THE GRASS IS ALWAYS GREENER WHERE THERE IS NO CONTAMINATION IN THE SOIL: LEGAL ISSUES RELATED TO ENVIRONMENTAL AUDITS AND SITE ASSESSMENTS

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I. Introduction

The goal of this paper is to provide you with a basic understanding of the nature and scope of environmental law and regulation in the United States as related to environmental audits and site assessments. It is not intended to be a comprehensive and detailed study, but rather a summary snapshot of a relatively complex area of law.[1]

Perhaps the first environmental case known on record was *Folkes v. Chad*, 3 Doug. K.B. 157, before Lord Mansfield in England in 1782, dealing with the sedimentation of a local shipping harbor. Nonetheless, the practice and discipline of environmental law is relatively new. Although cases and issues now recognized as "environmental" have always been with us, it is only in the last half century that comprehensive environmental regulation has arisen throughout the world, beginning here in the United States. Since then, the practice of environmental law has emerged as an extremely technical area of specialization. Unlike many areas of law, scientific issues on chemistry, biology, toxicology, geology, hydrology, etc are interwoven with the legal requirements. One does not need a scientific background to understand environmental law but it is certainly a multi-disciplinary study.

The environmental regulatory framework depends on a variety of inter-dependant factors:

- Media - the area of the environment under regulation such as air, water, groundwater, and soil;
- Materials - the substances of concern which are hazardous or potentially hazardous, e.g. PCBs, petroleum constituents, metals;
- Location - the physical setting of the area of potential exposure, for example inside or outside of a structure, within a wetland, stream or

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[1] The written materials for this CHMM Review Course are an updated and rewritten version of an outline used in previous years for whom original authorship was undeterminable. As such, credit for a portion of the research and the basic organization of the materials belongs to the anonymous creator of the outline and not the current author.

lake, etc.

- Level of regulation - whether the applicable laws and regulations federal, state, local or international, or, more likely, a combination of all.

As you might expect considering the items above, the liability framework in environmental law is very different from most other legal fields. First, the liability of any given party is often determined by their status. Although the party which actually undertakes an offending action is still responsible for the consequences of those actions, e.g the guy pouring a barrel of generic methyl-ethyl-death into the swamp behind the machine shop, other related parties also share co-equal liability. The company which is operating the machine shop is responsible for pollution produced by its operations, even if by a rogue employee. Likewise, the owner of the property is also liable for pollution occurring or originating from its property even when not directly involved in the offending operations. Environmental law is the home of the concept of the Potentially Responsible Party (PRP) which holds anyone or any entity with a tie to the property, the action or even the substance itself potentially responsible for necessary clean-up and remediation activities.

Secondly, while it is still a source of liability, the presence or absence of negligence usually does not control the ultimate determination of liability. Most environmental statutes are "strict liability" in nature. In other words, once a release or discharge which is either un-permitted or exceeding regulatory limits is established, liability is also established. The intent, good-faith or even stupidity of the actor does not play a factor in liability determinations. However, they can influence the relative weight of the penalty assessed against the PRP. Even so, the goal of environmental statutes is the protection or restoration of the environment first and, as a result, a PRP who may be given leniency on the penalty will almost always have to provide for the environmental restoration or clean-up. As a practical matter, this has led to a great deal of monetary contribution litigation among PRPs after the restoration is complete.

Finally, environmental statutes do not require the proof of damages per se in the traditional sense to establish liability. Obviously, there must be some impact or potential for impact to the environment to warrant either governmental or private prosecution. However, it is not necessary for the party bringing the

action to show that it has been directly harmed or by how much in order to establish liability, only that the violation of the statute occurred. Indeed, other than monetary contribution (or reimbursement if you like) provisions found in certain statutes mandating potentially expensive environmental remediation, environmental statutes do not allow for the imposition of damages, only remediation, civil or criminal penalties and reimbursement of litigation costs.

Incidentally, although not necessarily unique to environmental law, it is worth noting that most environmental statutes allow for citizen suits by persons or groups with an interest in the proper implementation of the statute to initiate prosecution where the government has not done so or done so insufficiently. Essentially, these 'private attorney's general' step into the shoes of governmental prosecutors to ensure that local politics or even monetary influence do not prevent scofflaws from being brought to justice, or at least that was the idea behind Congress' inclusion of citizen suit provisions as well as other citizen participation requirements.

