ENVIRONMENTAL LAW DEVELOPMENTS AFFECTING THE ENERGY INDUSTRY

prepared for the

CENTER FOR ENVIRONMENTAL RESEARCH AND TECHNOLOGY
University of Tulsa

by

Professor David E. Pierce
Washburn University School of Law
Topeka, Kansas

ENVIRONMENTAL LAW DEVELOPMENTS AFFECTING THE ENERGY INDUSTRY

by

David E. Pierce
Professor of Law
Washburn University School of Law
Topeka, Kansas

Research Associate
Center for Environmental Research and Technology

ENVIRONMENTAL LAW DEVELOPMENTS
AFFECTING THE ENERGY INDUSTRY

TABLE OF CONTENTS

ENVIRONMENTAL LAW DEVELOPMENTS AFFECTING THE ENERGY INDUSTRY

by

David E. Pierce
Professor of Law
Washburn University School of Law

Research Associate
Center for Environmental Research and Technology

I. INTRODUCTION

This report examines significant environmental law developments during the first eleven months of 1989. In addition to discussing approximately fifty court cases, various legislative and administrative developments are noted. The cases have been selected from over 250 decisions. Selection was based upon their relevance to the energy industry. To enhance the educational and practical value of this report, the cases and materials are discussed in contexts which hilight basic environmental law concepts and emerging regulatory trends. I have also included citations to my sources for those desiring further study.

II. SHIFTING FROM TECHNOLOGY-FORCING TO LIABILITY-FORCING

In the Clean Air Act and the Clean Water Act, Congress' major tools for achieving environmental goals were governmental

restrictions on the amount of pollution that could be produced by industry. The Environmental Protection Agency ("EPA") would establish, pursuant to the appropriate statute, the level of performance required by the industry. This would ultimately be reflected in a numeric pollution limit stated in a permit. The regulated community and the general public would have the opportunity to provide input concerning what the level of performance should be in establishing a standard. Once the standard is set, the level of pollution control may, in effect, dictate a particular control technology - such as flue gas desulfurization. See generally Clean Air Act § 111 (New Source Performance Standards).

These Acts also rely upon varying degrees of "technology-forcing" to promote the development and use of improved pollution control technology. The concept of technology-forcing requires that pollution control preformance standards be set beyond what can be currently achieved, but within the realm of future feasibility. The standard will take effect at a specified future date. The industry has until the effective date to perfect or invent the technology to meet the standard -- or to convince EPA, a court, or Congress to change the standard or delay its effective date. The entire process is generally dominated by engineers and the administrative process of determining what the numeric limit should be and how it can be met. Although the process seems quite logical, it has proven

cumbersome in some situations. For example, the regulation of toxic pollutants under § 112 of the Clean Air Act and § 307 of the Clean Water Act have proven most difficult. These Acts also operate prospectively; generally, liability cannot be premised upon an industry's environmental practices prior to the effective date of the regulation.

With the passage of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), commonly called the "Superfund," Congress elected to rely upon what I call "liability-forcing" to achieve its regulatory goals. Instead of attempting to regulate the release of a pollutant, Congress uses unrelenting monetary liability to discourage pollution. Instead of paying a fine for violating a permit, the industry must clean up the pollution. Liability is retroactive. Even if you disposed of wastes in accordance with the then existing law, if the site subsequently becomes an environmental hazard you will be responsible for its cleanup. The United States Supreme Court recently observed in Pennsylvania v. Union Gas Co., 29 Environment Reporter Cases ("ERC") 1657, 1664 (1989): "The remedy that Congress felt it needed in CERCLA is sweeping: everyone who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup." Whenever a court finds it necessary to interpret the scope of CERCLA's provisions, they usually begin by noting: "CERCLA places the ultimate

responsibility for clean up on 'those responsible for problems caused by the disposal of chemical poisons.'" U.S. v. Aceto Agricultural Chemicals Corp., 29 ERC 1529, 1532 (8th Cir. 1989). To date, this process has been very lawyer-intensive. A routine CERCLA case can easily turn into a bottomless pit of billable hours for legal fees and engineering services.

As will be discussed in section III of this report, an industry is often held responsible for the problem -- not merely their contribution to the problem. If liability is easily established, and the cost of any delay borne by the industry, then industry will have the incentive to do whatever is necessary to avoid creating situations where liability may attach. Industry now recognizes that the only effective way to avoid entanglement in the CERCLA liability web is to minimize, reduce, and eliminate the precursor to liability: waste. Note that I refer to "waste" instead of "hazardous waste." What is classified as waste today may be classified as hazardous waste tomorrow. If no hazardous waste is generated, none will be transported, stored, or disposed. Proper disposal offers little solace in the long term. Many "model" and "EPA-approved" disposal sites have been the object of CERCLA actions.

Congress, in its 1972 Amendments to the Clean Water Act, espoused the lofty goal: "that the discharge of pollutants into the navigable waters be eliminated by 1985." Clean Water Act

§ 101(a)(1). Even with a hefty dose of technology-forcing and 17 years of command-and-control regulation, the goal appears unattainable under the present regulatory regime. CERCLA offers a new approach to controlling pollution by creating a strong corporate incentive to minimize, reduce, or eliminate present and future hazardous waste liabilities. This is just the sort of freedom industry has sought under the more traditional environmental laws. Presently, industry can choose what it believes it can best do to minimize, reduce, or eliminate its wastes. The decision to act, and the mix of actions, are left up to the industry. CERCLA provides the catalyst for action through the likelihood of devastating monetary liability.

The EPA is also relying upon more lawyer-intensive measures to achieve compliance under the traditional environmental statutes. There are two discernible techniques being employed to encourage compliance: The first is an intensified effort to impose civil and criminal penalties. The second is a focus on responsible individuals in addition to their corporate entities. For example, in U.S. v. Carr, 30 ERC 1128 (2d Cir. 1989), the maintenance foreman, who directed the disposal of paint cans in a pit on the industry's premises, was presented with a 43-count indictment and convicted under the criminal provisions of CERCLA. In U.S. v. Marathon Development Corp., 29 ERC 1145 (1st Cir. 1989), a real estate development corporation, and its senior vice-president, were indicted on 25 counts of

violating the Clean Water Act. Citizen groups have also been successful at having civil penalties imposed when the EPA or state agency have been reluctant to press the matter. For example, in PIRG v. Powell Duffryn Terminals Inc., 30 ERC 1201 (D.N.J. 1989), a Clean Water Act citizen suit, the citizen group asked the court to impose the maximum statutory penalty possible: $4,205,000.00. The court imposed a $3,205,000.00 civil penalty.

III. HAZARDOUS WASTE: THE TAR BABY OF ENVIRONMENTAL LAW

The vast majority of reported environmental law cases in 1989 concern hazardous waste issues under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the Resource Conservation and Recovery Act ("RCRA"). These two Acts function together to provide a comprehensive system of hazardous waste regulation. Under RCRA, the treatment, storage, and disposal of hazardous waste are regulated using traditional command-and-control techniques. In essence RCRA requires that you write your name on your hazardous waste (the "manifest" procedure) and throw it away using approved disposal sites. If hazardous waste stored or disposed at the site ever creates a problem, the EPA can see whose waste has been deposited at the site and begin their CERCLA action to have it cleaned up. The EPA can also rely upon RCRA to address improper handling and disposal of hazardous, and nonhazardous,

waste.

A. Defining Hazardous Waste

Waste can constitute hazardous waste under RCRA if it is "listed" by the EPA as hazardous or if it exhibits one of the characteristics of a hazardous waste: ignitability, corrosivity, reactivity, or toxicity. The person who creates the waste must determine if it is on the list or exhibits one of the characteristics that will make it hazardous under the Act. Pursuant to RCRA § 3001(b)(2), the EPA has declared certain wastes, generated as a result of petroleum exploration and production, to be "exempt" from the hazardous waste requirements of RCRA. Under RCRA the EPA was instructed to conduct a study and report on "the adverse effects, if any, of drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil or natural gas or geothermal energy on human health and the environment . . . ." RCRA § 8002(m)(1). EPA completed its study and on July 6, 1988 made a regulatory finding exempting many, but not all, exploration and production wastes from RCRA's hazardous waste provisions. Nonexempt wastes should be tested to determine if they meet any of the four hazardous waste characteristics. If they do, they must be dealt with as hazardous wastes. See generally API Environmental Guidance Document 13-19 (API 1989).

Although the exploration and production exemption offers the industry a current savings on waste handling and disposal costs, it does not provide any protection against future CERCLA liability. Nor does it protect against common law claims in private litigation. If the waste is exempt, but nevertheless possesses one or more hazardous characteristics, it should be carefully managed to ensure it does not become a future liability.

CERCLA § 101(14) excludes from the term "hazardous substance": "petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance" in other federal environmental laws, "and the term does not include natural gas, natural gas liquids, liquified natural gas, or synthetic gas usable for fuel . . . ." In Wilshire Westwood Associates v. Atlantic Richfield Corp., 30 ERC 1065 (9th Cir. 1989), Wilshire sued ARCO under § 107(a) of CERCLA seeking to recover the cost of cleaning up soil contaminated by gasoline from leaking underground tanks. ARCO defended asserting gasoline is not a hazardous substance under CERCLA because of the petroleum exclusion found at § 101(14). Wilshire argued the petroleum exclusion does not apply because the gasoline contained listed hazardous substances: benzene, toluene, xylene, ethyl-benzene, and lead. The court, following an EPA opinion on the issue, holds:

> [T]he petroleum exclusion in CERCLA does apply to

> unrefined and refined gasoline even though certain of its indigenous components and certain additives during the refining process have themselves been designated as hazardous substances within the meaning of CERCLA.

Wilshire, 30 ERC at 1073. Since the gasoline, its "indigenous components," and "additives" are covered by the petroleum exclusion, Wilshire's suit against ARCO was dismissed; no claim could be made under CERCLA.

B. Restrictions on Land Disposal

The Hazardous Solid Waste Amendments of 1984 modified RCRA to severely limit land disposal of hazardous wastes. The land disposal restrictions are to be implemented in three phases. EPA must establish treatment standards and disposal restrictions for the various wastes. Land disposal is prohibited for certain wastes unless they have been treated to meet standards set by the EPA. However, EPA recognized there may not be adequate treatment facilities currently available. To deal with this situation, EPA established a two-year "national capacity variance." Under the variance, the wastes can be disposed on land only if the disposal facility meets certain "minimum technological requirements" specified in § 3004(o) of RCRA. The requirements include the use of double liners, a leachate collection system, and groundwater monitoring.

