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Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

Areas of Interest: I Planning, Administration, Environment; IIA Highway and Facility Design

Transportation Agencies as Potentially Responsible Parties at Hazardous Waste Sites

A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Deborah L. Cade. James B. McDaniel, TRB Counsel for Legal Research, was the principal investigator and content editor.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report is a new paper, which continues NCHRP's policy of keeping departments up-to-date on laws that will affect their operations.

This paper will be published in a future addendum to *Selected Studies in Highway Law* (SSHL). Volumes 1 and 2 deal primarily with the law of eminent domain and the planning and regulation of land use. Volume 3 covers government contracts. Volume 4 covers environmental and tort law, inter-governmental relations, and motor carrier law. An expandable format permits the incorporation of both new topics as well as supplements to published topics. Updates to the bound volumes are issued by addenda. The 5th Addendum was published in November 1991. The next addendum is scheduled for mid 1997. Between addenda, legal research digests are issued to report completed research. Presently the text of SSHL totals over 4,000 pages comprising 75 papers.

Copies of SSHL have been sent, without charge, to NCHRP sponsors, certain other agencies, and selected university and state law libraries. The officials receiving complimentary copies in each state are the Attorney General and the Chief Counsel and Right-of-Way Director of the highway agency.

APPLICATIONS

Increasingly, state transportation agencies are encountering hazardous waste when acquiring property for highway construction. State highway officials must determine the appropriate way to remove and dispose of identified waste. Also, they must determine the appropriate method for valuating the property.

This report discusses the various methods being used by state agencies when confronted with hazardous waste problems. Discussions on court cases and valuation strategies are included.

The report should be useful to attorneys, administrators, planners, right-of-way officials, appraisers, environmental analysts and transportation agencies' financial officers.

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Transportation Agencies as Potentially Responsible Parties at Hazardous Waste Sites

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EXECUTIVE SUMMARY

Transportation agencies are facing dramatically increased environmental liability because of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), which Congress enacted in 1980 to address the problem of abandoned hazardous waste sites. The problem for transportation agencies is based on their involvement as "potentially responsible parties," and may lead to greatly increased construction costs, delay of construction projects, commitment of staff time, and uncertain future costs. This report addresses the particular involvement of transportation agencies and ways to minimize the problems, such as through investigation of sites before acquisition, negotiating with affected environmental agencies about cleanup, and imposing the cleanup costs on the parties responsible for contamination.

Basis for Liability

Under CERCLA, Congress imposed liability for the costs of cleaning up contaminated sites very broadly on several classes of parties. These include: (1) current owners and operators; (2) former owners and operators, who owned or operated the sites at a time when hazardous substances were disposed of there; (3) those who arranged for the disposal or treatment of hazardous substances; and (4) those who transported hazardous substances. Costs are imposed on potentially responsible parties whether the costs are incurred by the Environmental Protection Agency (EPA), state or local agencies, or private entities. A transportation agency may be involved as a party from whom costs are sought and as the party seeking to recover its own cleanup costs from others.

The policy behind CERCLA is to impose costs on those who benefited from the industrial practices that caused pollution, rather than on the taxpayers. However, courts have found no defense to liability in claims by public agencies that polluting activities are part of their sovereign function. Some defenses and exemptions are available to local and state agencies, especially where the contamination occurred prior to the agency's acquisition of a site. There are also statutory defenses available to any party, which include showing that the release of hazardous material was caused by an act of God, an act of war, or solely by the act of an unrelated third party. Since liability is strict, joint and several, any responsible party who can be found and who has money may pay a disproportionate share of costs. This often applies to transportation agencies.

Agencies may be liable for cleanup costs as "owners" or as "operators" of a contaminated site. Generally, to be held as an owner, the agency must acquire the property in fee. In at least one court case, an easement did not create ownership for CERCLA purposes; however, the easement holder may be liable as an operator if use of the property (such as excavation) causes or releases contamination. Courts have interpreted "operator" to mean a party that had "authority to control the cause of contamination" at the time hazardous substances were released. This can be the operator at the time of the original deposit (such as a hazardous waste site) or a contractor who moves or releases contamination through excavation or fillings. If a transportation agency employs a contractor for construction or for inspection and investigation of a site prior to acquisition, the agency should enter into an indemnification agreement with the contractor. A sample indemnification agreement is attached to the report. Such an agreement will not protect the agency from liability but will allow the agency to recover cleanup costs from the contractor.

There are a number of situations in which transportation agencies may be potentially responsible parties. (1) Maintenance facilities, which use and dispose of hazardous materials, such as paint, solvent, batteries, and transformers, may be a source of liability. (2) Road salt, which is often stored in the open, may contain ferrocyanide or other hazardous substances used as anti-caking agents. Through storm water runoff, these substances leach into groundwater and create liability for the transportation agency. (3) Use of oil on unpaved roads to control dust has led to problems when the oil was contaminated with other substances. Such use is now prohibited by federal law. (4) Ownership and operation of storm water drainage facilities may lead to liability where contaminated runoff enters the drainage system or where users dump contaminating substances into the sewer. The agency should build and maintain sewers in conformance with industry standards. A third-party defense may then be proved. (5) Where public land is leased to others, an indemnification agreement is an important feature of the lease. An indemnification agreement is not a defense against environmental liability but allows the public agency to recover its costs of cleanup from the lessee. (6) An agency may be liable for sending waste to disposal facilities; maintenance of accurate disposal records is thus vital. In some instances, agencies have been able to convince courts that some materials, such as old tires and construction debris, were not hazardous waste. (7) Relocation costs paid to business entities under the Surface Transportation and Uniform Relocation Assistance Act, ferry operations, and contamination by abutting landowners are also potential bases of liability for transportation agencies.

Regulatory Action by EPA

Regulatory action against a transportation agency by EPA is generally initiated by a "general notice letter" in which the agency is notified that it is considered a "potentially responsible party" (PRP) for a site. The letter may also include an information request with the time limit for response. The agency should provide any information that it wishes to have in EPA's administrative record, bearing in mind that later court proceedings will be based on this record. Following the notice letter, EPA may negotiate an agreement or consent order with the parties. During negotiations, the agency must be aware of how the federal government is designated in the agreement, since EPA may be negotiating on behalf of the "United States" and this will affect the transportation agency's defenses as to other federal entities. Before sending notice letters, EPA may designate a particular site as part of the National Priorities List (NPL) or the Superfund list. Such designation is done by administrative rule through a listing in the *Federal Register*. Any challenge to a listing must meet statutory requirements for contesting administrative rules. The transportation agency should comment on the listing to preserve its rights. Unfortunately, the agency often has no reason to know it will be affected at the time of a listing on the Superfund list.

Defenses and Exemptions to Liability

State and local government agencies enjoy an exemption from liability under 42 U.S.C. 9601(2)(D) in situations where a site has been acquired by the agency "involuntarily" through "bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign." The section also provides, however, that if the state or local government agency has caused or contributed to the release of a hazardous substance at the site, the exemption does not apply.

A reasonable argument can be made that transportation agencies acquire real property "involuntarily" when it is needed for highway and street construction, as the property in a particular location must be acquired, whether or not it is contaminated. This expansion of the exemption has not been adopted by EPA or the courts; however, the acquisition of property by eminent domain does provide for a third-party defense not available to private parties.

There are statutory defenses available to any party that EPA attempts to hold responsible. Set forth in 42 U.S.C. 9607(b), these consist of showing that the contamination was caused by (1) an act of God; (2) an act of war; (3) an act of a third party "other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant...." To prove this third-party defense, the defendant must also show that it "exercised due care with respect to the hazardous substance concerned" and that it took precautions against "foreseeable acts or omissions" of the third party.

If an agency acquires property that was contaminated by another party prior to agency acquisition, CERCLA provides a complete third-party defense under 42 U.S.C. 9601 (35)(A)(11). If the agency acquired the site "by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation," and the site was acquired after contamination, then there is no "contractual relationship" between the former owner and the agency for purposes of 42 U.S.C. 9607(b). In other words, the agency can show that the contamination was caused by a third party with which no "contractual relationship" existed. A court has recognized this "condemnation defense" even in a case where contamination occurred between the time the agency filed an eminent domain action and the time the payment was made. The touchstone was the right to control the property.

Since acquisition after contamination may provide an agency a complete defense against liability, the agency should set out when and under what circumstances it acquired the site when responding to a PRP notice from EPA. Any information the agency has about when contamination occurred should also be included. This will constitute an important part of the administrative record and may also allow the agency to convince EPA to remove it from the PRP list.

If an agency challenges EPA's decision to include a particular site on the Superfund list or the NPL, the requirements of 42 U.S.C. 9613(a) must be followed. That is, the challenge must be made judicially, in the United States Court of Appeals for the District of Columbia Circuit, and must be filed within 90 days after publication of the rule in the *Federal Register*. The review will generally be done on EPA's administrative record, although one court has allowed the state agency to supplement the record with documents from EPA's own files, which the state agency argued should have been included in the basis for decision making.