Environmental law is also primarily regulatory, not judicial. These days, for a variety of reasons big, sweeping changes in environmental law typically flow directly or indirectly from litigation. Even so, on a day to day basis compliance with environmental regulations is not driven by case law or often even the specific statutory provisions themselves. The statutes all call for the administrating agency to promulgate the rules and determine their interpretation. Given the nature of bureaucracy, it should not be surprising that the agency's position on or interpretation of the rules can frequently be difficult to establish, even for seasoned professionals. Consequently, it is often necessary to seek and/or receive informal guidance from the agency to determine how to proceed in a particular situation. It is not unusual for the agency's unwritten policy to play a determinative factor in the end result. Therefore, in dealing with the agency one must take care not to assume that the regulations are the "truth," although conversely they absolutely are in a litigation setting. Moreover, whether dealing with the agency in a compliance or enforcement setting, one must be mindful that the agency's interpretation or policy on the implementation of its rules will be given deference by any reviewing tribunal, be it judicial or administrative.

Thus, the challenges of environmental law include:

- identifying applicable requirements (media, materials, location and regulation);

- understanding applicable requirements;

- making sure those requirements have not changed since you last looked at them;

- making sure the agency's interpretation remains consistent, and

- melding the regulatory requirements with the client's current and future strategic needs.

II. Historical Background of Environmental Regulation in the U.S.

Until the 1960s, "common law" or case law based on historical lawsuits provided the basis for environmental law. Typically, this would include claims for nuisance, trespass, or common law strict liability. In 1962, the publication of an influential book on pesticides in the food chain, *Silent Spring* by Rachel Carson, spurred broader interest in environmental regulation. By the end of the decade, along with putting a man on the moon, America initiated the modern era of Federal environmental regulation in 1969 with the passage of the National Environmental Policy Act (NEPA). This statute focused on the assessment of the environmental impacts of any federal action prior to implementation and included for the first time the concept that a project could be blocked due to unjustifiable environmental impact.

Shortly thereafter, riding on the afterglow of the first Earth Day in 1970, Congress revamped existing, mostly toothless Federal provisions into the more comprehensive and sweeping Clean Air Act and Clean Water Act. In these revisions, for the first time the aspirational goals of the statutes were backed up by limits on emissions or discharges and the establishment of technological standards to meet those goals. In 1976, a framework for solid and hazardous waste management was enacted, the Resource Conservation and Recovery Act (RCRA) which contained the most comprehensive regulatory scheme yet, requiring the cradle to grave regulation of solid and hazardous wastes.

Again, in 1980, Congress moved to address the cleanup of existing

hazardous waste contamination with the passage of the Comprehensive Environmental Response and Compensation Liability Act (CERCLA) which provided for the forced implementation of corrective and remedial actions and allowed for cost recovery from other parties qualifying as PRPs. Finally, during the 1980s, states enacted their own versions of environmental laws and regulations to provide vehicles for state implementation of Federal requirements and often to facilitate more expansive regulation.

III. Applicable Federal Laws and Regulations

A. Key Federal Laws Relating to Environmental Audits and Site Assessments

- **Resource Conservation and Recovery Act (RCRA)**, 42 U.S.C. § 6901 *et seq.*

Intended to address all solid and hazardous waste by regulation of the entire waste stream, it provides for the management and disposal of solid and hazardous waste from "cradle to grave," meaning from manufacture or first use through disposal. In addition to the active regulation of sites utilizing hazardous substances, it provides for prospective remedial action to address ongoing contamination issues. Typically, this statute covers any potential contamination of soil and groundwater mediums. Some of the salient provisions include:

- regulation of the treatment, storage and disposal of hazardous waste through specific handling and documentation requirements to track the hazardous substances over lifetime of use;

- regulation of post-closure care with specific care and monitoring requirements intended to minimize or track potential environmental impacts after disposal, applies specifically to landfills after useful life ends;

- Exclusions for small quantity generators who follow proper disposal requirements;

- regulation of used oil and other recycling requirements, i.e. scrap metal collectors or recycling plants;

- regulation of underground storage tanks; and

- comprehensive land disposal restrictions.

