CERCLA Liability Considerations: Evolving EPA Policy for Purchasers and Owners of Contaminated Properties

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Roadmap for Today’s Discussion

I. Overview of CERCLA Liability Considerations
   – Liability: Categories of Potentially Responsible Parties
   – Cost Recovery and Contribution
   – Liability Defenses and Exceptions

II. Landowner Liability Protections
   – Background
   – Threshold/Pre-Acquisition Requirements
   – Post-Acquisition “Continuing Obligations”
   – Updated Common Elements Guidance

III. Additional Developments
   – Pending Update to ASTM E1527 Phase I ESA Standard
   – Litigation of Interest
   – Conclusion of EPA’s Superfund Task Force
I. Overview: CERCLA Liability Considerations

• Allocates liability for hazardous waste contamination
  – Liability is:
    • **Strict**  → Applies regardless of fault
    • **Joint and several**  → any one PRP can bear cost of all cleanup
    • **Retroactive**  → Includes liability for pre-CERCLA contamination
  – CERCLA authorizes EPA to clean up sites contaminated with hazardous waste and to compel PRPs to perform cleanups or reimburse the government for EPA-lead cleanups
    • States and third parties can sue PRPs for cost of remediation
    • Statute allows for recovery of natural resource damages
Who is Liable Under CERCLA?

• **CERCLA § 107**: When there is a “release” or a “threatened” release of a “hazardous substance” from a “facility” all “potentially responsible parties” are liable for all response costs incurred by the US, a state, an Indian Tribe, or any other person.

• Remember: Liability is **strict, joint and several**, and **retroactive**
Who is Liable Under CERCLA? (continued)

• Who is a “Potentially Responsible Party” (PRP)?
  – Current owners and operators
  – Former owners and operators at the time of the disposal
  – Generators or arrangers for disposal or transport of hazardous substances
  – Transporters that selected site to which hazardous substances were brought
Cost Recovery & Contribution

• States and third parties can sue PRPs to recover cleanup costs

• Cost Recovery under CERCLA § 107(a)(4)(B)
  – 6-year statute of limitation
  – Joint and severable
  – Available only for response costs incurred cleaning up the site, not those incurred in a settlement

• Contribution under CERCLA § 113(f)
  – 3-year statute of limitation
  – Equitable distribution
  – Available only to PRPs previously sued under § 106 or § 107 or who negotiated a settlement resolving PRP’s liability against the United States/state
Traditional CERCLA Defenses to Liability

• Owners are not liable when release or threatened release is caused solely by:

  – An act of God

  – An act of War

  – An act or omission of a contractually unrelated third party, and (i) where the defendant exercised due care and (ii) took precautions against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions
Limitations on Liability

• Liability may be limited for some parties:
  – De minimis/de micromis parties
  – Parties unable to pay
  – Owners above contaminated aquifers; residential homeowners

• Narrow Statutory exemptions for:
  – Demonstrated divisibility
  – Cleanup contractors
  – Lenders
  – Good Samaritans
  – Qualified exemption for small business/nonprofit/residential generators of municipal solid waste
  – State and local governments
  – Landowners
Significant Amendments to CERCLA

• 2002 - Small Business Liability Relief and Brownfields Revitalization Act ("Brownfields Amendments")

• 2018 - Brownfields Utilization, Investment and Local Development Act (the "BUILD Act")
Small Business Liability Relief and Brownfields Revitalization Act ("Brownfields Amendments")

• Enacted January 2002
• Established three categories of landowner liability protections (LLPs)
  – Bona Fide Prospective Purchaser (BFPP)
  – Contiguous Property Owner (CPO)
  – Innocent Landowner (ILO)
• There is significant overlap in the eligibility requirements for/conditions of each LLP category
  – EPA has issued guidance on these “common elements”
Brownfields Utilization, Investment and Local Development Act of 2018 (the “BUILD Act”)

• Enacted March 2018

• Formally extends the BFPP liability defense to certain tenants
  – Tenants who independently perform pre-lease investigations and all BFPP requirements even when property owner does not qualify as a BFPP
  – Tenants who leased the property from an owner who was a BFPP
  – Tenants who leased contaminated property from an owner who was a BFPP when the lease started but lost the defense through no fault of the tenant provided the tenant perform all BFPP requirements other than pre-lease investigations
II. Landowner Liability Protections in Detail
Landowner Liability Protections

• Bona Fide Prospective Purchaser
  – May buy with knowledge of contamination
  – All disposal must occur before acquisition