Cleanup Costs Accounted for at Acquisition

Transportation agencies may protect their interests with regard to contaminated property by taking the costs of cleanup into account when acquiring the property. This involves a thorough, early, and expert investigation of the site and may lead to acquisition of less-than-fee interest or to valuation of the property for eminent domain purposes at less than its fair market value if "clean." There are three methods of valuation most frequently used by transportation agencies dealing with contaminated property. These are as follows:

(1) Value as if "clean" and then subtract cleanup costs. The difficulty with this method is that agencies frequently grossly underestimate the cost of cleanup. Furthermore, some courts have held that use of such costs as a means of valuation in condemnation suits violated the owner's due process rights under applicable state environmental laws. Other courts have allowed the agency to use this method, and the owner presents his own evidence of cleanup costs in the "just compensation" phase of the condemnation action. There is still a problem, however, when all parties responsible for contamination (such as part owners) are not brought into the condemnation action. This is especially so when the cleanup cost exceeds the fair market value of the property.

(2) Use of contaminated comparable sales. Both real and potential cleanup costs and the effect of "stigma" may be taken into account when evidence of comparable sales is used as a method of valuation. Stigma is the effect of the uncertainty of future needs to clean up residual contamination or undiscovered contamination or the possibility of future, stricter environmental standards. Comparable sales may be difficult to find in some areas.

(3) Value as "clean" in exchange for owner cleanup or indemnification. There are several variations on this, including placing the money into an escrow account to be used to pay for cleanup or paying the money into court until the cleanup is completed. Depending upon the extent of indemnification agreed to, this method may have the effect of dealing with both the present cleanup costs and the "stigma."

Recovery of Cleanup Costs

To recover its costs for cleaning up contaminated property, a transportation agency must identify prior owners and users, in addition to present owners. Land records and title reports may be used to determine earlier owners, and corporate ownership can often be traced through a state agency responsible for regulating corporations. The transportation agency should try to negotiate with any potentially responsible parties before construction or any other work on the site. Such negotiations are important for two reasons: (1) the PRP may agree to assist with cleanup, take responsibility for cleanup, or indemnify the agency for costs; and (2) the National Contingency Plan (NCP) requires that such parties be notified and given an opportunity to perform the cleanup in order for the agency to recover its cleanup costs under CERCLA.

As a prerequisite for recovering its costs under CERCLA, a local, municipal, or regional transportation agency must show that its costs are consistent with the NCP. The "United States or a State" may recover those costs that are "not inconsistent with the national contingency plan." This means that federal and state agencies are entitled to a presumption that their costs were consistent; other entities must prove this. Defendants may argue that a state transportation agency is a "state"; however, case law and common law support the position that it is. In order for its costs to be "not inconsistent with" the NCP, a state must "substantially

comply" with the NCP, according to EPA's rules, which declined to require "strict compliance."

The 1990 NCP is a complicated list of technical requirements that may or may not apply at a given contaminated site. Recognizing that private parties and transportation agencies might not have experience with Superfund sites, EPA has determined that a deviation from the NCP must be "material" and result in demonstrably excess costs in order to defeat an action for recovery of cleanup costs.

Transportation agencies may have particular problems recovering costs from parties who are in bankruptcy when there are deadlines for filing claims against the bankruptcy. At least one court has held that a "contingent claim" may arise before the agency actually incurs any cleanup costs, and if not filed by the deadline, the claim would be discharged. This holding is limited to a fact pattern where the agency has adequate information tying the bankruptcy party to contamination and adequate information that the agency would be incurring cleanup costs. Where an agency has no reason to know at the time a bankruptcy becomes final that it may have a claim, the claim would not be discharged. It may also be possible, in the case of a bankruptcy reorganization, to sue the reorganized successor.

If EPA orders a transportation agency to perform a remedial or removal action at a site, and the agency is not a responsible party, the agency may be entitled to reimbursement from the federal Superfund. Some states have similar funds, used for such purposes as paying the costs of remediating leaking underground storage tanks. Furthermore, state environmental laws generally allow for the same type of cost recovery action from other potentially responsible parties that can be had under CERCLA. Often, the states have less stringent procedural requirements than the NCP.

CERCLA Reauthorization

The report concludes with advice to transportation agencies to provide input to those who are rewriting CERCLA during the current session of Congress.

A. INTRODUCTION

Just as transportation agencies are confronting shrinking budgets and the cost of replacing aging infrastructure, the environmental liabilities of these agencies are increasing dramatically. A major source of this increased liability is the involvement of these agencies as potentially responsible parties at hazardous waste sites. This involvement can cause any number of problems, including adding greatly to the cost of construction projects, because of the cost of environmental cleanup or delay to the project, or both; commitment of staff time; and the uncertainty of future costs. These problems can be minimized in a variety of ways, including performing a thorough technical review of a contaminated site prior to acquisition, working with environmental agencies to negotiate appropriate and cost-effective cleanups, and making an effort to impose the costs of cleanup on the parties responsible for the contamination.

1. Statutory Framework of CERCLA Liability

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted in 1980 to address the problem of abandoned hazardous waste sites.[1] Previous environmental laws, such as the Resource Conservation and Recovery Act of 1976 (RCRA)[2] had created a "cradle to grave" responsibility for those who generated hazardous wastes, but applied only prospectively. Congress apparently saw a need to address the problems that had been left by industry in the past, in addition to creating standards to be adhered to in the future.

Rather than creating a national public works program to fund the cleanup of these abandoned contaminated sites, Congress imposed liability for costs on several classes of parties. These include (a) current owners and operators of contaminated sites; (b) former owners and operators who owned and/or operated the sites at a time when hazardous substances were disposed of at the sites; (c) those who arranged for the disposal or treatment of hazardous substances; and (d) those who transported hazardous substances.[3] Because the responsibility for costs is imposed on these parties rather than being funded by the government, Congress created broad classes of responsible parties, intending to "cast a wide net" in imposing liability.

Liability for cleanup costs, or "response costs," is imposed on responsible parties regardless of whether the costs are incurred by the Environmental Protection Agency (EPA), another federal agency, state or local agencies, or private entities. Liability is strict, joint, and several.[4] The limited statutory defenses include showing that the release was caused by an act of God, an act of war, or solely by the act of an unrelated third person.[5] In addition, the costs incurred must be consistent with, or in the case of a state or federal agency, not inconsistent with, a set of regulations known as the National Contingency Plan (NCP).[6]

Transportation agencies can become involved on both sides of this statutory scheme, both as parties from whom response costs are sought and as plaintiffs seeking recovery of their own response costs from other responsible parties. If they are owners or operators of contaminated property, then they may be designated by EPA as "potentially responsible parties," or PRPs, for a given contaminated site. Status as a PRP does not, however, preclude the agency from seeking to recover any costs it incurs that are in fact the responsibility of another PRP in an action for contribution.[7]

Although CERCLA is based largely on a system of funding of cleanups by responsible parties, it also created a federal cleanup fund known as the Superfund,

Since the court will require payment of just compensation, the agency will have to have some evidence of the rental value of the property. Although no permanent damage will necessarily be done to the property, the owner is still entitled to compensation for the time in which the agency will be performing its investigation.

The State of Michigan has recently amended its condemnation statutes to allow entry onto private property for the purpose of performing an "environmental inspection," which is defined to include taking soil and groundwater samples.[108] However, the statute requires that "[t]he agency shall make restitution for actual damage resulting from the entry which may be recovered by special motion before the court or by separate action if an action for condemnation has not been filed."[109] The statute further provides that "actual damage" does not include any response activity that is required, or any diminution in value that is caused by the discovery of contamination.[110]

4. Valuation Methods for Contaminated Property

a. Value as if "Clean" and Subtract Cleanup Costs

This is a common method of addressing contamination problems in property acquisition by the state transportation agencies surveyed. However, many agencies reported having grossly miscalculated the potential costs in making this adjustment to the value of the property. The Colorado Department of Transportation reported having estimated cleanup costs to be about $100,000, roughly equivalent to the property's value. The agency chose to pay the nominal amount of $100 for the land and assume the cleanup responsibility. However, the agency subsequently discovered that its limited sampling had not revealed a major source of contamination, and cleanup costs eventually exceeded $1 million.[111] This method is useful only when the costs can be quantified with some certainty, such as when the area of contamination is limited and well defined. It is also better employed after cleanup has been completed. Given the experience of some transportation agencies, this method may also be better used when the purchase price can be negotiated with the owner, since the use of cleanup costs as evidence in condemnation trials is not without its own potential hazards.

In *Illinois Department of Transportation v. Parr*, the Illinois Department of Transportation attempted to use the cost of a completed cleanup as evidence of diminished property value.[112] The court held that the use of the cleanup costs as directly impacting value was not allowed under Illinois condemnation statutes and violated the defendant's rights to due process under the state's cleanup law. Under the Illinois Environmental Protection Act, the complainant must prove that a violation of the statute has occurred and that the property owner caused the violation. Where the costs were sought to be introduced in an eminent domain action, the court felt that the standards would not be the same. The trial court thus excluded the evidence of the cleanup costs, and was upheld on appeal. The appellate court held that the state's remedy to recover its cleanup costs was under the Environmental Protection Act.

The Arizona Department of Transportation (ADOT) reported a similar result in *State v. Gabrielli*, which involved an acquisition of a parcel improved with a paper recycling plant.[113] During construction, ADOT discovered contamination on this parcel, most likely resulting from the activities of a previous owner rather than the owner from whom ADOT was acquiring the property. In a pretrial ruling, the court ruled that evidence of the impact of contamination on value would not be admissible in the trial on just compensation. As a result, the landowner received the fair market value of the land with no reduction for cleanup costs. In a separate action, ADOT recovered its reasonable cleanup costs, excluding the increased costs that were due to ADOT's construction schedule, from prior landowners and tenants.