- **Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) also known as Superfund,** 42 U.S.C. § 9601 *et seq.*

An offshoot of RCRA in the 1980 amendments, as its title suggests, it provides for a comprehensive scheme to insure that existing contaminated sites throughout the country are identified, delineated and remediated. It only covers past contamination and reserves ongoing issues for RCRA but it also can require current owners with no connection to the contamination to remediate the property. Similarly, anyone who contributed to the site's contamination, for example by sending a barrel of hazardous waste there, may also be held responsible. To make up for such a heavy-handed approach mandating clean-up activities, the act provides for PRPs to seek equitable contribution from other PRPs who have not participated in the clean-up activities. Other salient points include:

- "De minimus" exceptions for small quantity PRPs;

- Secured creditors can also be exempted;

- Goal is clean-up and restoration of environment, classic example of scrapping traditional liability concepts in favor of goal oriented scheme to insure remediation of the environment;

- Encourages Brownfield Redevelopment schemes to facilitate reuse of contaminated sites;

- **Clean Water Act (CWA)**, 33 U.S.C. § **1251** *et seq.*

Enacted to protect all of the nation's water resources from pollution and degradation it absolutely prohibits the discharge of any pollutant into waters of the United States unless authorized by a permitting scheme under the act. Although some contention recently as to what constitutes "waters of the United States" in litigation, the act generally covers just about all surface water bodies.

Some of the salient provisions include:

- regulation of discharges through implementation of National Pollution Discharge Elimination System (NPDES) permits which cover point source discharges of water including traditional point sources such as effluent or process waste water discharges;

- Additional NPDES permit requirements for storm water discharges from various types of facilities or sites;

- pretreatment program for discharges to sewers connected to publicly owned treatment works; and

- regulation of impacts to wetlands and related jurisdictional waters such as streams through the regulation of dredge and fill operations.

- **Safe Drinking Water Act (SDWA)**, 42 U.S.C. § 300fet *seq.*

The basic statutory framework regulating public water systems and the discharge of effluent and wastes into groundwater. It establishes Maximum Contaminant Levels (MCLs) for many substances which are relied on by other environmental statutes to determine safe exposure levels.

- **Clean Air Act (CAA)**, 42 U.S.C. § 7401 *et seq.*

Much like the CWA with water, it is intended to regulate the entire air medium to provide for safe air to breath and to prevent airborne pollution impacts to other resources such as water and forest resources. It provides for a comprehensive permit system for air emissions as well as some aspects of emergency response. Recently, the Supreme Court ruled that the Environmental Protection Agency (EPA) can in fact create and implement regulations intended to address global warming through the CAA. Even more recently, the National Fish and Wildlife Service agreed to begin designation of critical habitat for species specifically effected by global warming issues. Some salient points include:

- regulation of emissions from stationary sources and vehicles;

- sets emission limits and technological standards for sources depending on location, type of facility and level of existing contamination at location;

- regulations may also affect "major modifications" of certain facilities and may require significant technological upgrades for any modification;

- regulation of toxic air pollutants;

- **Emergency Planning and Community Right-to-Know Act (EPCRA)** (SARA Title 111), 42 U.S.C. § 11001 *et seq.*

EPCRA regulates releases of substances from industrial facilities by addressing the dissemination of information regarding such facilities and any releases thereon. It contains community right-to-know restrictions and imposes annual reporting obligations.

- **Toxic Substances Control Act (TSCA)**, 15 U.S.C. § 2601 *et seq.*

This statute regulates chemical substances and mixtures which might present an "unreasonable" risk of injury to human health and/or the environment. Covers just about any toxic substance but also specifically regulates polychlorinated biphenyls (PCBs) and asbestos.

- **Hazardous Materials Transportation Uniform Safety Act (HMTUSA)**, 49 *US.C.* § *1801 App. et seq.*

Regulates the transportation of hazardous materials by setting standards for packaging, labeling and placarding.