In Mobil Oil Corp. v. EPA, 29 ERC 1385 (D.C. Cir. 1989), the

court had to determine whether the minimum technological requirements applied to disposal of variance wastes in "units" of a facility which were opened prior to the effective date of the 1984 Amendments. Mobil argued that it could dispose variance wastes in a unit which was opened prior to the land disposal restriction -- even though it did not meet the minimum technological requirements. EPA argued that the variance would permit disposal only in a disposal unit meeting the new technological requirements. The court upholds EPA's interpretation.

In Chemical Waste Management Inc. v. EPA, 29 ERC 1185 (D.C. Cir. 1989), the court upholds two of EPA's treatment standards established pursuant to the 1984 Amendments. In the first rule, "leachate which is actively managed after the underlying wastes have been listed as hazardous will itself be deemed a hazardous waste and must be treated to the applicable standards" -- even though the waste, through which the leachate passes, was not deemed hazardous at the time of disposal. In the second rule, where a listed hazardous waste, or hazardous waste leachate, mixes with soil or groundwater, "the soil or groundwater is subject to all the treatment standards or restrictions that would be applicable to the original waste." Chemical Waste Management, 29 ERC at 1188. This is an extended application of the EPA's mixture concept which declares nonhazardous waste to be hazardous whenever it becomes mixed with a hazardous waste.

C. CERCLA - The Liability Framework

EPA now has much of its hazardous waste remediation and cost recovery litigation being conducted by private parties. This phenomenon can be traced to the CERCLA concepts of "strict liability" and "joint and several liability."

1. Strict Liability

Most of the environmental laws impose some form of strict liability. You may not have intended to pollute; your actions resulting in the discharge may have been the result of an honest mistake, simple negligence, miscalculation, or an equipment failure. The "reason" for the failure is irrelevant for purposes of liability; although it will often be relevant for assessing the appropriate penalty once liability is established. Perhaps the most notable strict liability provision is § 311 of the Clean Water Act regulating oil spills.

In U.S. v. West England Ship Owner's Assn., 29 ERC 1992 (5th Cir. 1989), a tug towing a barge with a cargo of oil struck an unmarked wreck causing a discharge of oil into the Atchafalaya River. The Coast Guard cleaned up the oil spill after the owner of the barge denied any responsbility for the release. The government, after stipulating that the owner of the tug and barge were not negligent in causing the discharge, sought

recovery of the amount expended by the Coast Guard to clean up the spill. The court notes that § 311 imposes strict liability on the person who causes the spill, regardless of their lack of negligence. However, like CERCLA, § 311 contains four narrow exceptions to liability; one relates to the actions of third parties. The barge owner argued the cause of the spill was the result of the act or omission of a third party in not discovering and charting the wreck. However, the court holds this can be a defense only when the discharge was caused solely by the third party. The court holds since the spill was partially caused by the route selected by the tug captain, the defense is not available to the barge owner.

As noted by the court in U.S. v. Parsons, 30 ERC 1160, 1162 (N.D. Ga. 1989), "[l]iability under CERCLA is strict, without regard to the party's fault or state of mind." However, CERCLA establishes four narrow statutory exceptions to liability. CERCLA § 107(a) provides: "[S]ubject only to the defenses set forth in subsection (b) . . . [four categories of persons] shall be liable for . . . [response costs]." The four categories of persons liable include:

1. The present owner or operator of the facility;

2. Persons who owned or operated the facility at the time a hazardous waste was disposed on the facility;

3. Persons who "arranged for" disposal, treatment, or transportation of hazardous substances at the facility;

4. Persons who transport hazardous substances and select the disposal facility.

CERCLA § 107(a)(1)-(4). The four statuory defenses include situations in which it can be shown that the sole cause of the release can be attributed to:

1. An act of God;

2. An act of war;

3. An act or omission of a third party that does not have any sort of employment, agency, or contractual relationship to the person charged with CERCLA obligations; and

4. The "innocent landowner" defense which operates as an exception to the item #3 "contractual relationship" provision. However, the landowner must meet the due diligence requirements of CERCLA § 101(35) to be eligible for the defense.

CERCLA § 107(b) and § 101(35).

In Wagner Seed Co. v. U.S., 29 ERC 1453 (D.D.C. 1989), Wagner's building was struck by lightning resulting in a release of pesticides stored in the building. EPA, pursuant to CERCLA § 106(b)(2), ordered Wagner to clean up the release. After spending $2.3 million to conduct the cleanup, Wagner petitioned the EPA for reimbursement from the Superfund. Under the 1986 Superfund Amendments and Reauthorization Act (SARA), CERCLA was amended to permit private parties to recover their response costs from the Superfund when: (1) they have received a § 106 cleanup order and complied with it; and (2) they are not liable for the response costs under § 107(a) -- they fall within one of the statutory defenses. Wagner was able to successfully assert that the sole cause of the release was an "act of God." Nevertheless, Wagner is denied reimbursement in this case because the order and the bulk of the cleanup activity occurred before SARA took effect. Only cleanup actions undertaken after the SARA amendments are eligible.

The innocent landowner defense was interpreted in U.S. v. Pacific Hide & Fur Depot Inc., 30 ERC 1082 (D. Idaho 1989), where the EPA brought suit against several parties to recoup costs incurred in cleaning up a recycling yard contaminated with polychlorinated biphenyls ("PCBs"). Some of the parties received their interests in the recycling yard as a gift from their parents. The court notes that a gift transaction is much like an inheritance for purposes of applying the innocent

landowner defense. However, the court holds that if disposal of the PCBs took place after the children were given an interest in the property, they cannot claim to be innocent landowners. The defense is only applicable where ownership is acquired after the disposal.

The court in Pacific Hide outlines the innocent landowner defense. First, the defendant has the burden of proving the following:

1. The release, or threat of a release, and the resulting damages, were caused solely by a third party;

2. The third party's act or omission did not occur in connection with a "contractual relationship" with the defendant;

3. The defendant acted with due care concerning the hazardous substance; and

4. The defendant took precautions against the third party's foreseeable acts or failure to act.

Pacific Hide, 30 ERC at 1086. See CERCLA § 107(b)(3). Prior to the 1986 SARA amendments to CERCLA, it was unclear whether a warranty deed or sales contract between the prior owner and the

new owner would be a "contractual relationship" which would make the defense unavailable. SARA amended CERCLA to add § 101(35) which defines "contractual relationship" to include land contracts, deeds, and similar title instruments, unless:

> [T]he real property on which the facility concerned is located was acquired by the defendant after the disposal . . . of the hazardous substance . . . and one or more or the circumstances described . . . [below] is . . . established by a preponderance of the evidence:
>
> > (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in or at the facility.
> >
> > (ii) The defendant is a government entity which acquired the facility through escheat or through any other involuntary transfer . . . .
> >
> > (iii) The defendant acquired the facility by inheritance or bequest.

Pacific Hide, 30 ERC at 1086; CERCLA § 101(35)(A).

The requisite lack of knowledge is further defined by § 101 (35)(B) which requires that the defendant:

> [M]ust have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in a effort to minimize liability.
>
> [T]he court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the

ability to detect such contamination by appropriate inspection.

Pacific Hide, 30 ERC at 1087; CERCLA § 101(35)(B).

2. Joint and Several Liability

CERCLA imposes "joint and several" liability on all responsible parties for cleanup of hazardous waste sites. For example, suppose companies A and B each contribute waste to a hazardous waste site operated by C on land owned by D. Assume there is a release of hazardous wastes resulting in $50,000,000 in response costs. Also assume that none of the parties are able to prove that the harm created by their activity is "divisible;" their respective contributions to the harm cannot be proven. A, B, C, and D are all jointly liable for the response costs. However, each is also individually liable. If only A has the funds to pay the $50,000,000 judgment, A must pay the full amount. A's only recourse is to seek "contribution" from B, C, and D. To the extent B, C, and D do not have any funds to reimburse A for their share of the harm, A, instead of the government, must bear the loss.

This joint and several liability concept is addressed in Rhode Island v. Picillo, 30 ERC 1137 (1st Cir. 1989). The Picillos were pig farmers who, in 1977, decided to use part of their farm as a disposal site for drummed and bulk waste.

Thousands of barrels of hazardous waste were dumped on the farm and in 1979 the EPA and Rhode Island began assessing and cleaning the site. The state brought suit to recover its response costs to date and to hold five potentially responsible parties liable for all future costs associated with the site. The state initially sued 35 potentially responsible parties; 30 of the parties settled with the state by paying a total of $5.8 million. The trial court found three of the five remaining parties jointly and severally liable for all of the state's past clean-up costs not covered by the settlements, as well as all costs that may become necessary in the future. Two of the five defendants escaped liability by proving the material they deposited at the site was not a "hazardous substance." The three remaining defendants assert it is unfair to hold them jointly and severally liable for the balance of all present and future cleanup costs. Picillo, 30 ERC at 1137-38.

Joint and several liability recognizes that damages should be apportioned among defendants only to the extent a defendant can prove the harm is divisible. As the court in Picillo notes:

> The practical effect of placing the burden on defendants has been that responsible parties rarely escape joint and several liability, courts regularly finding that where wastes of varying (and unknown) degrees of toxicity and migratory potential commingle, it simply is impossible to determine the amount of environmental harm caused by each party. . . .
>
> Congress intended for those proven at least partially culpable to bear the cost of uncertainty.

Picillo, 30 ERC at 1138. The Superfund Amendments and Reauthorization Act of 1986 (SARA) mitigate the joint and several liability rule in two respects. First, pursuant to CERCLA § 122(g) the EPA is directed to offer early settlements, called "de minimis settlements," to defendants the EPA believes are minor contributors to the problem. Second, under CERCLA § 113(f)(1) the responsible party can sue other responsbile parties to try and have them "contribute" to the payment of response costs. The court "may allocate response costs among liable parties using such equitable factors as the court determines appropriate."