However, in another similar case, the Supreme Court of Kansas allowed the use of evidence of cleanup costs in a transportation agency's eminent domain action. In *City of Olathe v. Stott*, the city's appraiser testified that the costs had an impact on value, and that in his opinion a buyer in the market would take those costs into account in deciding how much to pay for the property.[114] The court found that because underground petroleum contamination necessarily affects the market value of real property, evidence of contamination must therefore be admissible. The only possible basis for exclusion, in the court's opinion, was if the applicable environmental statute provided the exclusive remedy for recovery or offset of the cleanup costs. The court held that the environmental statute did not provide an exclusive remedy, because it did not address the reduction in value attributable to stigma and risk.[115]

The Illinois case, *Department of Transportation v. Parr*, and the Kansas case, *City of Olathe*, appeared to turn on the court's interpretation of the applicable environmental law and its determination of whether the exclusive method for recovering the costs of cleanup is under the environmental law. However, as the Kansas court correctly noted, the environmental statute may allow the recovery only of actual costs, (just as CERCLA allows the recovery of "response costs"), which do not include the reduction in the property value due to the stigma attached to a contaminated parcel.

The Illinois court could have considered whether the eminent domain action could have incorporated some of the attributes of a cost recovery action, at least to the extent of protecting what the court found to be the property owner's right to due process under the environmental statutes. When the evidence of contamination and potential costs is presented by the appraiser as an element of market value, the opportunity does exist for the owner's appraiser to counter with evidence that the cleanup costs could be lower than the government's projection, or in the case of the cleanup already having been performed, evidence that the cleanup costs could have been lower. Again, this is legitimately a factor that a willing buyer would consider. Both the state and the property owner could rely on environmental experts, whose testimony regarding actual or potential costs could serve as the basis for the appraiser's opinion of value. Although it is not exactly the same as the opportunity to challenge the government agency's compliance with environmental regulations that would be afforded the property owner in a cost recovery action, it would give the owner the ability to present contrary evidence if such evidence exists. If the owner could show that the agency's actual or projected costs were excessive, or that its choice of remedy was not cost effective, then the owner could likely convince a jury either to reject the agency's request to offset remediation costs or to reduce the amount offset. This might be an advantage to an owner, who would not otherwise be entitled to try the issue of cost recovery before a jury.[116]

Another way to approach this issue would be to try the issue of costs to the court as a preliminary matter prior to the trial on just compensation. If the court found that the agency had made a *prima facie* case for cost recovery, then the issue could be submitted to the jury as a factual issue in the trial.

In *Redevelopment Agency of the City of Pomona v. Thrifty Oil Company*, the trial court used a similar approach.[117] The city had acquired possession of a former gas station and had spent funds to clean up petroleum contamination. In the trial on just compensation, the city's appraiser testified that the cleanup costs had ex-

ceeded the value of the property and that the property had only minimal value.[118] The property owner's appraiser deducted only a nominal amount for cleanup, claiming that the city's costs were excessive. The court-appointed appraiser deducted a sum less than that actually spent by the city, based on the opinions of other experts who claimed that the cleanup could have been done for a lower price.[119] The appellate court noted:

> After examining the record and digesting the expert's discussions as to the different methods of remediation and the respective costs of each, we cannot agree with Thrifty's suggestion that City engaged in "wasteful cleanup." Nor are we persuaded by the contention that the remediation issue was not properly before the jury. The contamination of the property was used by all experts in determining the fair market value of the property. Extensive cross-examination was conducted as to the proper remediation procedure and the costs of different types of remediation. Inherent in this discussion was the reasonableness of the procedures taken by City. As a characteristic of the property which would affect its value, the remediation issue was properly before the trier of fact.[120]

The District Court of Appeal of Florida followed the holding in *Redevelopment Agency of Pomona* in finding that it was error for a trial court to exclude evidence of the impact of contamination on value in *State of Florida Department of Transportation v. Finkelstein*.[121] In that case, the appeals court noted that "the mere cost of remediation is not the sole effect of contamination."[122] The court further held that not only was the evidence of contamination and the remediation costs relevant to value, but "it was also relevant regarding the effect which the stigma of contamination would have on its market value in the mind of the buying public."[123]

The fact remains that the presence of contamination on property affects the property's value regardless of the acquiring agency's compliance with environmental laws. The argument that the agency's actual or projected cleanup costs are excessive should not be a sufficient basis to exclude this evidence. As with any factual issue affecting value, the property owner is free to present evidence that the contamination either does not affect fair market value or does not affect it to the degree asserted by the condemning agency.

One of the problems with attempting to bring response costs into a condemnation action is that the response costs may exceed the fair market value of the property. Another is that all of the potentially responsible parties may not necessarily be parties to the condemnation action. These would include any current operators who have no direct ownership interest and all former owners and operators, as well as arrangers and transporters. Only current owners would be named as parties to the condemnation action. It may be possible to file a separate cost recovery action and stay the trial of the condemnation case until the cost recovery action is resolved. At that point, the grounds for objection that existed in the *Parr* case in Illinois would no longer be present—the property owners would have had their opportunity to raise the defenses allowed to them under the environmental statutes.

Transportation agencies should realize, however, that by making the costs solely a cost-recovery issue, they run the risk of having the court find that recovery of costs from the current property owner—or the offset of these costs against the fair market value of the property in the condemnation action—is somehow barred, either by a failure to adequately follow applicable regulations or by a showing that the current property owner is an "innocent landowner." In such a case, the agency would be left having to pay the "clean" value of the property to the owner and having to incur the cost of cleanup before or during construction. If the owner is found to be an innocent landowner, the agency may still have the opportunity to pursue prior owners for the response costs, as ADOT did. On the other hand, if the costs can be dealt with as an appraisal problem, the owner does not have the argument that it is not liable for the cleanup costs. As a practical matter, if the owner were to sell the property, the cost attributable to the contamination would be taken into account by a willing buyer. If the owner truly is not responsible for the contamination, then the owner's recourse is to incur the cleanup costs itself and then pursue the former owners and any other responsible parties for what the owner has lost.[124]

Another problem arises when the agency is acquiring the property from an innocent intervening owner—one who is the current owner, but did not own the property when the release of hazardous substances occurred. Such an owner is a potentially responsible party under CERCLA Section 107(a)(1). However, the owner may have purchased the property for its full value, with no discount for the presence of contamination, particularly when the property was purchased prior to CERCLA's enactment. In that case, subtracting the cleanup costs or potential costs from the fair market value penalizes the owner for the cost of cleaning up contamination that the owner did not create. In *Murphy v. Town of Waterford*, the Connecticut Superior Court found that this was an inequitable result and refused to allow a condemning agency to subtract cleanup costs from the fair market value of a former gas station site.[125] The site was being condemned by a town for road widening and commuter parking. The owners had held the property since the 1970s and had never used it as a gas station. The town argued that the environmental contamination discovered on the property after the date of taking would be considered by a buyer and a seller in arriving at the fair market value of the property, and that the award of just compensation should be reduced by the amount that the town had already spent in remedying the site. In rejecting this argument, the court noted that the town did no environmental testing of the site prior to the date of taking, even though it was known that the site had been used for a gas station. The state environmental agency had supervised the removal of some underground storage tanks in 1988. Thus the court found that the town had notice of the site's former use and should have investigated the site's condition. Under these particular circumstances, the court held that deducting the cleanup costs from the award of fair market value was not equitable.[126]

Another question in this type of case is when the condemnation action should be tried—before or after cleanup. Obviously, if the case is tried after the cleanup is complete, then the amount of response costs is known. If it is tried prior to cleanup, then the agency must rely on the accuracy and thoroughness of its investigation to estimate the extent of contamination and the likely cost of cleanup. Unless the contamination is readily quantifiable, then it is difficult to estimate what the ultimate costs will be. Several agencies have reported experiences with attempts to estimate costs that were ultimately considerably lower than the final costs.

With most projects, the transportation agency will need to take possession of the property before the issues of liability for response costs and just compensation can be resolved. States generally have a process for either a negotiated possession and use of the property or a "quick take" process. In both situations, the agency must pay into the registry of the court the amount that it has in good faith determined to be just compensation for the property rights being taken, or that a court has preliminarily determined to be just compensation. In a situation where the property may be worth less than the cost of cleaning it up, then the problem of what to offer the owner for possession and use of the property, or to present as

evidence of value, becomes significant. In one case in which WSDOT was acquiring a gas station for an interchange improvement, the property was found to be contaminated with petroleum from leaking underground tanks.[127] WSDOT's appraiser had valued the property at nearly one-half million dollars. Cleanup of major petroleum contamination can cost in the hundreds of thousands of dollars. In this case, it was unlikely that the cleanup was going to cost more than the value of the property, but it was still likely to be substantial. The property owner, an oil company, agreed to accept an amount considerably less than the fair market value of the property as payment for possession and use of the property, leaving a difference that was likely to cover the cost of cleanup.[128] Because under Washington law the order granting possession and use must be stipulated to by the parties, it is essentially a contract between the state and the owner, similar to a rental agreement. The owner and the state could therefore agree to payment of the smaller amount, taking the potential cleanup costs into account.

b. Use of Contaminated Comparable Sales

The use of actual or estimated cleanup costs may cover the diminution in value of the property caused by the cleanup work needed to be done to make the property developable. However, this does not account for the reduction in value due to the stigma that is usually associated with contaminated sites. "Stigma" may result from the effect of residual contamination that is below regulatory cleanup levels or from the uncertainty that cleanup standards may become more strict in the future or that more contamination may be discovered. Both real and potential cleanup costs and the effect of stigma may be taken into account if evidence of comparable contaminated properties is used to establish the fair market value of the property.