- **Occupational Safety and Health Act (OSHA)**, 29 U.S.C. § 651 *et seq.*

One of the more all-encompassing and seemingly invasive of environmental regulatory schemes, it provides for safety and health requirements for businesses, and establishes worker right-to-know regulations.

B. Other Relevant Federal Laws

- **National Environmental Policy Act (NEPA)**, 42 U.S.C. § 4321 *et seq.*

Requires assessment of impacts to the environment for any project or program undertaken by the Federal government or using Federal money. Must give equal consideration to taking no action as well.

- **Endangered Species Act (ESA)**, 16 U.S.C. § 1531 *et seq.*

The most controversial of all environmental statutes and the most maligned. It provides specific protections for species or plants (on federal lands) and animals (anywhere) which have been determined or are in danger of going extinct or threatened with extinction. Also provides for designation and protection of critical habitat and for species recovery plans.

- **National Historic Preservation Act**, 16 U.S.C. § 470 *et seq.*

Provides for the protection and preservation of historically significant buildings, structures and places.

- **Coastal Zone Management Act (CZMA)**, 16 U.S.C. § 1451 *et. seq.*

Intended to protect threatened coastal resources where most all contamination eventually ends up, it contains some of the most potentially far reaching provisions of any statute. Every state with a coastline is required to have a CZMA plan to protect coastal resources, Georgia was one of the last to draft one. Requires that anything occurring anywhere in the watershed feeding the coast of a particular state must be consistent with the CZMA plan.

- **Noise Control Act of 1972**, 42 U.S.C. § 4901 *et seq.*

Intended to avoid or minimize noise pollution, it sets some aspirational limits for noise impacts.

- **Marine Protection, Research and Sanctuaries Act**, 33 U.S.C. § 1401 *et seq.*

Provides for the protection of marine mammals and sets aside specific zones of protection of marine mammals from human activities. Often works in conjunction with the ESA.

- **National Forest Management Act**, 16 U.S.C. § 1600 *et seq.*

Similar to the last one above, it provides for the protection and management of national forests. It is relevant where an activity outside of the forest will impact forest management or health. Similar statutes include the National Park Organic Act, 16 U.S.C. § 1 *et seq.* and the Wilderness Act, 16 U.S.C. § 1131 *et seq.*

- **Surface Mining Control and Reclamation Act (SMCRA)**, 30 U.S.C. § 1201 *et seq.*

Regulates all surface mining activities including quarries, its provisions work in tandem with other laws such as the CWA.

- **Rivers and Harbors Act of 1899**, 33 U.S.C. § 401 *et seq.*

One of the original Federal statues asserting Federal regulation over the use and control of the nations waters, it specifically regulates impacts to and uses of the nation's rivers and harbors. It is the original source of § 404 of the CWA which prohibits the dredging or filling of navigable waters.

C. Common Features of Federal Environmental Law

- Administrative and Civil Penalties

Virtually all of the Federal Acts authorize administrative compliance orders and strong agency action which can include civil penalties for noncompliance can range up to $50,000 per violation per day, and, under some statutes, the federal government can attach liens on property to collect its cleanup costs.

- Criminal Fines

Almost all of the federal environmental laws have strict criminal provisions under which a "knowing" (intentional) violation or failure to comply with requirements will be enough to establish criminal liability. In fact, meeting the "should have known" standard may be enough to trigger criminal liability under some statutes. Moreover, several statutes criminalize a "negligent violation" of the requirements.

Criminal liability can be imposed on the employees undertaking the act, the executives responsible for the employees and the corporation itself. The penalties include fines of up to $50,000 per violation per day and imprisonment.

- Reporting Obligations of Notification Responsibilities

Many of the federal environmental laws require reporting of accidental or sudden releases of chemicals into the natural environment. An example of an accident that must be reported under at least three different laws would be a forklift dropping a crate of toxic chemicals into a small river near a manufacturing plant.

- Regulatory Documentation

All of the federal environmental laws have specific informational and documentary requirements that must be met. Even most regular permitted releases require periodic monitoring reports so the agency can track compliance. For example, the handling of hazardous substances as part of a cleanup of a contaminated site will require notification to EPA under RCRA and CERCLA. Similarly, the CWA requires daily monitoring reports for some discharges. This information is publicly accessible once submitted to the agency and subject to disclosure in response to a Freedom of Information Act Request (FOIA).