In this case the defendants attempted to prove the harm was divisible asserting they could show how many barrels of waste they contributed to the site and how much it cost to remove each of its barrels. However, the defendants were unable to prove how many barrels they contributed to the site so they were held jointly and severally liable. The court notes: "Perhaps in this situation the only way . . . [the defendants] could have demonstrated that they were limited contributors would have been to present specific evidence documenting the whereabouts of their waste at all times after it left their facilities." Picillo, 30 ERC at 1142. Apparently the defendants had delivered their waste to a transporter for disposal; they really didn't know where their waste ultimately resided. Assuming they could show how many barrels they contributed, the

next step would be to demonstrate their proportionate contribution to the environmental harm requiring response action. Perhaps their contribution to groundwater contamination may be indivisible while their contribution to soil contamination might be divisible. Picillo, 30 ERC at 1140.

3. Contribution and Settlement

CERCLA § 113(f)(1) provides, in part:

> Any person may seek contribution from any other person who is liable or potentially liable under section . . . [§ 107(a)]. . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.

The contribution concept is applied in Rockwell International Corp. v. IU International Corp., 29 ERC 1577 (D. N.D. Ill. 1989). In 1982 Rockwell purchased all the assets of Hills-McCanna, an indirect corporate subsidiary of IU International. One of the assets was a manufacturing facility where Rockwell discovered, in 1986, traces of hazardous substances. The Illinois environmental agency directed Rockwell to conduct tests and monitor the site. No private or public entity had ordered Rockwell to clean up the site. Nevertheless, Rockwell filed suit against IU and other potentially responsible parties for a declaratory judgment concerning their liability for "whatever costs Rockwell will incur in the future as a

result of the actual or threatened release of hazardous substances at the Facility." Rockwell, 29 ERC at 1578. Rockwell seeks to impose joint and several liability on the parties and then apportion their respective liabilities among themselves through contribution.

The court notes that some district courts refuse to rule on these issues until the party, here Rockwell, begins to implement a government-approved cleanup program. The court in Rockwell rejects such an approach and holds a § 107(a) action can be brought to "recover monitoring, assessment and evaluation costs even if the government has not approved a cleanup plan and cleanup has not yet begun." Rockwell, 29 ERC at 1579. The court also holds that Rockwell can seek an apportionment of each party's contribution to the problem -- even before Rockwell's liability is established. The court states the issue as follows:

> To receive any actual compensation through an action for contribution, the party must have been found liable, through judgment or settlement, in some damages action. However, nothing in either the concept of contribution or CERCLA precludes a plaintiff from seeking a declaratory judgment . . . that defendants who are jointly and severally liable should pay conribution for [a] certain portion of that liability, only in the event the plaintiff is later found liable.

Rockwell, 29 ERC at 1581.

Throughout the Rockwell opinion, the court notes how its contribution rulings will tend to facilitate private party actions and settlement negotiations to remedy hazardous waste problems. CERCLA places a premium on settlement; parties who refrain from settlement risk greater liability for cleanup costs. The increased liability arises from contribution restrictions imposed by § 113(f)(2) of CERCLA:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the other by the amount of the settlement.

The relationship between contribution and settlement is addressed in In re Alleged PCB Pollution, 29 ERC 1730 (D. Mass. 1989). To encourage settlement of CERCLA claims, SARA added § 113(f)(2) and (3) to protect parties who settle CERCLA claims from contribution liability to non-settlors. The court in PCB Pollution notes the impact of the SARA addition to CERCLA:

> The result is a powerful tool -- actually a carrot and a stick -- placed in the hands of the EPA to obtain settlements. The carrot the EPA can offer potential settlors is that they need no longer fear that a later contribution action by a non-settlor will compel them to pay still more money to extinguish their liability. In addition to this protection, settlors themselves are enabled to seek contribution against non-settlors. 42 U.S.C. sec. 9613(f)(3)(B). As for the stick, if the settlor pays less than its proportionate share of liability, the non-settlors, being jointly and severally liable, must make good the difference. [T]he

> potential liability of the others is reduced 'by the amount of settlement,' not by the settlor's proportionate share of any damages ultimately determined to have been caused.

PCB Pollution, 29 ERC at 1735. CERCLA § 113(f)(3)(A) provides that "[i]f the United States or a State has obtained less than complete relief . . . in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability."

The other type of settlement is the so-called "de minimis" settlement under CERCLA § 122(g). "De minimis" has proven to be a relative term when dealing with hazardous waste problems. The largest de minimis settlement to date was recently entered into by the EPA and various potentially responsible parties with regard to the Hardage-Criner site in Criner, Oklahoma. 179 parties have agreed to pay the EPA $11 million to help finance the estimated $155 million cleanup effort. The Department of Justice indicates the 179 de minimis parties contributed a total of 7% of the hazardous substances deposited at the site. EPA will seek the remaining $144 million in cleanup costs from the 171 parties who were not included in the de minimis settlement. Environment Reporter, Current Developments 1129 (BNA Oct. 27, 1989).

A de minimis settlement is possible when it "involves only a

minor portion of the response costs at the facility concerned and, in the judgment of the . . . [EPA]" certain conditions are met. The first situation where the de minimis settlement is possible is when the the party's waste volume, and waste toxicity, are "minimal in comparison to other hazardous substances at the facility." The second situation is when the owner of the real property where the site is located can demonstrate: (1) They had nothing to do with the generation, transportation, storage, treatment, or disposal of hazardous substances at the facility; (2) They did not contribute to the release or threatened release of a hazardous substance; and (3) The property was purchased by the party without "actual or constructive knowledge" that the property was used for the generation, transportation, storage, treatment, or disposal of hazardous substances. CERCLA § 122(g)(1)(A) and (B).

4. Defining CERCLA's Scope

In First United Methodist Church v. U.S. Gypsum Co., 30 ERC 1111 (4th Cir. 1989), First United was seeking to recover from U.S. Gypsum costs it incurred to remove asbestos-laden plaster used to construct the church in 1961. Citing CERCLA § 104(a)(3)(B), the court holds CERCLA does not apply to the removal of asbestos products which are part of the structure of a building. However, in Amland Properties Corp. v. ALCOA, 29 ERC 1538 (D. N.J. 1989), the court holds that CERCLA applies to hazardous

substances spilled on a concrete floor inside a manufacturing plant. Classifying the spill as disposal "into or on any land or water" within the meaning of CERCLA, the court notes the disposal of such waste "may" enter the environment by gradual movement through the concrete and into the underlying soil. Amland, 29 ERC at 1544.

The predicate to action under CERCLA is a "release, or a threatened release" of a hazardous substance. See CERCLA §§ 104 (a), 106(a), 107(a). In Amland the court reviews cases which define a "threatened" release. For example, the following situations could constitute a threatened release: corroding and deteriorating tanks containing hazardous waste or hazardous substances stored at a site when nobody is willing to take responsibility to ensure a release does not occur. In the Amland case the court holds PCBs spilled on the concrete floor of the plant, and the presence of 45 PCB-laden transformers, constitute a threat of release. Amland, 29 ERC at 1545.

In U.S. v. Aceto Agricultural Chemicals, 29 ERC 1529 (8th Cir. 1989), the EPA was seeking $10 million in remedial costs from eight pesticide manufacturers. The manufacturers had contracted to have Aidex formulate technical grade pesticides into commercial grade pesticides. The remedial costs were expended to clean up the Aidex property where the formulating process was conducted. The manufacturers asserted EPA's claim

for costs against them should be denied because they hired Aidex to formulate a product, not dispose waste. The court rejects this argument noting the manufacturers owned the pesticide before, during, and after the formulation process. Since the process invovles the generation of hazardous wastes, the manufacturers can be held liable for the waste. The court also notes that this is not a situation where the manufacturers sold a "useful" substance to a third party for incorporation into a product. Aceto, 29 ERC at 1535. The court holds the EPA has stated viable claims against the manufacturers under CERCLA and RCRA: Under CERCLA § 107(a) (3), any person who "arranged for" disposal or treatment of a hazardous waste is liable for response costs. Under RCRA § 7003 (a) any person who has "contributed" or who "is contributing" to the disposal of a solid or hazardous waste can be liable.

5. Reporting Requirements

A major adjunct of the environmental laws is the obligation to tell on yourself. For example, CERCLA § 103 requires notification to the government of any release of a reportable quantity of hazardous waste. In U.S. v. Carr, 30 ERC 1128 (2d Cir. 1989), the court considers the portion of § 103 requiring all persons "in charge" of a facility to make the necessary release report. Carr was a civilian employee at Fort Drum; the mainentance foreman of the firing range. Carr instructed

workers under him to discard a number of paint cans, some containing paint, into a man-made pit that contained water. Two weeks later Carr had dirt dumped over the cans in the pit. Carr's actions resulted in a 43-count indictment charging him with violation of various environmental laws. Carr's defense to the § 103 reporting claim was that he was not a person "in charge" of the facility. The court holds, however, that Congress intended the § 103 reporting requirements "to reach a person -- even if of relatively low rank -- who, because he was in charge of a facility, was in a position to detect, prevent, and abate a release of hazardous substances." Carr, 30 ERC at 1132. The court affirms Carr's conviction.

D. Cost Recovery Actions

The liability framework established by CERCLA has simplified the cost recovery process for the government and private parties. As courts define and enforce the strict liability concepts of CERCLA, the liability of potentially responsible parties becomes less of an issue. There will be more instances in which the potentially responsible party concedes liability and commences the required cleanup. However, the responsible party will simultaneously exercise the joint and several liability provisions of CERCLA to seek out other potentially responsbile parties. Many of the actions to recoup past and future cleanup costs are being brought by one potentially

responsbile party against other potentially responsible parties. The largest number of reported CERCLA cases in 1989 concern private cost recovery actions.

1. Avoiding Government Cost Recovery Actions

Instead of spending funds to conduct a cleanup, and then seeking recovery from the responsible parties, the EPA usually begins the process by issuing an order to potentially responsible parties to initiate the cleanup at its own expense. CERCLA § 106(a) provides, in part:

> [W]hen the President [EPA] determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General . . . to secure such relief as may be necessary . . . . The President [EPA] may also . . . take other action . . . including . . . issuing such orders as may be necessary to protect public health and welfare and the environment.

This section gives EPA the option of issuing an administrative order, or seeking a court order, requiring a landowner to clean up a release or threatened release. If the person receiving the order fails to act, "without sufficient cause," § 106(b) permits EPA to fine them up to $25,000 for each day they fail to comply. If the responsible party fails to act, § 104(a) permits the EPA to enter the premises and conduct the necessary remedial action. The EPA can then recover its response costs from responsible

partys pursuant to § 107(a). The EPA can recover all response costs which are "not inconsistent" with the national contingency plan ("NCP"). CERCLA § 107(a)(4)(A). If the EPA has to conduct the remedial action, after a responsible party's failure to act under a § 104 or § 106 order, § 107(c)(3) permits the EPA to seek punitive damages of "not more than three times" the costs incurred by the EPA.