Finding contaminated comparable sales may be easier in some areas than in others. In some cases, it may be necessary to look at sales over a wider geographic area. Sales of property in large industrial areas are likely to take contamination problems into account in arriving at a sale price. The agency's appraiser may inquire into the presence or significance of any contamination when confirming the sale price. Environmental agencies' lists of potentially contaminated sites may be checked to see whether the sale property is listed.

Contaminated comparable sales may be used in two ways. First, they may be used just as comparable sales would be used as evidence of the value of clean property, with adjustments being made for differences between the comparable property and the subject property. This approach may be used where there are sales of property that are similar to the subject in size, location, and highest and best use. Second, the contaminated comparable properties may be used to establish a discount factor to be applied to the value of the property if it were clean. This may be appropriate where there are sales of contaminated property available, but none are sufficiently comparable to the subject in size, location, highest and best use, or other comparability factors. However, a "discount factor" is likely to be a range of percentages, and the range will likely be narrower—and more reliable—if the properties used are more comparable to the subject.

c. Income Approach with Amortization of Costs

No transportation agencies surveyed reported use of this method, which is only workable for sites that have an income stream. The cases discussing the use of this approach are tax assessment cases, which may not always be useful as guidance in valuation problems in eminent domain. While it may seem that the goal of both proceedings should be to value property fairly, and to search for the best estimate of fair market value, tax appeals cases that deal with valuation of contaminated property sometimes take a different view. Some boards of tax appeals and reviewing courts have hesitated to discount the value of contaminated property in tax cases, considering the resulting reduction in property taxes that the owner will realize to be unfair. The New Jersey Supreme Court held in one tax case, *Inmar Associates Inc. v. Borough of Carlstadt*, that the cost of remediation did not affect value, but rather was to be considered a cost of doing business.[129] The fact that this approach has been rejected in some tax cases should not be taken as a sign of its invalidity in eminent domain cases. Rather, the tendency of tax boards and courts to refuse what is in effect a tax benefit to owners of contaminated property should be taken into account here. Even the *Inmar* court acknowledged that the myriad federal and state environmental programs that impose cleanup obligations on landowners "will undoubtedly affect the true value of real property."[130]

One of the court's problems in *Inmar* was its dissatisfaction with the appraisal evidence produced. The court noted that an amortization of cleanup costs over a number of years might have been appropriate in that case:

> Those annual expenditures that reflect a reduced new operating income should have correspondingly reduced the appraised value of the property as an income-producer. Today's investment in the cost of neglected cure might prudently be spread out by "competent management" over a number of years.[131]

The court also cited an article on valuation of contaminated properties, in which the author suggested that the capitalization rate may have to be altered to reflect stigma and other factors resulting from contamination.[132] This was the approach used by the Washington Board of Tax Appeals when it found that the cost of remediation was not an "ordinary business expense," but was rather a detriment running with the land that affected value.[133] The board applied an income approach to determine value and then modified the capitalization rate to take the costs of contamination into account.[134]

d. Value as "Clean" in Exchange for Owner Cleanup and/or Indemnification

Several agencies reported success at getting owners to agree to clean up their property in exchange for the agency's valuing the property as if clean. Depending upon the extent of the indemnification granted, this method can have the effect of taking both the present cleanup costs and the "stigma" associated with the property into account. Effectively, if the owner agrees to accept responsibility for both the current cost of cleanup as well as any response action that might be necessary in the future as a result of the contamination left by the owner, then the owner is paying for both the cost of cleanup and the stigma resulting from the contamination, since stigma is largely the result of the uncertainty of further cleanup being necessary in the future. A sample indemnification agreement is included as Appendix B.

Indemnification is not a defense to liability under CERCLA.[135] If the transportation agency obtains an indemnification agreement from a property owner, the agency, as the current operator of the site, may still be named as a PRP.[136] Nonetheless, the indemnification agreement is still enforceable between the parties.[137]

An agreement may also be reached with a property owner for the owner to clean up the property without necessarily entering into a formal indemnification agreement. The Nevada Department of Transportation reported success in reaching an

agreement with an oil company whereby the oil company agreed to clean up the property, in exchange for which the property was valued as if clean.[138] The Nebraska Department of Transportation reported similar experience with oil companies that agreed to clean up property being acquired rather than have the cleanup costs set off against the property value.[139]

e. Prospective Purchaser Agreements

Some state environmental agencies may have procedures for resolving the liability for a particular site prior to the purchase of the site. In these agreements, known as prospective purchaser agreements, the transportation agency may negotiate with the environmental agency prior to purchase to limit the extent of the transportation agency' responsibility. The Washington State Department of Ecology has recently developed a policy on prospective purchaser agreements and has entered into those agreements with both private and public developers, including a transportation agency. Pierce Transit, which operates the bus service in Tacoma and Pierce County, Washington, was attempting to acquire several contaminated parcels in Tacoma to build a park-and-ride lot. The parcels were located in an industrial area and had both soil and groundwater contamination. Pierce Transit was willing to undertake cleanup as part of its construction project, but was unwilling to take on the uncertainty of future liability. The agency was able to agree with the Department of Ecology to undertake a defined cleanup project, which included removal of contaminated soil and groundwater monitoring. In return, the Department of Ecology agreed to grant Pierce Transit a release from future liability. [140]

In addition, EPA has issued guidance on prospective purchaser agreements, which has recently been revised to be more broadly applied.[141] The former guidance required a substantial benefit to EPA in order for EPA to enter into a prospective purchaser agreement, generally in the form of performance of cleanup work and sometimes payment of EPA costs. The new guidance also allows prospective purchaser agreements in situations where there will be less significant benefit to EPA, but where there will be a substantial benefit to the community.[142] The primary benefits to the community that are contemplated by EPA include job creation or productive use of abandoned property, but may also include "provision of community services (such as improved public transportation and infrastructure)."[143] EPA still expects that some benefits will be provided to EPA in these circumstances, such as partial cleanup. In exchange for consideration such as payment of cleanup costs, EPA will covenant not to sue the purchaser for future costs. The new published guidance includes a model agreement and a covenant not to sue.[144]

A related option from EPA is the *de minimus* settlement agreement. The guidance for these settlements is available from EPA and is published in the *Federal Register*.[145] *De minimus* settlements may be considered by EPA when the owner's liability is minimal and may have value to the transportation agency because of the covenant not to sue that is included in the agreement.

f. Value Property as "Clean" and Place Funds in Escrow until Cleanup Is Completed by Owner

Several agencies reported that they have had success in getting owners to clean up property prior to its transfer to the agency by agreeing to pay the "clean" value of the property and placing the funds to be paid for the property in escrow until the cleanup is complete. WSDOT used this method in the case of a former gas station site that was purchased from an intervening land owner. Although the owners were not the owners or operators of the site when the release of hazardous substances occurred, they recognized that they were liable as current owners and that they would have to either clean up the property in order to sell it or sell it at a greatly reduced value. Originally, WSDOT was going to acquire only the access rights to the property for an Interstate 5 interchange improvement. When the property owners agreed to take responsibility for the cleanup, WSDOT decided to acquire the site for a park-and-ride lot. Because it was a commercially zoned site, the value of the access was a significant portion of the total property value. The owners, however, were unable to totally fund the cleanup themselves prior to the sale to WSDOT. In exchange for an indemnification by the owners, WSDOT agreed to place the amount of the "clean" value of the site in escrow and to make the funds available to the property owners for cleanup costs. As costs were incurred and invoices received by the owners' contractor, the escrowed funds would be released to pay these bills.

The South Carolina Department of Transportation (SCDOT) also reported a positive experience with putting a portion of the funds in escrow in an amount that represented the projected cleanup costs. The owner agreed with SCDOT that it would clean up the site within 36 months. If the site was cleaned up within that period, the owner would receive the escrowed funds with interest. If the site was not cleaned up at the end of that time period, the escrowed funds would go to the agency.[146] Either way, the agency did not have to pay the "clean" value of the site unless it had been cleaned up.