- Shared Agency Responsibility

The Environmental Protection Agency usually administers federal laws and regulations but other agencies such as the Army Corps of Engineers (CWA wetlands), Department of Labor (OSHA), Fish and Wildlife Service (ESA) and Department of Transportation (HMTUSA) jointly participate in activities. In

addition, most states administer the many Federal environmental statutes under a delegation of authority and become the primary point of contact for most regulated entities.

D. Superfund--CERCLA: Comprehensive Environmental, Remediation and Liability Act, 42 U.S.C. § 9601 *et seq.*

CERCLA regulates past and present releases[2] or threatened releases of hazardous substances,[3] pollutant or contaminant into the environment. It is the vehicle through which EPA implements the Superfund to provide reimbursement for certain cleanup activities, when undertaken by EPA or under certain circumstances by private parties. CERCLA also sets numerical cleanup standards for corrective action at contaminated sites which are found in the National Contingency Plan.

CERCLA imposes a strict liability framework, meaning that liability is imposed without regard to knowledge, intent or fault. Moreover, CERCLA liability is joint and several such that where the harm is indivisible, all parties are equally liable and any one, or all, may be held liable. Finally, CERCLA liability is retroactive in that it applies to all releases of hazardous substances, even those which occurred before CERCLA was enacted in 1980.

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[2] "Release" includes (1) any spilling, leaking, dumping, or disposal into the environment; (2) the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant; and (3) specifically excludes workplace releases covered by employer claims (under workers compensation). Disposal, as used above, is defined as placing any solid or hazardous waste into or on any land or water so that such solid or hazardous waste or any constituent thereof may enter into the environment; including the migration, leaching or passive leaking of wastes from their initial location

[3] "Hazardous substances" includes (1) any RCRA hazardous waste; (2) any hazardous chemical substance designated under CWA § 311; (3) any toxic pollutant listed under CWA § 307; (4) any hazardous air pollutant listed under CAA § 112; *(5)* any imminently hazardous chemical substance under TSCA § *7;* and (6) any substance designated under CERCLA § 102.

To establish liability under CERCLA for cost recovery purposes requires showing:

- that a release or a threatened release of a hazardous substance from the site has occurred or is occurring;
- that the site is a facility;[4]
- that the release or threatened release has caused plaintiff seeking cost recovery to incur response costs; and
- that the defendants fall within at least one of the classes of liable persons.

CERCLA specifically excludes petroleum products, including crude oil and "any fraction thereof " as well as natural gas. Even with this exclusion, CERCLA is a broad reaching statute since there is no minimum quantity required--any amount may trigger CERCLA liability. This is very different from those statutes that have a reportable quantities threshold requiring reporting to the agency.

The persons who can be deemed responsible for a release (PRPs) include:

- the current owner or operator of a facility;
- owners or operators of the facility at the time hazardous substances were disposed of (former owners);
- generators of the hazardous substances or a broker who arranged for the disposal of hazardous substances (arranger); and,
- transporters of the hazardous substances who selected the disposal site.

Even so, secured creditors will not be considered PRPs if they hold indicia

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[4] "Facility" includes any building, structure, pipe, well, or any site or area where hazardous substances come to be located.

of ownership to protect a security interest and have not participated in the management of a facility.

The act does provide for some limited defenses including an act of God, an act of war, an act or omission by an unrelated third party, and for an innocent purchaser of the property. In practice, the third party defense is very narrow. To qualify, one must show that the party claiming the defense:

(1) had no relationship with the third party;

(2) exercised no control over its activities; and

(3) took precautions against foreseeable acts or omissions of the third party and the consequences thereof.

Accordingly, lessees/lessors, purchasers/sellers, easement holders, etc. will not be able to rely on the third-party defense because of the inherent relationship between such parties. Moreover, any predecessor in title will not qualify as a third party. On the other hand, an innocent purchaser defense may be raised to establish a third party status with a predecessor in title and thus avoid liability for the purchaser.