• Contiguous Property Owner
  – Must buy without knowledge or reason to know of contamination on property

• Innocent Landowner
  – Must buy without knowledge or reason to know of contamination on property
  – All disposal must occur before acquisition
Pre-Acquisition Requirements

• No affiliation with a liable party
  – No contractual, corporate, financial relationship, not a reorganized potentially responsible party or direct/indirect familial relationship

• Conduct “all appropriate inquiries” (“AAI”) prior to acquiring property
  – Designed to identify conditions indicative of releases or threatened releases of hazardous substances
  – 40 C.F.R. Part 312
  – ASTM E1527-13 (Phase I ESA) / ASTM E2247-16 (Phase I ESA for Forestland or Rural Property)

• Ongoing duty to perform “continuing obligations” post-acquisition
  – §§ 101(35), (40), 107(q)
  – ASTM E2790-11 (Continuing Obligations)
All Appropriate Inquiries

• All Appropriate Inquiries can be satisfied by
  – Following requirements in EPA rule, 40 CFR Part 312
  – Using ASTM E1527, E2247

• Key Components
  – Performed by an environmental professional

• Timing: AAI must be completed with 1 year prior to ownership, with following components no more than 180 days prior to acquisition:
  – Interviews with owners, operators, occupants
  – Searches for recorded environmental liens
  – Review of government records
  – Visual inspection of property and adjoining properties
  – Declaration by EP responsible for Phase I
Post-Acquisition Continuing Obligations

• No disposal after acquisition
• Compliance with land use restrictions and institutional controls
• Take “reasonable steps” to:
  – Stop continuing releases
  – Prevent threatened future releases
  – Prevent or limit human, environmental, or natural resource exposure to earlier hazardous substance releases
• Cooperation, assistance, and access
• Compliance with information requests and administrative subpoenas
• Provision of legally required notices
2019 Common Elements Guidance

• “Interim” guidance issued in 2003

• Since 2003 – Important developments in case law, EPA enforcement precedent

• Updated 2019 guidance provides important clarification on several pre- and post-acquisition requirements
  – No affiliation
  – “No disposal after acquisition”
  – Reasonable steps
  – Land use restrictions and institutional controls
2019 Common Elements Guidance: “No Affiliation” Requirement

• Clarifying EPA would generally **not** treat the following relationships as disqualifying
  – Relationships between entity seeking liability protection and PRP for properties other than the contaminated property
  – Relationships between the purchaser and a PRP arising after the purchase and sale of the contaminated property
  – Contractual or financial documents or relationships often executed at the time the contaminated property is transferred
  – Relationships established between a tenant and owner during the leasing process
2019 Common Elements Guidance: “No Disposal After Acquisition”

• EPA may use its enforcement discretion to **not** treat the following post-acquisition disposals as automatically disqualifying:
  
  – Disposal occurring while a party is working to contain or remediate existing hazardous substances
  
  – Certain development and construction activities when owner undertook activities in a “reasonable manner” and “proactively and subsequently took steps to manage the release”
  
  – Passive migration, provided owner takes reasonable steps to address and cooperates with regulatory authorities to clean up the property
2019 Common Elements Guidance: “Reasonable Steps”

• Owners are required to take reasonable steps to
  – Stop continuing releases
  – Prevent threatened future releases
  – Prevent or limit human, environmental, or natural resource exposure to earlier hazardous substance releases

• 2019 guidance provides a more in-depth analysis of case law on “due care” and “reasonable steps”
  – PCS Nitrogen, Inc. v. Ashley II of Charleston, LLC
  – 3000 E. Imperial, LLC v. Robertshaw Controls

• Providing categories and examples of reasonable steps
2019 Common Elements Guidance: Land Use Restrictions and Institutional Controls

- Enforcement discretion is **not** appropriate when owner fails to comply with these legally binding requirements.

- Clarifying that owners are required to cooperate and assist with implementation of LURs and ICs that have not yet been fully implemented prior to acquisition.