The State of Vermont also reported a successful agreement with a property owner in which the amount estimated for cleanup plus a contingency amount were escrowed to be used for cleanup.[147]

The State of Michigan has recently enacted an amendment to its Uniform Condemnation Procedures Act to address the acquisition of contaminated property by condemning agencies.[148] This new law requires that the condemning agency indicate in its good faith offer whether (1) it reserves the right to recover any costs of remediation in a separate lawsuit or (2) it waives the right to bring a separate cost recovery action. The Declaration of Taking must also state whether the agency reserves or waives its rights. If rights are reserved, the agency may then request that the court set aside an escrow as security for the costs of remediation. The agency must establish by affidavit and an environmental report that the funds are likely to be required to remediate the property. Once an escrow has been established, the property owners may ask the court to release the "funds in escrow, plus interest, under circumstances that the court considers just," which is generally where the full amount will not be needed for cleanup. The amendment does not preclude the condemning agency from also filing a cost recovery action separate from the condemnation case where the agency has obtained an escrow account as security for its remediation costs. The amendment also preserves the opportunity for the agency to present evidence of the impact of value on contamination as an issue for the jury in the trial on just compensation.

g. Value as "Clean" and Pay Funds into Court Pending Cleanup and/or Indemnification

A variation of the payment of the just compensation funds into escrow involves the payment of these funds into the registry of the court as a condition of a stipulation for immediate possession and use. Since a stipulation for possession and use

is, in effect, a contract entered into freely by the parties, there is no reason why a condition such as cleanup of the property could not be placed upon withdrawal of the funds, so long as it is agreed to by the property owners. One of the difficulties with contaminated property is that the agency often needs to take possession of the property before the trial on just compensation can be held. Where the property is contaminated, the agency usually does not want to pay the owner the full value of the property prior to the property being cleaned up or prior to the owner's agreeing to take responsibility for the cleanup. At the same time, in order to obtain possession and use, the agency has a duty to make a good faith determination of the fair market value of the property and pay that amount either directly to the property owner or into the registry of the court. When confronted with the need to acquire a contaminated parcel before the issue of just compensation could be tried, WSDOT was able to agree with a property owner to pay a nominal amount for possession and use while the agency and the owner negotiated an agreement under which the owner assumed responsibility for the cleanup of petroleum contamination. The agreement required that the owner would be responsible for cleanup and that, in return, WSDOT would not discount the value of the property because of the contamination. After the agreement was finalized, WSDOT paid into the registry of the court the remainder of the amount determined to be the "clean" value of the property.[149]

h. Valuation of Access Rights

Occasionally, a transportation agency may need to acquire access rights on a parcel, without the need to acquire the entire parcel. This may be the case on a limited access facility or in an area near an interchange. If a parcel is contaminated but the agency is acquiring only access rights, then the question arises as to whether the contamination affects the value of the access. If a parcel is so severely contaminated that its value is zero or even a negative value, then there is a question as to the value of its access to the highway. However, if access is treated as one of the factors that gives the property value and the contamination is treated as another factor affecting value, the problem is easier to resolve. The property's access to the highway or road gives it the same additional value regardless of the presence of contamination. As a practical matter, this may simply give some parcels a lower negative value than they would have had if only the access rights had been purchased. If an agency is acquiring only the access rights to a contaminated parcel, no deduction should be made for the presence of contamination; the value of the access and the effect on value of the contamination are two completely independent factors.

E. RECOVERY OF CLEANUP COSTS

1. Identifying Potentially Responsible Parties

In addition to those owners from whom a parcel was acquired, the agency should investigate the prior ownership and use of the property to determine if other prior owners are responsible for the presence of contamination. A chain of title report might indicate prior uses, as well as prior owners. If the report identifies corporations as prior owners, the corporations' records filed with the state, such as articles of incorporation, might indicate whether a corporate owner was engaged in activities on the site that might have left contamination behind. The individual deeds cited in the chain of title report might also describe the uses to which the property was put by a particular former owner. If a particular corporate owner is no longer in existence, it may have merged with or been acquired by an existing corporation. The state agency responsible for regulating corporations, usually the Secretary of State's office, can provide this information.

Other potentially responsible parties might include a parent corporation that participated in the operation of a site, other government agencies, and owners of abutting properties whose wastes may have migrated onto the agency's property.

2. Negotiating with Responsible Parties

Prior to construction or any other work on the site, an agency should attempt to negotiate with known PRPs regarding the possibility of the PRPs assuming responsibility for the cleanup and/or costs. Because negotiations may take some time, and could result in delay to a project, this underscores the importance of a thorough environmental review of the site as early as possible.

There are two reasons why an effort to negotiate with PRPs is important. First, agencies have been successful in getting PRPs to assist with cleanup, indemnify the agency for costs, or take over responsibility for the cleanup. Second, the NCP requires that a party undertaking a removal action have notified the responsible parties and given them an opportunity to perform the cleanup themselves, "to the extent practicable" and if they will perform the cleanup "promptly and properly."[150] An agency that fails to do so may be unable to recover its costs under CERCLA. In addition, state cleanup statutes and regulations may have a similar requirement that is also a precondition to cost recovery.

Several agencies have had success in negotiating with PRPs to take responsibility for cleanup. These include several cases in which oil companies that were former owners of gas stations assumed responsibility for removal of underground tanks. These companies apparently recognize that they are legally responsible for the removal of leaking underground tanks and remediation of any contamination, and also that it is cheaper in the end if the company accepts that responsibility up front rather than litigating with the agency after the cleanup is done. The company also has control over the costs if it conducts the cleanup itself. In another case, the Iowa Department of Transportation (DOT) negotiated a settlement with a utility company that was the responsible party for an abandoned coal gasification site. Under the settlement, the company agreed to clean up the site at its own expense, up to a total of $15 million, which at the time of the settlement agreement was approximately the amount that the environmental agency expected the cleanup would cost. Also under the settlement, the parties would share costs that exceeded $15 million, with Iowa DOT paying 25 percent and the utility paying 75 percent. The utility also took responsibility for much of the hazardous waste disposal that was required by a new bridge construction project.[151] This is in sharp contrast to the case in which WSDOT incurred millions in cleanup costs at a similar site and attempted to recover those costs in litigation, and was a far preferable result.

The NCP requires that a party seeking to recover its costs for a removal action under CERCLA have given the responsible parties notice regarding the contamination and an opportunity to perform the cleanup themselves.[152] This requirement serves a number of purposes. First, it gives the responsible party an opportunity to accept responsibility and avoid litigation. Second, it also gives the responsible party control over the remedy selected and the costs incurred. Third, it serves CERCLA's

policy that those responsible for contamination pay for its cleanup, and it does so while avoiding the costs of litigation. In a case in which the party seeking its costs notified the responsible parties before it commenced its removal action, and gave the responsible parties an opportunity to perform the removal themselves, it was held to have substantially complied with the NCP.[153]

In one of the more extreme cases, a town that attempted to recover its costs from the former owner of some leaking paint drums was denied its costs because it had failed to notify the responsible party prior to undertaking the cleanup action.[154] The court applied the doctrine of laches, despite the general rule that laches does not run against a government agency, and held that the town had waited too long to sue for its costs. The court did not consider, however, that the action was brought well within the statute of limitations period set out in CERCLA.[155] The court appeared to be more concerned with the ability of the responsible party to defend itself against the town's claim, which the court found to be impaired due to the town's failure to give the defendant notice of the intended cleanup.[156]

3. Cost Recovery Under CERCLA

In order to recover its costs under CERCLA, a state or federal transportation agency must prove that (a) the contaminated site is a "facility" (b) at which a release of a hazardous substance occurred, (c) which caused the incurrence of response costs, and (d) that the defendant is a responsible party. In addition, a city, county, or regional agency must prove that its costs were consistent with the NCP.[157]

The federal district courts have exclusive original jurisdiction over all CERCLA actions. Venue will lie either in the district in which the release occurred or in which the defendant resides, has its principal place or business, or may be found.[158] Where a state agency is a defendant in a cost recovery action, the United States Supreme Court has held that the states' Eleventh Amendment immunity does not preclude such an action being brought against a state agency in federal court.[159] Actions for recovery of response costs must be brought within 3 years of completion of a removal action or within 6 years of initiation of on-site construction for a remedial action.[160]

Section 107 of CERCLA allows "the United States or a State" to recover those response costs that are "not inconsistent with the national contingency plan."[161] The same section allows "any other person" to recover those costs that are "consistent with the national contingency plan."[162] Courts have interpreted this difference in language as creating a different burden of proof for parties other than the federal or state governments.[163] Federal and state agencies are entitled to the presumption that the costs they have incurred were consistent with the NCP; the defendants must prove that the costs were not consistent. This standard has consistently been applied when federal agencies sue to recover response costs.[164] Similarly, when a state government is pursuing response costs under CERCLA, the burden of proving that the costs were inconsistent with the NCP rests with the defendant.[165] However, municipal agencies have the burden of proving consistency with the NCP as part of their *prima facie* case.[166] Courts have held that, because the term "person" includes "political subdivision of a state" and the definition of "state" does not, a political subdivision of a state such as a city or county is not included within the definition of "state" and must therefore be considered to be "any other person" in Section 107(a)(4)(B).[167]

Defendants might argue that a state transportation agency is not a "state" under Section 107, and that that section refers only to the state's environmental regulatory agency. However, an analysis of Section 107 supports the argument that the presumption of consistency with the NCP applies to a state transportation agency, as well as the state environmental agency. This is the conclusion that the Ninth Circuit reached in *WSDOT v. Washington Natural Gas Co.*[168]

First, when a statute is unambiguous, courts must rely on its plain meaning. The plain meaning of "state" must include a state agency, since states act through their agencies. In *Stilloe v. Almy Brothers, Inc.*, the court found that the New York Department of Environmental Conservation was a "person" under CERCLA, because a "state" is included in the definition of "person."[169]