To qualify for coverage under the innocent purchaser defense, a purchaser must have undertaken all appropriate inquiries into the previous ownership and uses of the property during the acquisition process. The standard for such environmental due diligence is good commercial or customary practice put forth in an effort to minimize liability. Additionally, the following factors are to be considered to determine whether the innocent purchaser defense is available in a given case:

(1) the specialized knowledge or experience of the person acquiring the property;

(2) the relationship between the purchase price and the value of the property if it were uncontaminated;

(3) the reasonably available information regarding the condition of the property;

(4) the obviousness of the contamination; and

(5) the ability to detect the contamination by appropriate inspection.

In practice, the innocent purchaser defense may also be narrowly available because of independent state law requirements.

IV. STATE ENVIRONMENTAL LAWS AND REGULATIONS

In our Federalist system, the relationship between State and Federal law is such that Federal laws and regulations govern where the two are in conflict, but only to they extent they conflict. Otherwise, they apply concurrently. While the Federal provisions set the minimum standards, State laws can and often are, more stringent. As mentioned above, under the regulatory schemes of most Federal environmental statutes, the Federal government typically will delegate the responsibility for implementation and enforcement to the State. Thus, the complex web of agency authority often is difficult to understand, but can have significant implications.

Many states have enacted their own separate hazardous waste laws, both for cleanups and hazardous waste management:

- State superfund statutes such as Georgia's Hazardous Site Response Act (HSRA) which tend to cover a significantly larger number of impacted properties;

- State hazardous waste management programs though most of these still follow Federal regulations;

- State Underground Storage Tank programs with differing timing and technological requirements; and,

- State level NEPA laws such as the Georgia Environmental Policy Act (GEPA) with mirroring requirements for State-funded projects.

In particular, State level statutes often have property disclosure laws or provisions which exceed Federal limits. Some examples include: New Jersey, Illinois, Ohio, Connecticut, Georgia where the HSRA statute imposes an absolute

duty to report hazardous contamination within thirty (30) days of discovery of a release. Such provisions are usually triggered by a property transaction of a specified type though the requirements vary in scope and specificity.

State property disclosure requirements typically arise where, as part of a property transfer, a property assessment is undertaken. If contamination is identified, the property disclosure requirement triggers notification to a state agency (as is the case under HSRA). Occasionally, approval from the state agency is required and is only granted when a corrective action plan is developed and implemented. In other instances, notice of the contamination may be required by filing a deed restriction on the property. In still other states, the requirement for the assessment itself is not required by law but is often mandated by a lender. However, in such states like Georgia, a known or suspected release will trigger the need to notify the state agency and began the corrective action process.

Generally, because of the policy of delegation to the States, permitting is usually carried out at the state level, and thus, the state's interpretation related to permitting usually governs. Moreover, although there is a Federal Brownfields redevelopment program, it is typically the State Brownfield programs which see the most properties assessed and redeveloped after meeting the State requirements. Additionally, States typically also have in place other environmental laws without specific Federal analogs which concern a range of topics such as soil and erosion control, groundwater withdrawal, and surface water withdraw and use permitting.

It is also under State common law that causes of action seeking monetary damages for environmental issues arise. Some of the causes of action which are very typical include:

- Nuisance: an unreasonable and substantial interference with an individual's use or enjoyment of land.

- Trespass: an interference with another's exclusive possessory interest in land.

- Negligence: the breach of a duty owed to another such as a duty to use your property in such a way as to not

interfere with the legitimate use of an adjoining property.

- Strict liability: liability for an abnormally dangerous activity.

- Fraud and deceit: intentionally misleading or inadequate disclosures within the property transaction.

- Contribution: whether under common law or State level superfund statutes such as HSRA, there is usually a right to seek compensation for expenditures made to undertake corrective action. Often, the scope of costs reimbursable here is much broader than under Federal statutes such as CERCLA.

Although often just a measure of damages for one of the specific claims discussed above, some states allow separate actions for the diminution of property value, that some action has devalued a the complaining party's property. Similarly, post-contamination stigma claims or damages assert that past or present contamination created a stigma with respect to a party's property which negatively impacts its value or marketability.