In U.S. v. Parsons, 30 ERC 1160 (N.D. Ga. 1989), the EPA issued an administrative order to numerous potentially responsible parties directing them to clean up a hazardous waste site. None of the parties took any action; the EPA cleaned up the site and filed an action against the parties to recover punitive damages equal to three times the amount of EPA's cleanup costs. The court examines the "without sufficient cause" condition of § 107(c)(3) and notes "sufficient cause" has been defind as "an objectively reasonable, good faith belief that one has a valid defense to complying with the administrative order." Parsons, 30 ERC at 1164. The court can consider the "equities" of the individual case to determine whether punitive damages are appropriate. However, financial inability to comply with the EPA's administrative order may not be "sufficient cause" to avoid punitive damages. The court states: "from a policy standpoint, one should consider one's financial risks before becoming involved in transporting potentially hazardous materials." Parsons, 30 ERC at 1165.

2. Private Cost Recovery Actions

Frequently, the private cost recovery action will be filed against a previous owner, operator, or user of a site by the current owner of the site. For example, in General Electric Co. v. Litton Business Systems Inc., 30 ERC 1335 (W.D. Mo. 1989), Litton sold a manufacturing plant and associated land to General Electric ("GE") in 1970. Litton was responsible for disposal of cyanide-based electroplating wastes, during 1959 to 1962, on the site sold to GE. In 1980 the Missouri Department of Natural Resources ("MDNR") alerted GE to the hazardous waste problem at the site. In 1986 GE entered into a consent decree with the MDNR to clean up the site. In 1988 the MDNR certified that GE had completed its cleanup. The cleanup cost GE $940,843.23. GE filed suit against Litton to recover GE's cleanup costs.

To state a case against Litton, GE must prove:

1. Litton falls within one of the four categories of "covered persons" under CERCLA § 107(a)(1)-(4).

2. There was a "release" or a "threatened release" of a "hazardous substance" from the facility.

3. The release or threatened release caused GE to incur response costs.

4. GE's costs were "necessary costs" of response.

5. GE's response actions were consistent with the National Contingency Plan ("NCP").

General Electric, 30 ERC at 1340; CERCLA § 107(a)(4)(B).

Applying this five-step analysis, the court finds:

1. Litton owned or operated the facility at the time the cyanide-based electroplating wastes were disposed at the facility.

2. a. The wastes are listed as hazardous wastes under 40 C.F.R. § 261.31, F007-F009.

b. The wastes have been released into the environment.

c. The site is a "facility" because it is an area where hazardous substances have been deposited or come to be located [CERCLA § 101(9)].

3. The release caused GE to incur response costs.

4. The costs incurred by GE were "necessary" to remedy the problem.

5. GE's actions were consistent with the National Contingency Plan. The court engages in a detailed discussion concerning what a private party must do to be "consistent" with the NCP. General Electric, 30 ERC at 1343 -1346.

GE was also awarded attorney fees, court costs, and prejudgment interest on its response costs.

In Ascon Properties Inc. v. Mobil Oil Co., 29 ERC 1001 (9th Cir. 1989), the court addresses the minimum requirements for pleading a viable private cost recovery claim. Ascon purchased a 37-acre tract of land in 1983. From 1938 to 1972 the property was used as a disposal site for waste from industrial sources and oil field operations. In 1984 the property was declared a hazardous waste site. In 1985 Ascon was directed by the EPA and California officials to prepare and implement a response plan.

Ascon complied; the estimated cost of cleaning up the site is between $250 and $270 million. After preparing its plan Ascon filed suit against numerous oil companies as the alleged generators of hazardous waste deposited at the site. Ascon also sued other companies who allegedly transported waste to the site.

Regarding Ascon's CERCLA cost recovery claim, the court notes that Ascon pleaded all the "core elements" of a CERCLA § 107(a) claim. The core elements identified by the court include:

> (1) the waste disposal site is a 'facility' . . .
> (2) a 'release' or 'threatened release' has caused the plaintiff to incur response costs that are 'consistent with the national contingency plan' . . . . In addition, the defendant must fall within one of four classes of persons subject to CERCLA's liability provisions . . . .

Ascon, 29 ERC at 1003. Mobil attacks Ascon's pleading asserting it must specifically state: (1) "the manner in which a 'release' or 'threatened release' has occurred," and (2) "the types of response costs incurred." Ascon, 29 ERC at 1003. Rejecting Mobil's first argument, the court holds that a "plaintiff need not allege the particular manner in which a release or threatened release has occurred in order to make out a prima facie claim under section 107(a) of CERCLA." Ascon, 29 ERC at 1003. Accepting Mobil's second proposition, the court holds:

"It . . . makes sense to impose as a pleading requirement that a claimant must allege at least one type of response costs cognizable under CERCLA in order to make out a prima facie case." Ascon, 29 ERC at 1004.

County Line Investment Co. v. Tinney, 30 ERC 1062 (N.D. Okla. 1989), demonstrates the importance of conducting all response work in compliance with the National Contingency Plan. County Line sued Tinney for cost recovery under § 107 and for contribution under § 113(f). Tinney defends asserting County Line's expenditures on the property were not consistent with the NCP. The court notes the NCP requires that a Remedial Investigation/Feasibility Study ("RI/FS") be conducted on the property to "'determine the nature and extent of the threat presented by the release and to evaluate possible remedies.'" Tinney, 30 ERC at 1063. The RI/FS must include "'sampling, monitoring, and exposure assessment,' along with 'the gathering of sufficient information to determine the necessity for and proposed extent of remedial action.'" Tinney, 30 ERC at 1063. The court holds the metal detector survey and limited sampling conducted by County Line do not meet the NCP requirements for a RI/FS. The court also notes that no opportunity was given for public comment on the selected remedial action, nor is there evidence the action taken was cost-effective. Therefore, the court holds County Line cannot recover any of its costs from Tinney under CERCLA.

Although response costs must be consistent with the NCP, most courts addressing the issue have held there is no requirement for prior government approval before response costs can be recovered under § 107. In Rockwell International Corp. v. IU International Corp., 29 ERC 1577 (D. Ill. 1989), the court holds that a party can recover monitoring, assessment, and evaluation costs "even if the government has not approved a cleanup plan and cleanup has not yet begun." Rockwell, 29 ERC at 1579. In Rockwell the court awarded Rockwell costs it incurred in monitoring and investigating a release of hazardous substances from a facility it had purchased from IU International. The court also allows Rockwell to seek a declaratory judgment that the defendants are jointly and severally liable for future cleanup costs and a determination of how such liability should be apportioned. Rockwell, 29 ERC at 1583.

In International Clinical Laboratories Inc. v. Stevens, 29 ERC 1519, 1524 (E.D. N.Y. 1989), the court "rejects the notion that a governmental order is a necessary prerequisite to recovery in a private CERCLA action." The court notes that "[t]o adopt such a rule would do little to promote the effectiveness of private actions and would not further CERCLA's goal of encouraging environmental cleanup activities." Stevens, 29 ERC at 1524. See also Cooper v. Armstrong Rubber Co., 29 ERC 1102 (S.D. Miss. 1989) (government approval prior to incurring

response costs not required for private recovery action).

In Amland Properties Corp. v. ALCOA, 29 ERC 1538 (D. N.J. 1989), Amland purchased a facility from ALCOA which had areas contaminated with PCBs. Amland sued ALCOA seeking recovery of costs incurred by Amland in responding to the PCB contamination. ALCOA defended asserting, among other things, that Amland's actions were not consistent with the NCP. The court notes that in private cost recovery actions the burden is on the party seeking cost recovery to prove their actions were consistent with the NCP. Amland, 29 ERC at 1546. CERCLA refers to two categories of response action: "removal actions" and "remedial actions." Removal actions are taken to alleviate an immediate threat to the public or the environment and include "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release" and includes "security fencing or other measures to limit access . . . ." CERCLA § 101(25). Remedial actions focus on the long-term solution to the problem instead of short-term measures to stabilize the situation until it can be remedied. CERCLA § 101 (23). The court in Amland notes:

> The distinction between these actions [removal and remedial] is of no small importance, for whereas removal actions need only comply with the relatively simple NCP requirements set forth at 40 C.F.R. § 300.65 . . . , remedial actions must comport with the 'more detailed procedural and substantive provisions of the NCP' as set forth at 40 C.F.R. § 300.68.

Amland, 29 ERC at 1547.

Amland asserted it should be able to recover for two "removal" actions undertaken at the site: erecting a fence around the site and providing a 24-hour guard. The court notes that each of these activities is a proper removal action. However, Amland took these actions prior to the time it was aware of the PCB contamination problem. Therefore, they were not taken in response to any sort of health or environmental threat and cannot be recovered under CERCLA. Amland, 29 ERC at 1547. Once the hazardous waste problem was discovered, initial monitoring and assessment of the PCB release are recoverable as removal costs. For recovery of remedial costs, the court holds: "the requirements of the NCP must be adhered to . . . unless the party seeking recovery explains why a specific requirement is not appropriate to the specific site and problem." Amland, 29 ERC at 1547. The court holds Amland's remedial actions were not consistent with the NCP and therefore cannot be recovered from ALCOA.

The state or federal government can also be the target of a private cost recovery action. In Pennsylvania v. Union Gas Co., 29 ERC 1657 (U.S. 1989), the United States Supreme Court considered whether Union could sue the State of Pennsylvania to recover a portion of coal tar cleanup costs Union was forced to pay the EPA. Union's predecessor had operated a coal

gasification plant which produced coal tar as a by-product. Pennsylvania acquired easements along the bank of a creek and began excavating the area. While digging in the area the State struck a large deposit of coal tar which began to seep into the creek. The EPA determined the coal tar was a hazardous substance and EPA, and the State, took emergency action to clean up the site. EPA reimbursed the State for its share of the cleanup costs: $720,000. EPA sued Union to recover this amount. Union joined the State, as an owner or operator of the site, seeking recovery of a portion of the costs under CERCLA § 107 (a).

