (to be codified at 40 C.F.R. pt. 312).

<sup>41</sup> *Kerr-McGee*, 14 F.3d at 321.

<sup>42</sup> 42 U.S.C. § 9601(35)(B)(i)(II).

<sup>43</sup> § 9601(40).

<sup>44</sup> § 9601(40)(D).

<sup>45</sup> § 9607(q).

<sup>46</sup> Memorandum from Susan E. Bromm, Director of Site Remediation Enforcement, U.S. EPA, (Mar. 6, 2003) "Interim Guidance Regarding Criteria Landowners Must Meet In Order to Qualify for the Bona Fide Prospective Purchaser, Contiguous Property Owner or Innocent Landowner Limitations on CERCLA Liability, ('Common Elements')" <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf>.

<sup>47</sup> *Id.* at 4-7.

<sup>48</sup> *Id.* at 19.

<sup>49</sup> § 9603(a). The RQ only pertains to the reporting obligation of section 103 and does not determine whether there has been a CERCLA release that must be remediated.

<sup>50</sup> *Notification Requirements; Reportable Quantity Adjustments*, 50 Fed. Reg. 13,456, 13,466 (Apr. 4, 1985) (to be codified at 40 C.F.R. pts. 117 and 302). When a substance is released that is not a CERCLA hazardous substance but reacts after the release with other chemicals to produce a CERCLA hazardous substance, the release must be reported if the subsequent reaction produces a CERCLA hazardous substance that equals or exceeds the RQ for that particular substance. 54 Fed. Reg. 3,390. While the statutory notification obligation only requires that federal authorities be contacted, state authorities are usually contacted as well.

<sup>51</sup> 50 Fed. Reg. 13,463 (Apr. 4, 1985) (clarifying that the 24-hour period is the period in which a reportable quantity of a hazardous substance must be released for EPA to consider the release “reportable” rather than the timeframe for the knowledgeable party to report the release, since reports must be made “immediately”).

<sup>52</sup> Clean Water Act, 33 U.S.C. § 1321(2006).

<sup>53</sup> Daniel Schlesinger, Note, *Revisiting New York’s Brownfield Cleanup Program: An Analysis of a Voluntary Cleanup Program that Lost its Way*, 3 ALB. GOV’T L. REV. 403, 407 (2010) (arguing that the New York statute, which uses the same definition of Brownfield as CERCLA, encourages property owners to abandon the property rather than risk the expense associated with remediating and redeveloping the property, and citing N.Y. State Department of Environmental Conservation, Brownfields FAQ’s, available at <http://www.dec.ny.gov/chemical/8642.html> (last visited Jan. 9, 2010), which states that high cleanup costs can result from Brownfield sites). See also Oni N. Harton, Note, *Indiana’s Brownfields Initiatives: A Vehicle for Pursuing Environmental Justice or Just Blowing Smoke?*, 41 IND. L. REV. 215, 218 (2008) (claiming uncertainty of existence or extent of contamination, and presumably corresponding liability, as a primary factor in abandonment and underutilization of Brownfield lands) (citing Bradford C. Mank, *Public Participation in the Cleanup and Redevelopment Process, in Brownfields Law and Practice in 1 BROWNFIELDS LAW AND PRACTICE: THE CLEANUP AND REDEVELOPMENT OF CONTAMINATED LAND*, ch. 31 (Michael B. Gerrard ed., 1998)).

<sup>54</sup> Based on correspondence with the EPA brownfield office, it appears EPA does not take into account the existence of such potentially viable parties when reviewing brownfield funding applications. In fact, EPA does not seem to track if there are any viable responsible parties for the sites that have been awarded assessment grants or cleanup funds. In a time of constrained government resources, it would seem that good stewardship would involve pursuing cost recovery from firms that created the brownfield site by abandoning the properties in the first place. This would also be consistent with the “polluter pay” concept that is at the heart of CERCLA.

<sup>55</sup> Bromm, *supra* note 46, at 2 (explaining EPA regulation and continuing need for use of institutional controls, even after establishing landowner liability protection because the controls serve to minimize risks of human exposure and limit possibility of further contamination spread).

<sup>56</sup> See Draft Guidance For Evaluating the Vapor Intrusion To Indoor Air Pathway From Groundwater And Soils (Subsurface Vapor Intrusion Guidance), 67 Fed. Reg. 71,169, 71,171-72 (Nov. 29, 2002) (explaining that vapor intrusion refers to the transport of vapors from subsurface soils or groundwater into buildings through the natural exchange of air or mechanical ventilation systems. To develop a vapor intrusion problem, there must be a source of contamination and a pathway for entry of the contaminants into a building. The source of the vapors can be from contamination in the soil, dissolved in groundwater, or that exists as a separate phase with the groundwater known as a non-aqueous phase liquid (“NAPL”) such as gasoline floating on the top of the water table. In general, contaminated vapors want to move from areas of high concentration (e.g., groundwater) to areas of low concentration such as soil gas or building interiors. However, the factors that influence the movement of vapors from the subsurface soil or groundwater into buildings can be very complex. Because the science behind vapor intrusion is rapidly evolving and the preferred technical approaches for addressing the issue vary considerably by state, owners and operators of contaminated sites can find themselves subject to costly delays and uncertainty as they try to satisfy the ever-changing regulatory requirements. In addition, responsible parties who thought they had completed remediation and received no further action letters are now finding themselves subject to additional investigation and remedial obligations. Moreover, the potential for vapor intrusion is creating potential exposure for third party claims for personal injury and property damage.).