CERCLA defines "state," but does not separately define "state agency." In other contexts, the term "state" includes state agencies, such as for the purpose of invoking Eleventh Amendment immunity from suit in federal court,[170] determining whether there has been "state action" under the Fourteenth Amendment,[171] and determining whether there is sovereign immunity.[172] When a term has a settled meaning, the court must infer that Congress meant to incorporate that established meaning unless the statute dictates otherwise.[173] CERCLA does not set out a different definition of state, so it must be interpreted as including state agencies.[174]

Another basis for arguing that the word "state" in Section 107 is not limited to the state's environmental regulatory agency is that there is no such qualifying language in Section 107. In other sections of CERCLA, Congress did require that a state have environmental enforcement capability. In Section 104, CERCLA allows states to enter into cooperative agreements with EPA provided that they have statutory enforcement capability.[175] Since states act through their agencies, it makes sense that this section is limited to state environmental agencies. Likewise, Section 111 has similar limitations regarding use of the federal Superfund for funding work done under cooperative agreements.[176]

Courts have consistently rejected the arguments that Section 107 should be construed in light of the restrictions set out in Sections 104 and 111.[177] These arguments have most often been made to suggest that liability under Section 107 is somehow limited by the language of Sections 104 and 111. However, courts have pointed out the different purposes served by these sections: Section 107 is intended to impose liability on the parties responsible for dumping hazardous substances, while Sections 104 and 111 are intended to conserve the Superfund by limiting the situations in which it may be used.[178]

Where Congress has included particular language in one section of a statute and omitted it in another, it is presumed to have done so intentionally, and a court should not imply the term where it has been excluded.[179] If Congress had intended that only a state environmental agency would be entitled to a presumption of consistency with the NCP, it could have included such a limitation. Since no such limitation is included in Section 107, a state transportation agency should be entitled to the presumption that its costs were consistent with the NCP. The Ninth Circuit noted in *WSDOT v. Washington Natural Gas* that the defendants' argument that "state" in Section 107 be interpreted with regard to Section 104 was tantamount to arguing that WSDOT should not be considered a "state" because it did not act pursuant to federal government authorization. The court rejected this argument, pointing out that Section 107 imposes liability "notwithstanding any other provision or rule of law, and subject only the defenses set forth in subsection (b)." The court concluded, "The defendants' position, if adopted, would require that we read the 'notwithstanding' clause out of the statute."[180]

The application of "state" in Section 107 to all state agencies is consistent with the common law rule that a government agency is entitled to the presumption that

it acted properly and according to law. This includes both the presumption that the administrative action taken was valid and the presumption that government officials performed their duties in a proper manner.[181] The Ninth Circuit has also applied this rule to a state transportation agency's actions in a case brought under the National Environmental Policy Act.[182] If a common law principle is well established, then it must be assumed that Congress intended that principle to apply, even if Congress has not stated so expressly.[183] When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts.[184] The presumption of consistency with the NCP that is accorded the United States and states is a codification of a "judicially-defined concept" — the concept that a government agency is entitled to the presumption that it followed the law. Since Section 107 contains nothing to the contrary, Congress must have intended that the courts' interpretation of this concept be part of Section 107.[185]

Interpreting "state" in Section 107 in this manner is also consistent with the interpretation given to the term "United States" in the same paragraph. Courts have applied the standard set out in Section 107 (a)(4)(A) to federal agencies other than EPA, although none have included any analysis.[186] One court has noted that CERCLA grants broad authority "to the executive branch of the federal government" to provide for cleanup.[187] EPA also considers this standard to apply to all federal agencies. In a proposed rule regarding recovery of its own costs, EPA noted that "CERCLA Section 107(a) provides authority to *federal agencies* to bring an action against responsible parties for recovery of all costs incurred for removal or remedial action *not inconsistent* with the National Contingency Plan."[188] EPA does not consider the presumption of consistency with the NCP contained in Section 107 to apply only to itself, but rather considers it to apply to all agencies of the United States. By analogy, the presumption must apply to all agencies of a "state."

The importance of the definition of a state transportation agency as a "state" that is entitled to the presumption of consistency with the NCP cannot be overemphasized. As a "state," the agency will have a much easier time proving its case than if it were required to affirmatively prove consistency with the NCP. In addition, the state is not required to prove that its costs were "necessary," which is required of "any other person" under Section 107(a)(4)(B). Rather, the state's costs are presumed to be necessary if they are not inconsistent with the NCP.

Whether the transportation agency is state or local, and regardless of the standard in Section 107 that will apply, the agency needs guidance from both qualified environmental professionals and from the state environmental agency regarding what steps are required when cost recovery is contemplated. The earlier these individuals become involved in the cleanup process, the better for the transportation agency's eventual cost recovery prospects. It is unlikely that the transportation agency employees responsible for a particular construction project will be familiar with CERCLA, its companion state statutes, or other environmental statutes. Experts in the field of hazardous substance investigation and remediation are essential to the transportation agency's efforts. These individuals are familiar with the most current federal and state regulations governing investigation and cleanup, as well as with the procedures employed by EPA and the state environmental agency.

Response costs recoverable by an agency would include any costs incurred to investigate the site, study cleanup alternatives, implement the cleanup, and do any monitoring. Whether litigation costs would be included is still an open question. CERCLA expressly authorizes the federal government to recover its litigation costs in cost recovery actions.[189] However, the United States Supreme Court has ruled that a private party may not recover attorney fees as part of its response costs under Section 107(a)(4)(B).[190] The district court had held that a private cost recovery action is essentially a private enforcement action and held that a private party was entitled to recover all of the costs of enforcement, including attorney fees.[191]

The Supreme Court, in affirming the Ninth Circuit, held that attorney fees are not "necessary costs of response" and are therefore not recoverable by a private party as response costs. The requirement that costs be "necessary" is included in Section 107(a)(4)(B), which is applicable to private parties, but is not included in Section 107(a)(4)(A), which is applicable to the United States or a state. The question of whether a state agency could recover attorney fees in a cost recovery action is still open. The Court specifically declined to comment on whether Section 107 allows recovery of attorney fees by "the Government," presumably referring to the federal government. Particularly in light of Justice Scalia's dissent, in which he and two other justices advocated the treatment of attorney fees as costs of a "private enforcement action," a state agency would be well advised to pursue attorney fees.

The Supreme Court did allow that costs of identifying potentially responsible parties, even if they are costs incurred as attorney fees, are properly awarded as response costs. The Court distinguished attorney fees incurred for the purposes of litigation from fees incurred in identifying responsible parties; tracking down financially solvent polluters increases the chance that cleanup will be undertaken, which the Court considered to be a higher goal than allocating costs.

It is important for transportation agencies to be aware that response costs do not include the consequential economic impacts that remediation may entail, such as delay costs, inflation costs, or costs to the traveling public. When contamination is discovered unexpectedly during construction, an agency may have to weigh the cost of cleanup against the cost of delay that might be incurred if the agency takes the time to take all of the steps necessary to preserve its right to cost recovery.

An agency is entitled to a declaratory judgment on liability for future costs upon a finding of the defendant's liability.[192] However, future cost recovery would still be subject to a court's finding that the costs were not inconsistent with the NCP.

4. Defenses to a Transportation Agency Cost Recovery Action

a. Not Consistent with National Contingency Plan

In order for its costs to be not inconsistent with the NCP, an agency must "substantially comply" with the NCP.[193] For several years, courts differed on whether substantial compliance or strict compliance was required. EPA settled the issue in its 1990 revision of the NCP, in which it stated that substantial compliance would be expected.[194]

Courts have held that regardless of when a cost recovery action is initiated, the applicable version of the NCP is the one that was in effect when response costs were incurred. This is an easy concept if the same NCP is in effect throughout the entire investigation and cleanup. However, if the regulation changes during the process, the agency needs to look at the new regulation and determine if some of the new requirements might be applicable to its cleanup.

When WSDOT sued to recover its cleanup costs for the coal gasification plant found during construction of Interstate 705, it was confronted with the question of under which version of the NCP would its actions be evaluated. When WSDOT began its investigation of the site in 1984, the 1982 NCP was in effect. A proposed

revision was published in February 1985.[195] The Washington State Department of Ecology issued its decision on what remedial action would be taken in April 1985. WSDOT began its construction project, including the remedial action, in September 1985. EPA published the final revision of the NCP in November 1985, including a significant change from the proposed rule.[196] The proposed rule had expressly stated that non-EPA cleanups that did not involve NPL sites were not required to have a public comment period. It also set out the minimal requirements for a cleanup to be considered consistent with the NCP, which did not include a public comment period requirement. The final rule, however, added a requirement of a public comment period. By the time this requirement was published, WSDOT had selected a remedy, designed a cleanup, and was two months into implementation of the cleanup. Despite this, the district court for the Western District of Washington held that WSDOT had not complied with the requirements of the NCP because it had not held a public comment period after selecting a remedy.[197] The Ninth Circuit affirmed, holding that the NCP that was in effect when the actual remediation and disposal costs were incurred would be applicable, despite the fact that all of the investigation was undertaken and decisions were made when the earlier regulation was in effect.[198]

The only reported case that analyzes the situation when the regulation changed during the course of the cleanup is *City of Philadelphia v. Stepan Chemical*.[199] In that case, the investigation had been completed and cleanup was underway when the final revision was published. The court held that those response activities that had taken place prior to the publication of the final rule would be evaluated under the prior rule, and those that occurred subsequent to publication would be evaluated under the new rule. In explaining its decision, the court stated:

> Any activities which the city arguably should have implemented or considered before excavation pursuant to the requirements of the 1982 NCP, but did not, will not constitute inconsistencies with the plan *unless* such activities were mandated by the 1973 NCP as well. There is nothing in either the language of CERCLA or the 1982 NCP which requires a responsible party to cease response activities upon publication of a revised NCP and then backtrack to the first step of its remediation efforts to ensure that activities completed before publication comply with the new plan. Such a requirement would extend backwards the effective date of the 1982 NCP, a result I previously concluded Congress did not intend.[200]

This point is especially important for agencies that may be incorporating a cleanup into a construction project. If the NCP changes during the implementation of the cleanup, it would be costly to the agency to have to stop the cleanup, and possibly stop construction, and go back to carry out additional requirements that a new regulation might impose.