The State argues that under the 11th Amendment to the United States Constitution it cannot be held liable for money damages to a third party. The Court holds the SARA amendments to CERCLA clearly indicate that State and federal governments can be the target of cost recovery actions. As Justice Brennan notes: "Congress intended that States be liable along with everyone else for cleanup costs recoverable under CERCLA." Union Gas, 29 ERC at 1659. The Court next addresses the more difficult 11th Amendment issue and concludes the Commerce Clause permits Congress to impose liability on the States and, to that extent, override their sovereign immunity. See also Blue Legs v. U.S. Bureau of Indian Affairs, 29 ERC 1710 (1989) (Indian tribe can be held liable for cleanup of dump site under RCRA; RCRA issues must be tried in federal court, not tribal court).

E. Notice Problems

Many hazardous waste litigants have fallen prey to the notice requirements of CERCLA and RCRA. The United States Supreme Court, in Hallstrom v. Tillamook, 30 ERC 1425 (U.S. 1989), recently held that failure to comply with RCRA's statutory citizen suit notice provisions requires that the action be dismissed. RCRA's citizen suit provision is patterned off of § 304 of the Clean Air Act. Many other federal environmental stautes have citizen suit and notice provisions similar to RCRA § 7002. An unresolved issue under CERCLA is whether a person bringing a private cost recovery action under § 107(a) needs to comply with CERCLA's citizen suit provisions found at § 310. This issue was addressed by an Oklahoma federal district court in 1989.

In Roe v. Wert, 29 ERC 2002 (W.D. Okla. 1989), Roe owns land which he contends was contaminated by Wert's disposal of hazardous waste on adjacent lands. Roe sued Wert under CERCLA § 107(a) for response costs. Roe did not give the pre-suit notice provided for in CERCLA § 310. As the court notes: "The dispositive issue . . . is whether private suits under CERCLA require sixty (60) days presuit notice to the entities, including defendants, referenced in the statute." Roe, 29 ERC at 2003. The court holds the CERCLA § 310 notice requirements must be followed in a private cost recovery action. Since the

required notice was not given, "the Court is without subject-matter jurisdiction . . . ."

Contrast the Oklahoma court's approach with that of the Mississippi federal district court in Cooper v. Armstrong Rubber Co., 29 ERC 1102 (S.D. Miss. 1989). Cooper sued Armstrong in 1988 to recover response costs under CERCLA § 107(a)(4)(B). Cooper also raised a number of claims under other federal environmental statutes. Armstrong defended asserting Cooper had not given the statutory notice required to prosecute a suit under the Clean Water Act, Clean Air Act, Safe Drinking Water Act, Toxic Substances Control Act, RCRA, and CERCLA. The court agreed with Armstrong as to all the acts but CERCLA. Without addressing the CERCLA § 310 citizen suit provision, the court holds there is no pre-suit notice provision applicable to § 107 cost recovery claims.

In Regan v. Cherry Corp., 29 ERC 1112 (D. R.I. 1989), the court holds that CERCLA § 310, the citizen suit provision, does not authorize a cause of action for the recovery of response costs; response costs must be sought under § 107. The court also dismisses the § 310 claim because the statutory notice provision had not been followed. However, neither the court, nor the litigants, suggest that § 107 actions are in any way governed by the § 310 notice procedures. To the contrary, the court notes that attorney fees are not recoverable in a § 107

cost recovery action because only § 310 provides for attorney fees in citizen suits. This suggests that the two sections were intended to stand on their own -- procedurally and substantively. The court reasons that the distinction should be made because:

> The purpose of § 310 . . . is not to reimburse citizens for out-of-pocket expenses, but to prod government agencies into vigorously enforcing CERCLA and to allow private actions to compel compliance when the EPA and state fail to act. While § 107 concerns liability and compensation for pollution, § 310 is aimed at coercing governmental enforcement of hazardous waste laws.

Regan, 29 ERC at 1114-1115.

The need to carefully evaluate the nature of a claim is further demonstrated by the case of Ascon Properties Inc. v. Mobil Oil Co., 29 ERC 1001 (9th Cir. 1989). Ascon sued Mobil to recover response costs under CERCLA and for relief under RCRA. The court upholds dismissal of the RCRA claim because Ascon failed to comply with RCRA's statutory pre-suit notice provisions. RCRA's citizen suit provision contains two distinct notice provisons. If the claim concerns a present violation of law, the 60-day notice provision in § 7002(b)(1) must be followed. If the claim concerns past or present waste activities, which "present an imminent and substantial endangerment to health or the environment," the 90-day notice provision in § 7002(b)(2) must be followed. Where the § (b)(2)

claim relates to a violation of the RCRA hazardous waste management provisons (Subchapter III), "such action may be brought immediately after such notification . . . ." RCRA § 7002(b)(2)(A).

F. CERCLA - Allocating Risks Through Contract

The 1989 cases have addressed two distinct areas concerning the allocation of environmental risks through private contract. The first area concerns the extent to which parties to a sale of property can provide for the transfer or retention of environmental liabilities. The second area concerns the defense and indemnity obligations of an insurer to their insured under a general liability insurance contract.

1. The Property Sales Contract

Since many cost recovery actions arise out of the purchase of contaminated property, courts frequently must evaluate the sales documents to determine if the parties have addressed the matter. Note that the parties cannot, by contract, insulate themselves from liability to the government or injured third parties. However, the parties can seek to recoup their losses through indemnity agreements. CERCLA § 107(e) provides:

> (1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer

> from the owner or operator . . . or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

The typical sequence of events giving rise to the contract issue is demonstrated by Channel Master Satellite Systems v. JFD Electronics, 29 ERC 1172 (E.D. N.C. 1989). In 1980 Channel Master entered into a contract with JFD to purchase a manufacturing site. In 1985 it was discovered the site was contaminated with hazardous waste; Channel Master spent $3 million to clean up the site and now seeks to recover its cleanup costs from JFD -- the entity responsible as the owner or operator of the site when the hazardous wastes were discarded. JFD asserts Channel Master cannot recover its response costs from JFD because Channel Master agreed, in the site purchase and sale agreement, to relieve JFD from any further responsibility or liability for the property after the sale. The court reviews three lengthy paragraphs of the sales agreement to evaluate JFD's defense.

The first paragraph disclaims any warranties or representations which are not specifically contained in the agreement. The second paragraph indicates Channel Master has had the opportunity to inspect the property and agrees to accept the property "'as is' at the date of this contract and at the

Closing." Channel Master, 29 ERC at 1173. In the third paragraph JFD agrees to be responsible for correcting any violations of state or local law existing at the time the contract is signed. Channel Master agrees to indemnify JFD against any violations of state or local law noted after the contract is signed. Before evaluating the Channel Master/JFD contract, the court notes: "The thrust of § 107(e) is that although one may not deny liability for response costs by virtue of an indemnity or hold harmless agreement, such agreements to indemnify are not eliminated by the strict liability provisions of CERCLA." Channel Master, 29 ERC at 1174.

After evaluating the contract, the court holds none of the provisions would preclude Channel Master from bringing a § 107 cost recovery action against JFD. The court notes the first two paragraphs merely negate warranty claims. The court interprets the "as is" clause narrowly:

> "The 'as is' paragraph . . . negates the Seller's responsibility for injury to the Buyer occasioned by the impairment of its use of the property due to a condition or defect therein. For example, if the purchaser were restrained from using the property because of hazardous waste thereon, the purchaser would be without recourse against the Seller because of the 'as is' language.

Channel Master, 29 ERC at 1174. The third paragraph, the indemnity clause, only addresses violations of state and local law. However, the court notes that Channel Master's response

was "voluntary" and not pursuant to any state or local cleanup order. The court concludes the parties' contract does not limit Channel Master's right to recover response costs from JFD.

The court in International Clinical Laboratories Inc. v. Stevens, 29 ERC 1519 (E.D. N.Y. 1989), gives the "as is" language an equally narrow interpretation. The sales contract provided: "ICL has inspected the Duffy Avenue Site and agrees to purchase the property 'As Is' and in its 'present condition subject to reasonable use.'" International, 29 ERC at 1522. The court holds the "as is" clause is effective only to "'negate the existence of any representations by the seller as to the particular condition, fitness and type of the premises sold.'" International, 29 ERC at 1522. Stevens also argued that ICL's cost recovery claim should be denied, or reduced, because ICL agreed to purchase the property "as is" after inspection by an engineer. Stevens does not rely upon the "as is" clause but on concepts of "equitable estoppel." The court indicates this issue cannot be addressed until the facts of the case are known.

Although not the focus of the dispute, the court in Louisiana-Pacific Corp. v. Asarco, Inc., 29 ERC 1450, (W.D. Wash. 1989), reproduces an indemnity clause employed in a sale of assets used to process smelter slag from a copper mill. IMP agreed to sell its slag processing and other assets to L-Bar for $4.5 million. The purchase agreement contained the following

clause:

> 11.1 Indemnification by Seller. Effective as of the Closing Date, Seller shall indemnify and hold harmless buyer from and against any and all claims, damages, or liabilities (whether or not caused by negligence), including civil or criminal fines, arising out of or relating to any of the following: . . . .
>
> (c) any generation, processing, handling, transportation, storage, treatment, or disposal of solid wastes or hazardous wastes by Seller including, but not limited to, any of such activities occurring on any of the Assets;
>
> (d) any releases by Seller (including, but not limited to, any releases as defined under the Comprehensive Environmental Response Compensation and Liability Act of 1980) to the extent occurring or existing prior to Closing, including, but not limited to, such releases to land, water (surface waters or ground waters), or into the air . . . .

Louisiana-Pacific, 29 ERC at 1451.

The contract focus in Amland Properties Corp. v. ALCOA, 29 ERC 1538 (D. N.J. 1989), is again on the effect of an "as is" clause. However, the court holds Amland's complaint failed to state a § 107 claim for recovery of its response costs. Instead, the court considers the effect of the "as is" provision on Amland's common law strict liability claim. The court holds:

> The 'as is' contracts . . . cannot serve to insulate Alcoa from liability for an allegedly abnormally dangerous activity. . . . [S]trict liability may be avoided only by a knowing agreement to accept the risk of an abnormally hazardous activity, and an 'as is' contract, under the circumstances here, does not amount to a knowing agreement.