<sup>57</sup> *Id.* at 71, 171-72.

<sup>58</sup> Further complicating the issue is that vapor intrusion action levels are expressed in terms of weight by volume (micrograms per cubic meter) rather than mass (e.g., one pound).

<sup>59</sup> N.Y. Env’tl. Conserv. Law § 27-2403 (McKinney 2010).

<sup>60</sup> § 27-2405.

<sup>61</sup> Smart Growth Network, *Getting to Smart Growth: 100 Policies for Implementation*, 52 (2002) <http://www.smartgrowth.org/pdf/gettosg.pdf#xml=http://search.ncat.org/texis/search/pdfhi.txt?query=brownfield+remediation&pr=SGN&prox=page&rorder=500&rprox=500&rdfreq=500&rwfreq=500&rlead=500&rdepth=62&sufs=0&order=r&cq=&id=4cae7b3b7> (estimating 500,000 Brownfield sites exist nationally, citing Robert A. Simons, *Turning Brownfields into Greenbacks* (Washington, D.C.: Urban Land Institute, 1998)).

<sup>62</sup> Evans Paull, *The Environmental and Economic Impacts of Brownfields Development*, Working Draft for Distribution by the Northeast-Midwest Institute, (July 2008), [http://cbff.lunarpages.com/conference\\_2008/cbf\\_conf\\_2008\\_downloads/paull\\_eco\\_and\\_env\\_benefits\\_of\\_browfields\\_11\\_08.pdf](http://cbff.lunarpages.com/conference_2008/cbf_conf_2008_downloads/paull_eco_and_env_benefits_of_browfields_11_08.pdf).

<sup>63</sup> S. REP. NO. 96-848 (1980).

<sup>64</sup> Notification Requirements; Reportable Quantity Adjustments, 48 Fed. Reg. 23,552, 23566 (May 25, 1983) (to be codified at 40 C.F.R. pt 302).

<sup>65</sup> See Mark McIntyre, *How PlaNYC Will Help Facilitate Brownfield Redevelopment*, 54 N.Y.L. SCH. L. REV. 431, 435 (2009) (explaining that “self-directed” cleanups are done by developers without regulatory oversight; this fits neatly with the idea of a 24-hour reporting period and no reporting after that window under the RQ, thereby allowing developers to take on these projects).

<sup>66</sup> See Mireya Navarro, *New York Tackles ‘Brownfields’ Cleanup*, N.Y. TIMES Blog (Aug. 5, 2010, 11:42 AM), <http://green.blogs.nytimes.com/2010/08/05/new-york-tackles-brownfields-cleanup/> (discussing the inclusion in the new New York City brownfields cleanup plan of specific requirements establishing clear guidelines for developer-driven cleanups, rather than continuing with unregulated, and presumably problematic, “self-directed” clean-ups).

<sup>67</sup> Ontario Ministry of the Environment: Guidance on Sampling and Analytical Methods for Use at Contaminated Sites in Ontario (2008), <http://www.ene.gov.on.ca/envision/gp/326601.htm>.

<sup>68</sup> 2004 Smart Growth in Brownfield Communities Grant Recipients, EPA (2010), [http://www.epa.gov/smartgrowth/2004\\_sgbf\\_recipients.htm](http://www.epa.gov/smartgrowth/2004_sgbf_recipients.htm) (listing projects in North Carolina, Utah, Michigan, Indiana, Massachusetts, Rhode Island, and Louisiana) (last visited Oct. 6, 2010).

<sup>69</sup> Analysis of the New York State Brownfield Cleanup Program by the Brownfield Committee of the Environmental Business Association of New York State (on file with author).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> JANE AMBACHTSHEER ET AL., THE INVESTOR ENVTL HEALTH NETWORK, FIDUCIARY GUIDE TO TOXIC CHEMICAL RISK 17 (2007), <http://www.iehn.org/filesalt/Fiduciary.pdf> (highlighting the instance of a ten-year “no look” clause in property sale contract in California that was litigated after the property was resold within that timeframe and subjected the later buyer to undisclosed liabilities).

<sup>74</sup> Mark A. Cohen, *Information as a Policy Instrument in Protecting The Environment: What have We Learned?*, 31 ENVTL. L. REP. 10425, 10425-31 (Apr. 2001).

<sup>75</sup> Clifford Rechtschaffen & Patrick Williams, *The Continued Success of Proposition 65 in Reducing Toxic Exposures*, 35 ENVTL. L. REP. 10850 (Dec. 2005).