V. OTHER IMPORTANT LEGAL AND REGULATORY ISSUES

- **Insurance Coverage for Environmental Contamination**

Historically, there are several differing types of insurance policies. Before the mid-1960s, accident policies gave coverage for accidental events and were not meant for intentional disposal which unexpectedly led to environmental contamination. Occurrence-based policies, for problems that were neither expected nor intended, provide coverage in effect when harm occurs, with focus on intention or expectation of injury or property damage. Finally, "claims made policies" provide coverage if in effect when the claim is made.

The typical legal issues in dispute regarding insurance coverage include:

- the definition of an occurrence which may invoke coverage;

- the coverage trigger which may depend on which policies are in effect:

- exposure - related to the time of disposal;
    - manifestation - related to the time of discovery of harm;
    - injury-in-fact - related to the time of release into the environment;
    - triple-trigger - all of the above;

- expected or intended occurrences as there may be no coverage for intentional acts of disposal;

- pollution exclusion provisions which provide no coverage for pollution, unless it is sudden and accidental;

- owned property exclusion which bars coverage for damage to property owned by the insured;

- duty to defend and/or the duty to indemnify which the insurance company may have and when do these duties arise; and,

- notification to carrier that requires timely notice to be given to the applicable insurance carrier as soon as reasonably possible in order to be covered by the policy.

- **Securities and Exchange Disclosure**

Especially in the last few years under the new post-Enron reporting requirements, there is a broad standard of disclosure for public companies which applies to both ongoing and one-time activities. These concern material issues which a reasonable investor might consider, such as pending or threatened litigation over environmental contamination which may impact financial obligations and ultimately may affect stock prices and profitability. For example, the identification of a company as CERCLA PRP on a sizable Superfund site may trigger disclosure.

- **Financial Accounting Standards Board Disclosure**

Similarly, for many companies the financial audit process includes a broad standard of disclosure wherein any loss contingency must be disclosed. For actual losses, the question is the point at which the loss becomes sufficiently great to require disclosure. Likewise, for potential losses, the question is the point at which the probability of the loss is sufficiently great to require disclosure. For example, simply acquiring property with a UST may not require disclosure unless there is a significant known clean-up cost associated with the UST.

VI. HYPOTHETICAL EXAMPLES[5]

A. Example 1:

Facts: The Average & Normal Company (ANC) purchases a group of four parcels encompassing three (3) acres from Dirty Business Industries (DBI) for $900,000. Before purchasing the property, ANC did not undertake an environmental assessment of the property. For this reason, ANC does not know that the property used to be the site of a now defunct dry cleaner. Later, EPA sues ANC when perchloroethylene contamination is discovered on the site.

Question: Can EPA sue ANC for the cleanup?

Answer: Yes. ANC does not qualify for the innocent purchaser defense under either CERCLA or a state superfund statute. Hazardous substances have been released and ANC is the current owner of the facility as that term is defined under the law. ANC has no defense to liability because it did not undertake an "all appropriate inquiry" before it purchased the property. Thus, ANC did not conduct due diligence.

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[5] The hypotheticals are taken directly from prior CHMM Review Course materials prepared by others though they have been updated and the names changed to protect the innocent.

But: ANC did not do anything wrong. The contamination was DBI's fault.

Result: It does not matter. CERCLA is a strict liability statute. ANC will be required to undertake the cleanup along with DBI.

But: What if a fire destroyed the ANC facility, and this was the only reason that the substances were released?

Answer: ANC may qualify for the Act of God defense under CERCLA. The key issue would be whether the fire was the sole reason for the release of hazardous substances.

B. Example 2:

Facts: ANC owns undeveloped property adjacent to a manufacturing plant operated by DBI where hazardous substances are used, in particular bromide. ANC finds, in the process of its company-wide environmental assessment process, that the groundwater underlying its facility is contaminated with bromide. ANC has never used bromide, has never stored bromide, and has never disposed of bromide. ANC has a priest with a Ph.D. in environmental science complete an affidavit stating that bromide never was used at the facility, and the affidavit is submitted to EPA.

Question: Can EPA sue ANC for the cleanup?

Answer: Maybe not. ANC may be able to rely on the third party defense under CERCLA.