Amland, 29 ERC at 1554, n20. Amland asserted that when ALCOA sold its plant, leaving behind PCB contaminated transformers and concrete flooring, it was engaging in an abnormally dangerous activity for which strict liability should be imposed.

2. The Insurance Contract

Most of the litigation in this area has focused on the meaning of the "pollution exclusion" clause of a common form of comprehensive general liability insurance policy. The basic issue is whether environmental contamination caused by the discharge of pollutants over an extended period of time are covered. One common form of policy excludes coverage for:

> [B]odily injury or property damage arising out of the discharge, dispersal, or release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere, or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Claussen v. Aetna Casualty & Surety Co., 29 ERC 1901, 1902 (Ga. 1989) (emphasis added). In hazardous waste cases the issue is whether the gradual escape of pollutants can ever be "sudden and accidental" so as to fall into the exception to the exclusion. Cases on the issue have gone both ways.

For example, in Claussen v. Aetna Casualty & Surety Co., 29

ERC 1901, 1902 (Ga. 1989), the Georgia Supreme Court holds the word "sudden" as used in the pollution exclusion clause means "unexpected or unintended." In USF&G v. Murray Ohio Manufacturing Co., 29 ERC 1700 (6th Cir. 1989), the court, applying Tennessee law, holds the word sudden means "immediate" and is not a synonym for "'unexpected and unintended.'" USF&G, 29 ERC at 1703. Therefore, liability for contamination of a site which occurs over a long period of time would be covered by the Claussen interpretaion but would not be covered by the USF&G interpretaion. See collected cases in Claussen v. Aetna Cas. & Sur. Co., 865 F.2d 1217, 1219 (11th Cir. 1989). As with any contract interpretation issue, the outcome will depend upon the unique language of each contract. See, e.g., Travelers Insurance Co. v. Waltham Industrial Laboratories Corp., 30 ERC 1453 (1st Cir. 1989) (unique form of pollution exclusion clause).

G. Hazardous Waste and the Common Law

For persons seeking recovery for harm caused by hazardous waste, CERCLA offers little assistance. CERCLA is designed to promote cleanup of hazardous waste sites; it is not intended to compensate victims who seek something besides their necessary and NCP-consistent response costs. If a litigant is looking for more than response costs, or the response costs they have incurred are not consistent with the NCP, they will have to look

to other statutes and the common law for relief. To date, most state legislatures have left such compensatory schemes up to the courts and the common law. The most likely avenue of relief has been the common law cause of action for strict liability in tort.

1. Strict Liability in Tort

Amland purchased a manufacturing facility from ALCOA which was contaminated with PCBs. Amland sued ALCOA to recover response costs under CERCLA § 107(a) and for damages under four common law tort theories: strict liability, private nuisance, public nuisance, and negligence. In Amland Properties Corp. v. ALCOA, 29 ERC 1538 (D. N.J. 1989), the court finds that some of Amland's response costs are not recoverable under CERCLA, and that ALCOA is entitled to summary judgment on Amland's nuisance and negligence claims. However, the court retains the strict liability claim for trial.

Amland's strict liablity claim asserts: ALCOA's operations at the facility, and the condition in which it left the facility, were abnormally dangerous and give rise to strict liability. ALCOA defends asserting strict liability cannot be applied when a vendee is seeking to hold a remote vendor liable. ALCOA also asserts that whether its activities were abnormally dangerous depends upon a number of factual issues

which cannot be resolved by summary judgment. The court rejects ALCOA's first defense stating: "In cases involving abnormally dangerous activities, '[t]he party who creates such a[n abnormally dangerous] condition is absolutely liable and cannot avoid that responsibility unless a purchaser knowingly accepts that burden.'" Amland, 29 ERC at 1553. ALCOA asserts Amland "knowingly accepted" the burden when Amland chose, despite the recommendation of its engineer, not to test the property for PCB contamination prior to its purchase. The court rejects ALCOA's assertion, stating:

> Because the most that can be said here is that Amland negligently did not discover the presence of PCBs, and because it certainly cannot be said that Amland knew of the PCBs when it purchased the Edgewater plant, Alcoa may not raise assumption of the risk as a defense to liability.

Amland, 29 ERC at 1553. The court also holds that Amland's agreement to purchase the property "as is" does not insulate ALCOA from liability for an abnormally dangerous activity. Amland, 29 ERC at 1554, n20.

The court next addresses whether ALCOA's actions in this case were an "abnormally dangerous activity" giving rise to ALCOA's strict liability for any harm caused by its actions. The court relies upon the analysis prescribed by §§ 519 and 520 of the Restatement (2d) of Torts. First, the court notes: "'[W]hether an activity is abnormally dangerous is to be

determined on a case-by-case basis, taking all relevant circumstances into consideration.'" Amland, 29 ERC at 1555. To guide the court's analysis, the following six factors, taken from § 520 of the Restatement (2d) of Torts, must be considered:

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
>
> (b) likelihood that the harm that results from it will be great;
>
> (c) inability to eliminate the risk by the exercise of reasonable care;
>
> (d) extent to which the activity is not a matter of common usage;
>
> (e) inappropriateness of the activity to the place where it is carried out; and
>
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

Amland, 29 ERC at 1555. The court holds ALCOA's actions cannot be evaluated until the facts are developed and the Restatement factors applied to the facts. However, the court cites extensively from State Dep't of Environmental Protection v. Ventron, 94 N.J. 473, 19 ERC 1505 (1983), where the court held that the disposal of mercury and other toxic wastes was an abnormally dangerous activity giving rise to strict liability. The Amland court quotes the following passage from Ventron:

> [W]e conclude that mercury and other toxic wastes are 'abnormally dangerous,' and the disposal of them, past or present, is an abnormally dangerous activity. We recognize that one engaged in the disposing of toxic waste may be performing an activity that is of some use

> to society. Nonetheless, 'the unavoidable risk of harm that is inherent in it requires that it be carried on at his peril, rather than at the expense of the innocent person who suffers harm as a result of it.' [The defendants'] activity has poisoned the land and Berry's Creek. Even if they did not intend to pollute or adhered to the standards of the time, all of these parties remain liable. Those who poison the land must pay for its cure.

Amland, 29 ERC at 1556.

In Crawford v. National Lead Co., 29 ERC 1048 (S.D. Ohio 1989), persons living near a uranium metals production plant sued the plant operator asserting the operator failed to prevent the emission of uranium and other harmful materials from the plant. The plaintiffs seek damages from the plant operator for emotional distress and diminished property values. They also seek injunctive relief. Plaintiff's theories for liability include: negligence, strict liability, nuisance, willful or wanton misconduct, breach of contract, and violation of the Price-Anderson Act. Focusing on the strict liability claim, the court quotes the elements of strict liability stated in § 519 of the Restatement (2d) of Torts:

> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
>
> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

Crawford, 29 ERC at 1050. After applying the factors established by § 520 of the Restatement (2d) of Torts, the court concludes the operation of the plant is an "abnormally dangerous activity." Crawford, 29 ERC at 1051. The court next proceeds to determine whether "emotional distress" and "diminished property values" are injuries that can be recoverd under § 519 of the Restatement (2d) of Torts. The court holds emotional distress and diminished property values each will support a claim of strict liability under Ohio law.

The court also upholds the plaintiffs' private nuisance claim. The court notes that Ohio law imposes strict liablity for creating a nuisance caused by the escape of inherently dangerous material onto adjacent lands. Quoting from the Restatement (2d) of Torts § 822, the court defines the elements for a private nuisance action:

> One is subject to liability for a private nuisance if . . . his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
>
> (a) intentional and unreasonable, or
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or <u>for abnormally dangerous conditions or activities.</u>

Crawford, 29 ERC at 1052 (emphasis by the court).

2. Interaction of the Common Law and Envrionmental Statutes

a. Punitive Damages

Even though a litigant cannot recover anything except response costs under CERCLA, they may be able to assert a tort claim as a basis for recovering other actual damages and punitive damages. For example, in Regan v. Cherry Corp., 29 ERC 1112 (D. R.I. 1989), Regan owned land adjacent to the Cherry Corporation. Regan sued Cherry Corporation alleging it had deposited hazardous wastes on Regan's land. Regan sued under CERCLA to recover its response costs and for punitive damages. Regan also alleged a common law trespass claim and requested actual and punitive damages. The court dismisses Regan's claim for punitive damages under CERCLA holding a private party can only recover "response costs." The court states:

> Far from being synonymous, the terms 'response costs' and 'damages' have different meanings in CERCLA. . . . While § 107 permits a private party to recover response costs pursuant to § 107(a)(4)(B), only the United States, a State, or an indian tribe may sue for 'damages for injury to . . . natural resources' pursuant to § 107(a)(4)(C).

Regan, 29 ERC at 1117. The court, however, holds that Regan's continuing trespass claim can support an award of punitive damages. The court looks to § 161 of the Restatement (2d) of

Torts for guidance and holds Regan pleaded a viable continuing trespass claim.

b. Statute of Limitations

The court in First United Methodist Church v. U.S. Gypsum Co., 30 ERC 1111 (4th Cir. 1989), considers whether CERCLA § 309 operates to extend the period in which First United can bring an asbestos claim against U.S. Gypsum. Under a Maryland statute, First United's claim would be barred unless suit was filed within 20 years from the date the asbestos was installed. First United asserts that CERCLA would change the critical filing date to within 20 years from "the date plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." CERCLA § 309(a)(1) and (b)(4). The court rejects First United's argument because it finds that CERCLA does not apply to cost recovery actions for removing asbestos products which are part of a structure. First United, 30 ERC at 1114-1115; CERCLA § 104(a)(3)(B).

c. Alerting Potential Litigants

In 1986 Congress enacted the Emergency Planning and Community Right-To-Know Act ("EPCRA") (codified at 42 U.S.C. §§ 11001 to 11050). EPCRA seeks to accomplish two basic tasks:

(1) plan for emergencies caused by accidental chemical releases into the environment; and (2) inform the public about the existence of chemicals in their area and the risks they pose. Essentially, owners and operators of facilities where certain chemicals are present must comply with detailed reporting and notification requirements. The operation of the law is hilighted by a recent proceeding in which an EPA administrative law judge imposed a $75,000 fine against Riverside Furniture Corp. Riverside failed to submit its annual report, required by EPCRA § 313, estimating the toxic substances Riverside released into the environment during 1987. Riverside stated it didn't file the report because it did not think it was covered by EPCRA.