<sup>76</sup> Wash. Rev. Code § 64.06 (2010); 36 Md. Reg. 1782 (Oct. 23, 2009); State of Connecticut’s Department of Environmental Protection, Proposed Regulations Concerning the Reporting of Releases (Oct. 2010), [http://www.ct.gov/dep/cwp/view.asp?a=2692&Q=464770&depNav\\_GID=1648](http://www.ct.gov/dep/cwp/view.asp?a=2692&Q=464770&depNav_GID=1648). See also MARYLAND DEP’T OF THE ENV’T, “Facts About ... Maryland’s Controlled Hazardous Substance Reporting Notifications,” 1, [http://www.mde.state.md.us/assets/document/CHS%20Notification%20Regulations%20Questions%20and%20Answers\(1\).pdf](http://www.mde.state.md.us/assets/document/CHS%20Notification%20Regulations%20Questions%20and%20Answers(1).pdf) (last visited Oct. 12, 2010).

<sup>77</sup> 36 Md. Reg. 1782 (Oct. 23, 2009). See also MARYLAND DEP’T OF THE ENV’T, *supra* note 76.

<sup>78</sup> 36 Md. Reg. 1782 (Oct. 23, 2009).

<sup>79</sup> *Id.*

<sup>80</sup> State of Connecticut’s Department of Environmental Protection, *supra* note 76.

<sup>81</sup> Wash. Rev. Code § 64.06 (2010).

<sup>82</sup> Compliance Incentives and Auditing, EPA <http://www.epa.gov/compliance/incentives/auditing/index.html> (last visited Oct. 12, 2010).

<sup>83</sup> 42 U.S.C. § 9603(c).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Hazardous Substances: Notification of Treatment, Storage and Disposal Facilities, 46 Fed. Reg. 22,144, 22,149 (Apr. 15, 1981).

<sup>87</sup> See Memorandum from Thea McManus and Hubert Watters (June 9, 1988); Memorandum from Carolyn Barley and Barbara Hostage (Dec. 15, 1985); Letter from Lisa K. Friedman to Barry R. Bedride, (Dec. 28, 1984).

<sup>88</sup> *City of Toledo v. Beazer Materials & Servs., Inc.*, 833 F. Supp. 646 (N.D. Ohio 1993).

<sup>89</sup> *Id.* at 658-59.

<sup>90</sup> *Id.* at 659-61.

<sup>91</sup> *Id.* at 661.

<sup>92</sup> See 46 Fed. Reg. at 22, 145.

<sup>93</sup> 42 U.S.C. § 9611(g).

<sup>94</sup> *Id.*

<sup>95</sup> Notification Requirements; Reportable Quantity Adjustments, 50 Fed. Reg. 13,456, 13,464 (Apr. 4, 1985) (to be codified at 40 C.F.R. pts. 117 and 302).

<sup>96</sup> 42 U.S.C. § 9608.

<sup>97</sup> § 9607(b).

<sup>98</sup> *Id.*

<sup>99</sup> § 9601(35)(B).

<sup>100</sup> The thinking in these cases seems to follow the old aphorism: “You cant manage what you don’t measure.”

<sup>101</sup> § 9607(b)

<sup>102</sup> Compare 42 U.S.C. § 9601(35)(B)(iii) with 42 U.S.C. § 9601(35)(B)(iv).

<sup>103</sup> Standards and Practices for All Appropriate Inquiries, 70 Fed. Reg. 66,070, 66,089 (Nov. 1, 2005) (to be codified at 40 C.F.R. pt. 312).

<sup>104</sup> *Id.*

<sup>105</sup> § 66,089.

<sup>106</sup> § 66,101.

<sup>107</sup> See 42 U.S.C. § 9601(35)(B)(i). See also 42 U.S.C. § 9601(40)(adding BFPP liability protection) and 42 U.S.C. § 9607(q)(adding CPO liability protection)

<sup>108</sup> 42 U.S.C. § 9604(d) does authorize EPA to enter into cooperation agreements with states and local governments to carry out response actions. However, the agency has not used this authority much since the mid-1980s.

<sup>109</sup> § 9628.

<sup>110</sup> § 9601(41)(C).

<sup>111</sup> § 9628(a)(2).

<sup>112</sup> § 9601(41)(C)(i).

<sup>113</sup> § 9601(41)(C)(ii).

<sup>114</sup> § 9628(b)(1)(C)

<sup>115</sup> § 9628(b)(1)(C).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> § 9629(b)(1)(C).

<sup>119</sup> § 9628.

<sup>120</sup> *Id.*

<sup>121</sup> See Bromm, *supra* note 46.

<sup>122</sup> Standards and Practices for All Appropriate Inquiries, 70 Fed. Reg. at 66,070; 40 CFR § 312 (2010).

<sup>123</sup> LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT 92 (1914).

<sup>124</sup> Michael Moss, *The Burger That Shattered Her Life*, N.Y. TIMES, Oct. 4, 2009, at A1, available at <http://www.nytimes.com/2009/10/04/health/04meat.html>.

<sup>125</sup> *Id.*

<sup>126</sup> Michael Moss, *E. Coli Outbreak Traced to Company That Halted Testing of Ground Beef Trimmings*, N.Y. TIMES, Nov. 13, 2009, at A16, available at <http://www.nytimes.com/2009/11/13/us/13ecoli.html>.