- Landowners are expected to monitor ICs at sufficient frequency to ensure the ICs remain effective.
III. Additional Developments
Recent Developments

ASTM standards currently in process of being updated:
- ASTM E1527-13 Phase I ESA
- ASTM E2790-11 Continuing Obligations
- ASTM E2247-16 Phase I ESA for Forest Land or Rural Property

• Litigation of interest:
  - *Meritor, Inc. v. EPA*, 18-1325 (D.C. Cir.) – Challenging vapor intrusion scoring under HRS
  - *Atlantic Richfield Company v. Christian*, 17-1498 (U.S.) – Scope of CERCLA Section 113 prohibition of “challenges” to EPA’s selected remedy

• Emerging contaminants; potential listing of PFAS as CERCLA hazardous substance

• Conclusion of EPA’s Superfund Task Force
ASTM Standards Under Review

- ASTM E1527-13 Phase I ESA
  - Draft under development
  - Set for subcommittee ballot this fall
- ASTM E2790-11 Continuing Obligations
  - Draft update is up for ballot
  - Must be approved by main committee by the end of this year or it will be withdrawn
- ASTM E2247-16 Phase I ESA for Forest Land or Rural Property
  - Set to be revised after completion of ASTM E1527 update
Litigation of Interest:

*Meritor, Inc. v. EPA (D.C. Cir.)*

- Rockwell International Wheel & Trim Site (Grenada, Mississippi) and Delfasco Forge Site (Grand Prairie) listed on NPL using Hazardous Ranking System “subsurface (water/vapor) intrusion pathway” (“SsI”)

- Meritor, Inc., a PRP under CERCLA for one site, challenged EPA’s application of the SsI component of the HRS for:
  - Failing to account for the effect of existing vapor mitigations system
  - Improperly considering the site as residential instead of industrial

- Briefing has completed and oral argument is set for Nov. 7, 2019
Litigation of Interest:

*Atlantic Richfield Co. v. Christian (U.S.)*

- The Supreme Court of the United States granted ARCO’s petition on June 10, 2019; oral argument scheduled for Dec. 3, 2019.

- The Supreme Court will consider whether state common law claims seeking cleanup remedies at a Superfund site in conflict with EPA’s selected remedy are barred under CERCLA Section 113 as a “challenge” to EPA’s cleanup.

- Underlying Montana Supreme Court decision broke from precedent in federal courts of appeals.
• Question of liability allocation to no-fault property owner
  – Valbruna (current, no-fault property owner) set aside $500K for site cleanup per agreement with state at time of property acquisition
  – Ended up spending $2M + on site cleanup
  – Sued Joslyn (former property owner, responsible for contamination) for cost recovery under CERCLA §107; Joslyn counter-claimed for contribution under CERCLA §113

• District court determined allocation as follows:
  – Cleanup amount under consideration reduced by $500K (amount set aside at time of purchase for remediation)
  – Apportioned 75% liability to Joslyn (former owner), 25% to Valbruna, citing:
    • Valbruna’s assumed risk in purchasing site with known contamination
    • Inference of potential windfall

• Seventh Circuit: District court “reached the limits of its discretion” but did not abuse discretion
**Litigation of Interest:**

*Refined Metals Corp. v. NL Industries Inc. (7th Circuit)*

- Reinforces that PRP with proper contribution claim under CERCLA §113 cannot opt to pursue cost-recovery claim under CERCLA §107
  - CERCLA §113 claims triggered by “qualifying lawsuit” under CERCLA §106 or 107(a), and when person resolves its liability to US/state for some or all of a response action or all of the costs of such action in an administrative or judicially-approved settlement

- **Background:**
  - Refined Metals bought contaminated lead smelter site from NL Industries in 1980
  - 1998: Refined Metals enters settlement with IDEM & USEPA; receives covenant not to sue
  - 2017: Refined Metals sues NL Industries

- District court: Refined Metals had §113 claim for contribution based on 1998 settlement
  - Admission of liability not necessary for settlement to “resolve liability”
  - Resolution of CERCLA-specific liability not necessary to start three-year §113 statute of limitations clock
  - Settlement need not resolve “all” liability for response actions/costs
Emerging Contaminants/PFAS

• National Defense Authorization Act
  – Both House version, H.R.2500, and Senate version, S1790, contain various provisions that would address PFAS under existing laws and provide for study of the compounds.
  – H.R.2500 would list PFAS as a CERCLA hazardous substance among other PFAS related provisions. S.1790 does not contain an analogous provision.

• White House Involvement
  – On July 9, 2019, issued a Statement of Administrative Policy, objecting to certain PFAS provisions in H.R.2500
  – OMB is strongly objecting to PFAS provisions in Senate version
Conclusion of EPA Superfund Task Force

• May 22, 2017 – Task Force established by then-Admin. Pruitt

• July 25, 2017 – Task Force issues 42 recommendations

• September 9, 2019 – Superfund Task Force Final Report

• Work on many recommendations is ongoing despite termination of the Task Force
Questions?

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