But: What if ANC had a contract with DBI to provide technical educational services to its employees? Could ANC now rely on the third party defense?

Answer: Probably not because it has a contractual relationship with the third party, the third party defense is no longer available to it.

Question: Can the state environmental protection division also sue ANC to require it to clean up the site under the state superfund statute?

Answer: Yes. Federal and state superfunds are parallel activities.

Question: What other obligations does ANC have under CERCLA?

Answer: Notification to EPA and State.

C. Example 3:

Facts: ANC leases an old classroom facility to DBI. DBI tells ANC that it intends to manufacture bottled water. DBI actually manufactures illegal drugs and dynamite in the leased facility. When EPA identifies contamination on the site, DBI executives leave for parts unknown.

Question: Can EPA sue ANC for the cleanup?

Answer: Yes. ANC has no defenses available under CERCLA. It doesn't matter that it was ANC's lessee that caused the contamination.

But: As a smart landlord, suppose ANC has a lease with DBI which states: "DBI herewith agrees to defend, indemnify and hold harmless ANC from any and all liabilities, obligations and responsibilities under any and all Federal and State law by any party whatsoever."

Question: Will this provide a defense to the EPA action.

Answer: Absolutely not. CERCLA contains only three defenses, and a contractual agreement is not one of them. If DBI has assets in the U.S., the lease agreement may ultimately prove helpful for ANC in recovering its costs.

D. Example 4:

Facts: DBI takes out a first mortgage with Big Bank to purchase a site for its new explosives recycling/baby diapers manufacturing plant. Uncharacteristically, Big Bank does not conduct an environmental assessment of the property before it provides the funds for the purchase.

Question: Can EPA sue Big Bank when hazardous substances are released on the site?

Answer: No. Big Bank probably qualifies for the secured creditor exception under CERCLA. Big Bank merely holds a security interest in the property to protect its loan investment.

But: What if Big Bank is concerned about its interests and sends its maintenance personnel to investigate the site. Big Bank's personnel install a fence around the perimeter of the property. Can EPA now sue Big Bank for the cleanup?

Answer: No, probably not since Big Bank's participation at the site would not likely rise to the level of operator status under CERCLA.

But: What if Big Bank's personnel identifies some hazardous waste in 55-gallon drums, samples the drums to make sure, labels these drums, moves all the drums to one corner of the property, and then places an ad in the paper to sell these drums. Can EPA now force Big Bank to cleanup the DBI site?

Answer: Probably. Big Bank's activities now appear to be sufficient to establish its role as an operator of the site beyond what is required simply to protect its interests as a secured creditor.

E. Example 5:

Facts: Burgers-R-Us wants to purchase property on Jimmy Carter Boulevard for a new hamburger stand. Family Real Estate

Trust, LLC (FRET) has an available one acre parcel on Jimmy Carter Boulevard which it wants to sell to Burgers-R-Us for $1 million. Burgers-R-Us tentatively agrees to purchase that property. When hazardous substances are found on the property, Burgers-R-Us decides not to purchase the property. A dynamite manufacturing facility (the Just Dynamite Company) is located next door to the FRET site.

Question: Can EPA sue Burgers-R-Us to clean up the property?

Answer: No. Burgers-R-Us is not a responsible party. A purchase contract is not equivalent to property ownership.

Question: If FRET, the owner of the contaminated property, sues the Just Dynamite Company, what might its claims be?

Answer: Nuisance, negligence and diminution of property value (potentially $1 million). FRET can also seek cost recovery under CERCLA and any state superfund statue as well as under common law contribution provisions. Additionally, FRET could sue under RCRA to require Just Dynamite undertake investigation and corrective action on both properties if it is shown that the Just Dynamite Company caused the contamination on the FRET property.

Question: A group of property owners downgradient of the Jimmy Carter property want to sue the FRET property owners because they believe their property is worthless by being near the site. What are some of the key legal issues in their case.

Answer: (1) The actual documented or suspected physical impact to their property without which they do not have standing to bring a lawsuit.
(2) Causation showing a link between conditions on the FRET property and their own.
(3) Even if both (1) & (2) are met, should they sue FRET or join FRET in going after the Just Dynamite Company?