In addition to the penalties for failure to comply with EPCRA, it can also have a significant impact on private litigation concerning toxic substances. Most of the reports concerning the chemicals used by an industry, and those which it releases into the environment, are readily available to the public under EPCRA. These reports may contain information which could prompt claims for personal injury and property damage for exposure, or feared exposure, to hazardous substances. Consider Crawford v. National Lead Co., 29 ERC 1048 (S.D. Ohio 1989), where the court recognizes a cause of action for "emotional distress" and "loss of property value" for emissions of uranium and other harmful materials.

IV. NOWHERE TO HIDE: BREACHING THE CORPORATE FORM

A. Focus on the Individual

Most of the environmental statutes permit the EPA to focus its enforcement efforts on the individuals of a corporation or other form of business. CERCLA, like most of the environmental statutes, defines "person" to include "an individual, firm, corporation, association, partnership, joint venture, commercial entity, . . ." and all forms of government. CERCLA § 101(21). After defining "person" broadly, the operative provisions of the acts proceed to hold the "person" liable for various types of conduct. For example, CERCLA § 103(a) requires "[a]ny person in charge" of a facility to report any release of a hazardous waste. CERCLA § 106(b) provides that "[a]ny person" who fails to comply with an EPA order may be fined up to $25,000/day. CERCLA § 107(a) imposes liability for response costs on "any person" who "operated" a facility, "any person" who "arranged for disposal or treatment," and "any person" who "accepts" hazardous wastes for transport to a disposal site. Such broad statutory language can permit the EPA to focus on the business entity and individuals working for the entity. For example, many individuals, up and down the management chain, could be held to have "arranged for disposal" of a hazardous waste.

In U.S. v. Carr, 30 ERC 1128 (2d Cir. 1989), a maintenance

foreman who directed a work crew to throw paint cans into a pit was held to be a person "in charge" of a facility. Carr's failure to report the release, as a person "in charge," resulted in his conviction of a crime under CERCLA § 103(b). The "facility" which Carr, as a civilian employee, was held to be "in charge" of, was a military base. In Michigan v. Arco Industries Corp., 29 ERC 1936 (W.D. Mich. 1989), the State of Michigan sued the corporate officers of a company to recover the State's response costs. The State sued Matthaei, the controlling stockholder and chairman of the board of directors, Ferguson, the company's president and a stockholder, and the corporate entity Arco Industries Corp. The complaint alleged Matthaei had "the overall responsibility for the operation and management of the ARCO plant" and Ferguson "directly oversaw the daily management and operation of the plant." Arco Industries, 29 ERC at 1937. The complaint asserts Matthaei and Ferguson are personally liable for the State's response costs as "owners or operators" of the ARCO facility.

Holding that the State had properly pled a cause of action against Matthaei and Ferguson, the court observes:

> [T]he case law suggests that corporate officers can be held liable under CERCLA for unlawful disposal of hazardous waste. [citations omitted] The decisions that concern 'owners or operators' under section 107(a)(1) base liability decisions on the individual officer's knowledge, responsibility, opportunity, control, and involvement in the disposal process.

Arco Industries, 29 ERC at 1940.

In U.S. v. Marathon Development Corp., 29 ERC 1145 (1st Cir. 1989), Marathon Development, and Geoghegan, its senior vice-president, were indicted on 25 counts of violating the Clean Water Act. Marathon Development was building a shopping mall on 20 acres it owned. In constructing the parking lot, approximately five acres of the 20-acre tract were bulldozed and filled. The Army Corps of Engineers brought this action because the 20-acre site contained "wetlands" and Marathon Development had not obtained a dredge and fill permit, under § 404 of the Clean Water Act, prior to commencing its development operations. Marathon Development was fined $100,000; Geoghegan was fined $10,000 and sentenced to jail for six months. The sentence was suspended and Geoghegan placed on one year of probation. Marathon Development, 29 ERC at 1146.

Many state environmental statutes similarly probe beneath the corporate structure in search of responsible corporate employees. For example, in New York v. J.R. Cooperage Co., 72 NY2d 579, 29 ERC 1224 (1988), the State of New York passed a criminal statute to complement its hazardous waste regulatory system. The New York Legislature, noting the risk caused by hazardous wastes, found that "'[t]he unlawful possession and disposal of hazardous wastes, with the long-term toxicity that is inherent in these substances, may pose a greater threat to

the health and safety of the citizens of this State than street crime.'" J.R. Cooperage, 29 ERC at 1226.

On December 13, 1983, a team comprised of the New York health, fire, and police departments raided the J.R. Cooperage plant and seized 16 drums filled with a hazardous sludge. The drums were located next to a refuse dumpster owned by Red Ball Sanitation Service. Also found were a shovel, a funnel, and smaller drums in which the sludge was being placed for disposal in the dumpster. State officials had informed the defendants two months before the raid that the sludge was hazardous and that they needed to retain a licensed hazardous waste hauler. Instead, they continued to contract with Red Ball who disposed of anything in or around its dumpster, including drums of material left there by the company. The court affirms the convictions of J.R. Cooperage -- and its president.

The focus on the individual is heightened when it includes criminal sanctions. The EPA's goal with its criminal prosecution strategy is to get the most environmental "bang" out of its litigation "buck." EPA's reasoning appears to be that individuals who manage corporations will give environmental compliance a new priority if they, as individuals, can be investigated, arrested, charged with a crime, convicted, fined, and punished. The criminal arena also provides the sentencing judge with the ability to fashion some unique remedies. For

example, in U.S. v. Holland, 29 ERC 2041 (11th Cir. 1989), the court had convicted Holland for violating the Clean Water Act and sentenced him to five years probation with the condition that Holland "'refrain from violation of any law . . . .'" Holland, 29 ERC at 2041. Holland committed the prior violations while engaging in his maritime construction business. Following his conviction, he again violated the Clean Water Act. The court revoked his probation, fined him $10,000, and sentenced him to six months in jail. The court agreed to restore Holland's probation with the condition that Holland could not engage in the maritime construction business until June 7, 1990 when his probation would be complete. On appeal, the probation condition was upheld.

In U.S. v. Protex Industries Inc., 29 ERC 1593 (10th Cir. 1989), the court considers the operation of the "knowing endangerment" provision of RCRA. Protex operated a drum recycling facility where it cleaned and repainted used 55 gallon drums. The EPA and FBI, while executing a search warrant, obtained evidence that Protex failed to employ adequate safety measures to protect its employees from solvent poisoning and toxic substances found in the used drums. The court affirms Protex's conviction under RCRA § 3008(e) which provides:

> Any person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste identified or listed . . . or used oil . . . who knows at that time that he thereby places another person in

> imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment for not more than fifteen years, or both. A defendant that is an organization shall, upon conviction of violating this subsection, be subject to a fine of not more than $1,000,000.

B. Disregarding the Corporate Form

In the previous section the statutory language permitted the courts to avoid a direct attack on the corporate form of doing business. The statutes encompassed persons working for the corporation as well as the corporation. In this section, the courts attack the corporate form and seek to hold the stockholders of the corporation liable for the corporation's actions. This approach is demonstrated in U.S. v. Nicolet Inc., 29 ERC 1851 (E.D. Penn. 1989), where the court was asked to hold a parent corporation liable for hazardous waste problems created by its subsidiary. In Nicolet the T&N company, from 1934 to 1938, purchased all the stock of the Keasbey company. The Keasbey company operated a manufacturing facility and two adjoining waste disposal sites from 1873 to 1962. In 1983 the EPA discovered asbestos at the Keasbey facility and commenced a $2.5 million cleanup program. The EPA seeks to hold T&N liable for the cleanup costs associated with the Keasbey site.

The court fashions the following "federal rule of decision" concerning when the separate corporate existence of the parent

corporation should be ignored:

> Where a subsidiary is or was at the relevant time a member of one of the classes of persons potentially liable under CERCLA; and the parent had a substantial financial or ownership interest in the subsidiary; and the parent corporation controls or at the relevant time controlled the management and operations of the subsidiary, the parent's separate corporate existence may be disregarded.

Nicolet, 29 ERC at 1858. The court holds the EPA pled a viable claim against T&N based upon its alleged ownership, control, and management of Keasbey.

In Nicolet the EPA also asserts that T&N is liable as an "owner and operator" of the site under CERCLA § 101(20)(A)(ii) which provides:

> The term 'owner or operator' means . . . in the case of an onshore facility . . . any person owning or operating such facility . . . . Such term does not include a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility.

EPA reasons that since T&N was the sole stokholder of Keasbey, and T&N was "participating in the management of" the facility, T&N is directly liable as a former owner and operator of the site. Nicolet, 29 ERC at 1858. The trial court adopts EPA's position noting:

> 'Courts have generally concluded that the exemption

> from liability [found in Section 101(20) of CERCLA] . . . gives rise to an inference that an individual who owns stock in a corporation and who actively participates in its management can be held liable for cleanup costs incurred as a result of improper disposal by the corporation.'
>
> . . . .
>
> Both individuals and corporations are included within the definition of 'person' under Section 101(21) of CERCLA. Accordingly, if an individual stockholder can be liable under CERCLA for his corporation's disposal, a corporation which holds stock in another corporation (e.g., a subsidiary) and actively participates in its management can be held liable for cleanup costs incurred as a result of that corporation's disposal.

Nicolet, 29 ERC at 1859.

C. Successor Liability

Suppose corporation A wants to sell its assets to corporation B. Corporation A, in its corporate past, had disposed of hazardous wastes at the Acme Landfill. In 1985 A sells substantially all its assets to B; B paying fair value for the assets. In 1989 the EPA, Acme, and other potentially responsible parties, seek response costs from corporation A relating to its disposal of hazardous wastes at the Acme Landfill. From 1985 to 1988 corporation A invested the proceeds from its sale of the corporate assets in oil and gas drilling operations and stock in savings and loan institutions. As of 1989 corporation A is bankrupt. To what extent can corporation B be held liable for A's hazardous waste liabilities?