The language in the decisions regarding which NCP applies has caused some confusion and considerable opportunity for obfuscation by defendants. The Ninth Circuit decisions, which have been followed by most other courts around the country, have stated that the applicable NCP is the one that is in effect "when response costs were incurred."[201] However, recoverable response costs include the costs of site investigation, identification of responsible parties, monitoring, planning, and removal or remediation of hazardous substances. These costs are incurred practically from the time that contamination is discovered until cleanup is complete. So the general rule does not address the issue of which NCP applies when the rule changes.

However, in the WSDOT case, the Ninth Circuit rejected this argument. In *WSDOT v. Washington Natural Gas Co.*, the defendants argued that since most of the "response costs" were spent on the actual cleanup rather than on investigation and planning, the version of the NCP applicable to the entire project should be the one that was in effect when most of the costs were incurred. In that case, WSDOT's investigation and planning of its remediation efforts were done while the 1982 NCP was in effect. After the cleanup had been underway for two months, EPA published the revised NCP. Most of the cleanup costs were incurred several months later, when the bulk of the contamination was dealt with. The court agreed with the defendants that all of WSDOT's efforts should be judged for compliance with the new plan, despite the fact that most of the NCP governs initial site investigation and decision making, not the actual implementation of the cleanup, and all of WSDOT's decisions had been finalized prior to the publication of the new plan.

Despite WSDOT's experience, the result set out in *City of Philadelphia v. Stepan Chemical* still provides the more rational rule for when an agency should consider a new revision of the NCP to apply to its cleanup activities. It is impossible for a transportation agency, or for a state environmental agency for that matter, to know for certain what changes in the NCP will be implemented by EPA until a rule is published. Expecting compliance with an unknown regulation defies logic and has the effect of making the new rule retroactive, as the *Stepan Chemical* court noted, which is contrary to the federal Administrative Procedure Act.[202]

What is the effect of some failure by the transportation agency to follow some portion of the NCP? Here is where the presumption of consistency with the NCP in Section 107(a)(4)(A) is important. Under the standard set out for a state by one court, it is insufficient for defendants to merely point out some inconsistency with the NCP in order to defeat a cost recovery action. In *O'Neil v. Picillo*, the trial court held that once a state had proved its *prima facie* case—that it incurred costs responding to a release of hazardous substances at a facility, and that the defendant was a responsible party—the burden then shifted to the defendants to show (a) that there was some deviation from the NCP, and (b) that quantifiably greater costs were incurred as a result.[203] EPA has proposed adopting this as a standard to be applied in its own cost recovery actions.

> EPA is considering adopting the standard developed by the court in *O'Neil v. Picillo*. The clarification would state that where the Agency [EPA] does not materially comply with the applicable requirements of the national contingency plan, and as a result, incurs costs demonstrably in excess of those costs that would have been incurred in the absence of such material noncompliance with the national contingency plan, recoverable costs ... would not include the demonstrably excess costs incurred as a direct result of the noncompliance with the national contingency plan. The clarification would further state that where material noncompliance with the national contingency plan does not result in demonstrably excess costs, all costs of response action are recoverable costs.[204]

EPA clearly intends that in order for some deviation from the NCP to be used to defeat or limit cost recovery, that deviation must be *material*, that is must result in excess costs. Further, such a material noncompliance should only limit the recovery of costs to what would have been incurred had the NCP been fully complied with and should not defeat cost recovery entirely. EPA also referred in the 1990 revision to the NCP to the need for any deviation from the NCP to be material in order to affect cost recovery, whether by the government or by a private party, stating, "The concept that deminimus and harmless deviations from specific NCP provisions should not defeat a cost recovery action is consistent with long-standing judicial principles of harmless error and materiality."[205]

The concept of whether a deviation from the NCP is material is important for a transportation agency in two respects. First, since it is not an environmental regu-

latory agency, the transportation agency is less likely to be familiar with the specific regulations or the actual practices of EPA at contaminated sites. The 1990 NCP is a complicated list of technical requirements that may or may not apply at a given site. EPA recognized that private parties may not have expertise with Superfund sites and stated in the 1990 NCP that "an omission based on lack of experience with the Superfund program should not be grounds for defeating an otherwise valid cost recovery action, assuming the omission does not affect the quality of the cleanup."[206] To the extent that transportation agencies also may lack experience with the Superfund program, their decisions should not be second-guessed for not being exactly what an environmental agency might have done.

Second, the transportation agency should consider whether this issue might be negated if it enters into an agreed order with either EPA or the state environmental agency. Having fulfilled the requirements of an EPA order creates a presumption of consistency with the NCP.[207] However, the time necessary to negotiate such an order, carry out its requirements, and obtain EPA approval may not be available to the transportation agency that is planning a construction project. The transportation agency may also have the option of entering into an agreed order with the state environmental regulatory agency, which might be done more quickly than with EPA.[208] In the 1990 NCP, EPA recognized that state programs, while not identical to the NCP, will achieve the same result:

> Governmental bodies, particularly states, may have programs similar to the NCP, that achieve the same objectives, but are not congruent with the NCP in every respect. EPA believes that these governmental bodies, consistent with the statute, should have flexibility to implement response actions and bring cost recovery actions for those response actions as long as the response actions are not inconsistent with the NCP, even if achieved by different methods.[209]

Most states have environmental cleanup statutes patterned after CERCLA. Compliance with a state agreed order, while not conclusive, should be strong evidence of consistency with the NCP, which should be difficult for defendants to overcome.

Transportation agencies need to balance their own time constraints with regard to construction schedules and funding against the evidentiary value of having an agreed order with one of the environmental agencies. They should also look into whether the state environmental agency might provide informal advice to the transportation agency without requiring the transportation agency to enter into an agreed order or consent decree. Although informal involvement by the environmental agency would not have the same evidentiary value as an agreed order or consent decree, it would increase the likelihood that the transportation agency has considered all of the necessary requirements of the NCP in its site investigation and consideration of remedial alternatives. The environmental agency could also provide advice on the public comment requirement; if the transportation agency follows the same procedures that the environmental agency does in providing a public comment period on its remedy selection, it is less likely that it could be challenged as being inconsistent with the NCP.

Despite having consulted with both an experienced environmental consultant and the state environmental regulatory agency, and having proceeded under the direction of the environmental agency, WSDOT was still found by both the district court and the Ninth Circuit to have not "complied" with the NCP to a high enough standard to recover any costs. Essentially, the Ninth Circuit set out a burden of proof for the defendants to meet, but then did not require them to have met that burden. The biggest difficulty with the case was that the work took place in 1984 and 1985, when the Superfund program was still studying sites, not actually implementing cleanups. WSDOT and the state environmental agency had no practical guidance to follow from EPA in terms of actual EPA cleanups. The WSDOT project was one in which many WSDOT and Department of Ecology standards and policies were developed. In effect, WSDOT was penalized for conducting the first significant cleanup in the region, and failing to predict what standards would develop in the future.

b. Use of Federal Funds by State or Local Transportation Agency

There are two challenges that can be made based upon the use of federal transportation funds by either a state or local agency or the use of state funds by local agencies. Both are equally without merit, but must be addressed.

The first is an argument that because the state or local agency did not totally fund the cleanup, it is not the "real party in interest." This argument is more likely to be made if there was substantial financial participation by another agency, such as use of Federal-Aid Highway funds, which fund 90 percent of an Interstate project. This argument was raised against WSDOT in *WSDOT v. Washington Natural Gas Co.*, which involved a federally funded Interstate construction project. Federal funds covered 90 percent of the construction project, including the environmental cleanup costs. The Federal Highway Administration had asked WSDOT to initiate a cost recovery action, and conditioned federal participation in the cleanup costs on WSDOT's seeking cost recovery from the responsible parties. If funds were recovered, they would be repaid to FHWA. Given those facts, the court found that WSDOT was in fact the real party in interest, rather than FHWA. The court further noted that given FHWA's participation in the cleanup, it would probably be estopped from pursuing the defendants on its own, which was the defendants' ostensible concern.[210]

Defendants in that case also argued that because WSDOT had received federal funds for 90 percent of the cleanup costs, it had already been reimbursed and was barred from receiving a double recovery by CERCLA Section 114(b).[211] However, the court ruled that Section 114(b) prevents a plaintiff from receiving a double recovery under CERCLA and any other laws that impose liability, and that it does not apply to statutes that govern the administration of federal highway funds. In addition, the court noted that WSDOT was obligated to repay the funds to FHWA and that there would in fact be no "double recovery" by WSDOT.[212]

c. Costs Incurred Were Not "Necessary"

This is another point in which the application of Section 107(a)(4)(A) is beneficial to the state transportation agency. This section does not contain the term "necessary." Section 107(a)(4)(B), applicable to "any other persons," including municipalities, allows recovery of "*necessary* costs of response."[213] The allegation that costs are not necessary opens the door to a construction claim type of analysis, in which every detail of the cleanup project is scrutinized as to its "necessity."

d. Discharge in Bankruptcy

The size and organization of many large transportation agencies create a significant problem in dealing with potentially responsible parties who may be in bankruptcy. Because many different individuals and several different divisions or sections of an agency are likely to be involved in environmental review, property acquisition, construction, and environmental remediation, it is less likely that criti-

cal information regarding the status of bankrupt parties will be communicated to those in the agency who need that information. As a result, an agency may lose the ability to recover costs from a party if the party's bankruptcy is resolved and the agency fails to file a claim prior to a deadline being imposed.