The court in Louisiana-Pacific Corp. v. Asarco Inc., 29 ERC 1450 (W.D. Wash. 1989), states and applies the tests to be used in determining whether corporation B will be liable for corporation A's prior hazardous waste activities. IMP [A] had processed and marketed smelter slag from 1907 through 1985 at a copper mill site owned by ASARCO. In 1986 L-Bar [B] purchased substantially all of IMP's assets, including some of the equipment used by IMP to process smelter slag at the ASARCO site. L-Bar did not renew IMP's slag business, it never used the equipment at the ASARCO site, nor did it purchase IMP's stock or name. The sale included assets across the nation and in the Philippines. L-Bar paid adequate consideration for the IMP assets -- $4.5 million. At the time of the sale, IMP's assets exceeded its liabilities. In the sales agreement, IMP expressly agreed to indemnify L-Bar against any liability relating to hazardous wastes and expressly references liability under CERCLA. ASARCO is suing L-Bar to determine its proportionate share of response costs incurred to cleanup the ASARCO mill site. L-Bar's liablity can be established only if it is deemed a successor of IMP.

The court states the general rules governing L-Bar's liability as follows:

> Under traditional corporate successor law, a corporation which buys the assets of another corporation will not become liable for the liabilities of the selling corporation simply because of the asset

purchase. [citations omitted] With a primary goal of protecting creditors and minority shareholders, rather than tort victims, four exceptions to this rule were established:

> (1) purchasing company expressly or impliedly agreed to assume liablity;
> (2) the purchase was a de facto merger or consolidation;
> (3) the purchaser is a mere continuation of the seller;
> (4) the transfer of assets was accomplished to fraudulently avoid liabilities.

Louisiana-Pacific, 29 ERC at 1452. The court also considers the "product line liability theory" which imposes successor liability on the purchasing corporation when it continues selling the same line of products as the selling corporation. Louisiana-Pacific, 29 ERC at 1453. Applying the facts to the referenced tests, the court concludes L-Bar cannot be held responsible for the hazardous waste liabilities of IMP.

Contrast the facts in Louisiana-Pacific with the situation in In re Alleged PCB Pollution, 29 ERC 1723 (D. Mass. 1989), where the Belleville/Aerovox corporation ("Belleville") [A] sold substantially all its assets to Aerovox, Incorporated ("Aerovox") [B]. Aerovox acquired all of Belleville's assets, including the right to use the Aerovox name, and in return Belleville recieved one share of stock in Aerovox's parent, RTE, for each share of Belleville stock. Belleville also agreed to liquidate and dissolve promptly and distribute the RTE shares to its shareholders. Aerovox agreed to assume all of Belleville's

liabilities -- except any liability relating to Belleville's use and disposal of PCBs. The transaction was completed in 1978 and Aerovox has continued to manufacture electronic products at the Belleville plant site. In 1983 EPA filed suit against Aerovox, Belleville, and RTE for PCB pollution of the Acushnet River and New Bedford Harbor. Considering the successor liablity of Aerovox for the PCB pollution of Belleville, the court holds the transaction was a de facto merger of Belleville into Aerovox. Therefore Aerovox, as the "surviving corporation," is liable for the conduct of Belleville, the "transferor corporation." PCB Pollution, 29 ERC at 1726.

V. WHEN YOU TAKE A HIT -- CONSIDER KEEPING THE MONEY AT HOME

Cases reported during 1989 demonstrate the courts' willingness to let industries settle their environmental liabilities by payments to local educational institutions and public interest organizations. Instead of sending money, in the form of civil penalties, to the black hole of the federal treasury, consider a negotiated settlement where some or all of the money can be used to study, monitor, or alleviate the problem. For example, in NRDC v. Interstate Paper Corp., 29 ERC 1135 (S.D. Ga. 1988), the Natural Resources Defense Council and the Sierra Club sued Interstate Paper under the Clean Water Act's citizen suit provisions. The parties entered into a

proposed consent decree in which Interstate Paper would pay $98,000 as follows:

> $15,000 to the federal government as a civil penalty;
>
> $55,250 to the Trust for Public Land for use in wetlands mitigation and a study down river from Interstate's discharge point; and
>
> $27,750 to the Georgia Conservancy to be used primarily for the education of school children.

NRDC, 29 ERC at 1136.

The EPA objected to the proposed consent decree because "it impermissibly provides payments of 'civil penalties' to entities other than the United States." NRDC, 29 ERC at 1136. The court responds to this assertion stating:

> The consent decree does provide for payments to entities other than the United States Treasury. Whether the payments provided pursuant to a consent decree in the course of settlement can be considered 'penalties' is questionable. Even if they can be, the type of payments at issue are specifically permitted under the EPA's published Clean Water Act Penalty Policy for Civil Settlement Negotiations, February 11, 1986 ('Penalty Policy').

NRDC, 29 ERC at 1136. Although the EPA's Penalty Policy provides for the funding of environmental mitigation projects, the EPA asserts the settlement must still contain a substantial monetary penalty component. The court finds $15,000 is a significantly large amount to satisfy the EPA's policy. The EPA also argues the $27,750 to be paid to the Georgia Conservancy to

educate school children is not the type of mitigation project contemplated by its policy. The court notes that other courts have approved payments to educational facilities, but they "were expressly made for the purpose of funding research related to the particular violation." NRDC, 29 ERC at 1136. Although the court concludes the payment to the Georgia Conservancy may not comport with EPA's policy, it nevertheless approves the settlement.

In SPIRG of New Jersey v. Hercules Inc., 29 ERC 1417 (D. N.J. 1989), the court and litigants take a different approach by agreeing to the allocation of a civil penalty and then having the court determine the appropriate amount of penalty. SPIRG, the "Student Public Interest Research Group," brought a Clean Water Act citizen suit againt Hercules. The court imposes a $1,680,000 civil penalty for 168 violations of the Clean Water Act at $10,000 per violation. Prior to submitting the penalty issue to the court, the parties agreed that Hercules' actual liability would be not less than $1,450,000 nor more than $2,000,000. The parties also agreed that the $1,450,000 would be shared as follows:

$483,333 to the United States Treasury;

$241,667 to the Department of Environmental Resources, Cook College, Rutgers University;

$241,667 to the American Littoral Society, Inc.

$483,333 to the University of Medicine and Dentistry of

New Jersey for graduate programs in environmental research.

The difference between the agreed upon $1,450,000 and the $1,680,000 assessed by the court, would be divided equally between the United States Treasury and the American Littoral Society.

In PIRG v. Powell Duffryn Terminals Inc., 30 ERC 1201 (D. N.J. 1989), PIRG, the "Public Interest Research Group," brought a Clean Water Act citizen suit againt Powell Duffryn. Like the defendant in the Hercules case, Powell Duffryn asserts it was "lulled into complacency" by State and federal environmental agencies. The court, although unimpressed with the official complacency defense, uses the inaction of the State and federal officials as a basis for reducing the civil penalty from $4,205,000 to $3,205,000. The court then appoints three trustees to "investigate and recommend to this Court how these funds should be used to directly impact environmental problems in New Jersey." Powell Duffryn, 30 ERC at 1209. The court states the basis for its action as follows:

> Merely having these monies paid to the Federal Treasury does not, in this Court's judgment, satisfy the purposes of the Act, nor completely discharge this Court's duty in environmental cases. This Court has an affirmative obligation to direct those funds to ameliorate environmental pollution. Paid into the public coffers, the penalties lose their identity and indeed, in all liklihood, will be used for other purposes. By retaining jurisdiction over the disbursement of these penalties, this Court can be assured that the actions taken by plaintiff (a public

> action group) to protect the environment will be vindicated and the fruits of its labor properly reinvested in the environment.

Powell Duffryn, 30 ERC at 1209.

Whenever there is the prospect of paying money to settle an environmental dispute, industry defendants should consider structuring their settlements to have the bulk of the settlement funds paid to a recognized non-profit environmental research entity. The industry obtains dual benefits from such an approach. First, the money can be used for research which will help the industry to avoid future liabilities and mitigate existing liabilities. Second, the payments, if properly structured and characterized, may be eligible for favorable tax treatment. For example, in Colt Industries Inc. v. U.S., 30 ERC 1179 (Fed. Cir. 1989), Colt deducted, as a business expense, $1.6 million it paid pursuant to a consent decree with the EPA. The Internal Revenue Service disallowed the deduction. The court notes that § 162(f) of the Internal Revenue Code prohibits a business expense deduction for "'any fine or similar penalty paid to a government for the violation of any law.'" Colt, 30 ERC at 1180. The court also relies upon the Treasury regulation which interprets § 162(f) as follows:

> As defined in the regulations, 'a fine or similar penalty includes an amount . . . [p]aid as a civil penalty imposed by federal, State, or local law, . . . [or p]aid in settlement of the taxpayer's actual or potential liability for a fine or penalty (civil or criminal).'

Colt, 30 ERC at 1180; 26 C.F.R. § 1.162-21(b)(1)(ii), (iii).

It would seem, if properly structured, a payment to a non-governmental entity could constitute either a deductible business expense or a charitable contribution. Note that the approach followed in PIRG v. Powell Duffryn Terminals Inc. and SPIRG of New Jersey v. Hercules Inc. is not conducive to an argument that the expense is deductible. In each of those cases the court assessed the total amount as a civil penalty and then divvied it up between the government and the educational institutions. The better approach, to preserve deduction arguments, would be that followed in NRDC v. Interstate Paper Corp. where a separate amount was allocated to the "civil penalty" and the balance allocated to non-profit organizations. Subsequent actions should also be consistent with how you structure the settlement. For example, you would want to avoid problems, such as the one noted in the Colt case, where Colt wrote on its $1.6 million check: "E.P.A. Penalty." As part of the settlement structuring process, the industry may want to seek a Private Letter Ruling from the IRS to determine how the IRS will view the transaction before it is consummated.

When considering a structured environmental settlement, the industry should enter the negotiations with a proposal focusing on the specific entities it wants to fund and the research or mitigation services they will perform. In most cases, the

entity should be willing to participate in formulating the proposal -- much like a grant application process. Whether dealing with the EPA, the State, or citizen suit litigants, courts should be willing to approve settlements where it can be shown the money to be paid to the entity will be used to address environmental problems. Certainly the Center for Environmental Research and Technology, as an established non-profit university environmental research center, would be an entity qualified to participate in the planning and execution of environmental settlements.

Title:	**ENVIRONMENTAL LAW DEVEOPMENTS AFFECTING THE ENERGY INDUSTRY**
Date:	**December 13, 1989**
Location:	**Tulsa, Oklahoma**
Program:	**Annual Meeting of the Center for Environmental Research and Technology**
Sponsor:	**Center for Environmental Research and Technology, University of Tulsa**
Duration:	**30 Minutes**