The Seventh Circuit has recently resolved the issue of when a claim arises under CERCLA for the purpose of filing a claim in a bankruptcy. In *Matter of Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, WSDOT had sued CMC Corporation, the reorganized successor to the Milwaukee Road, for contamination found on property acquired from the railroad for highway construction.[214] CMC asked the Milwaukee Road's bankruptcy court to enjoin the action, arguing that WSDOT's claim for response costs arose prior to the bar date for filing claims in its bankruptcy reorganization proceedings and was thus discharged. The trial court granted the motion to enjoin the lawsuit, and the Seventh Circuit upheld the ruling, holding that WSDOT had enough notice of the need to incur response costs that it should have filed a claim in the bankruptcy.

In that case, the Washington State Department of Ecology had conducted soil testing in the area and had informed WSDOT of the presence of contamination about three weeks before the bar date for filing claims. One day after the "consummation date," or the date on which the bankruptcy order was final, WSDOT obtained test results that showed that contamination levels would likely require cleanup.[215] The Seventh Circuit found that "WSDOT was well informed that a train derailment resulted in a contamination problem that would require treatment, removal, and/or storage costs."[216] Although one of the elements of a CERCLA claim is the incurrence of response costs, the Seventh Circuit rejected WSDOT's argument that it did not yet have a CERCLA claim at the time of the deadline for filing claims because it had not yet incurred response costs at the site. Instead, the court held that under the given facts, WSDOT had at least a contingent claim that it was required to file in the bankruptcy or else lose the right to pursue that claim.

> [W]hen a potential CERCLA claimant can tie the bankruptcy debtor to a known release of a hazardous substance which this potential claimant knows will lead to CERCLA response costs, and when this potential claimant has, in fact, conducted tests with regard to this contamination problem, then this potential claimant has, at least, a contingent CERCLA claim for purposes of Section 77 [of the Bankruptcy Act].[217]

The court made it clear that this rule would apply only in cases where similar facts were found—that is, where the CERCLA claimant had adequate information regarding both the connection between the release and the bankrupt party and the likelihood of incurring costs for which the bankrupt party should be responsible. "[W]e see no reason in the context of this case to adopt a standard which has the potential of cutting off future creditors' claims even though these creditors had no reason to know about the release or threatened release of a hazardous substance."[218] Thus if an agency had no reason to know at the time that a bankruptcy became final that it may have a claim against the bankrupt party, then its claim would not be discharged. In such a case, the agency would be able to assert its claim against the successor corporation, if there is one.

Several issues arose in this case that are unique to government agencies. In this case, the property had been acquired by WSDOT directly from the trustee in bankruptcy; WSDOT could not argue that it did not know that the company was in bankruptcy when the property was acquired. However, the individuals dealing with the contamination were not the same ones who had acquired the property, and the fact that the railroad was in bankruptcy was not communicated to those who were addressing the contamination problem.

Probably the only effective way to deal with this problem is to begin identifying and contacting potentially responsible parties as soon as possible. In this particular case, there was only three weeks between WSDOT's being notified of the contamination problem and the deadline for filing claims. Even if WSDOT had acted quickly, it is possible that the deadline would not have been discovered in time and a claim would not have been filed in a timely manner. However, it is also possible that a court would not have enjoined WSDOT if the agency could have shown that it acted as quickly as possible.

Another issue regarding notice was whether notice to other state agencies operated as "notice" to "the State of Washington" that was sufficient to notify WSDOT of both the presence of contamination and of the imminence of the bankruptcy proceedings and claim filing deadline. The Washington State Department of Ecology had discovered the contamination two months before it informed WSDOT of the problem. The railroad argued that this was notice to "the State" of the presence of contamination and the need for incurring response costs, causing a contingent claim to arise. The trial court held (with no real legal basis) in an unreported decision that notice to the Department of Ecology was notice to WSDOT.[219] Although the Seventh Circuit affirmed the trial court, it did so on the basis that WSDOT itself had adequate notice of the presence of contamination and the need for cleanup in time to file a claim in the bankruptcy; even though it had not yet received its own test results, it did have those obtained by the environmental agency.

In addition, the Washington State Department of Revenue, as a potential creditor, had actually received notice of the bankruptcy proceedings. However, there was no system—nor any perceived need—for disseminating that information to dozens of other state agencies. The only cases to address the issue have all held that notice of bankruptcy proceedings, in order to be sufficient, must go directly to the affected government agency; notice to one agency is not notice to the entire government.[220] Again, the trial court agreed with the argument that "the state is the state is the state," holding that notice to the Department of Revenue was notice to WSDOT. The Seventh Circuit did not address this issue, finding it unnecessary given its determination that WSDOT itself had all the notice to which it was entitled.

Matter of Chicago, Milwaukee, St. Paul & Pacific Railroad addresses the issue of what happens when a potentially responsible party has recently gone through bankruptcy.[221] However, many companies have gone through bankruptcy reorganization at some point in their history. Some of these reorganizations may have taken place after a release of hazardous substances occurred, but long before a claim for CERCLA response costs could have arisen, or even before CERCLA was enacted. The Third Circuit held in *Matter of Penn Central Transportation Company* that EPA's CERCLA claim could have arisen no earlier than when CERCLA was enacted in 1980. Thus, EPA's CERCLA claim could not have been discharged in Penn Central's 1978 bankruptcy.[222] The fact that EPA had other environmental regulatory authority over Penn Central at the time of its bankruptcy and was taking action against the railroad on the basis of that other statutory authority at that time was not enough to discharge a CERCLA claim where CERCLA was not yet in effect.[223]

In a case where the bankruptcy reorganization took place prior to the agency's CERCLA claim arising, then the agency should be able to sue the reorganized successor. If the reorganized successor continues to own and operate the same contaminated site that the predecessor corporation did, then the successor may become an owner, operator, or arranger on its own.[224] It may not be necessary in

such an instance to establish that the successor retains the predecessor's liability if the successor is itself a responsible party.

e. Counterclaims by Defendants Against Agency

Particularly where an agency has cleaned up a site either as part of a construction project or as an independent cleanup action, defendants may argue that the agency is at least partially responsible as an owner or operator, and that some costs should be offset against any costs asserted against the defendants. Courts have rejected attempts to counterclaim against EPA, pointing out that a defendant's remedy is instead to argue that the costs are inconsistent with the NCP.[225] Since a transportation agency's role is not like that of EPA, these cases are of little help. A transportation agency will not be involved in a cleanup unless it owns, has possession, or is undertaking construction on a site. EPA, on the other hand, acts strictly on its regulatory authority. A defendant will likely be able to maintain a counterclaim against the agency, but such a claim would be subject to dismissal upon a showing that the agency handled the substances with due care and acted in accordance with the NCP.[226]

f. Addressing the Perception that Agency Costs Are Excessive

When a transportation agency undertakes cleanup as part of or preliminary to a construction project, a defendant may argue that but for the construction, the cleanup would have been unnecessary. This argument presupposes that an owner will continue to hold a contaminated parcel without ever attempting to sell it or develop it; at any such point, cleanup will become necessary. Regardless, the argument that the agency should not be entitled to recover its costs because it was motivated by its construction project should not be sufficient to defeat cost recovery. The Eighth Circuit held in *General Electric v. Litton Industrial Automation Systems Inc.* that because CERCLA has no "unclean hands" defense, a plaintiff's motive should not be subject to question.[227] Still, a CERCLA defendant will take the opportunity to characterize the agency's cleanup efforts as having taken short cuts, conducted inadequate studies, or used more expensive methods of treatment or disposal in order to keep a construction project on schedule and generally avoid the usual environmental cleanup process.[228] In one case, the transportation agency recognized that its construction project had necessitated higher cleanup costs, and it settled with the responsible parties for a lesser amount to take those higher costs into account.[229]

The construction project may also be seen as having exacerbated the contamination problem. The cleanup should be evaluated on its own merits, apart from the construction project. The agency's motive should be treated no differently from that of any other party conducting a cleanup. In most cases, unless the site has been the subject of an order by an environmental agency, the plaintiff is doing a cleanup in order to sell or develop the property, as the plaintiff was in *General Electric*.

There are several ways that a transportation agency can address these problems when performing a cleanup during construction. First, a good public relations and public information and comment program is essential. Community support for the project—both the highway construction and the cleanup—will help. Second, good cost accounting during the project is important to separate out the costs actually attributable to the cleanup from those that would have been incurred in the construction project anyway. This can also be used to illustrate cost savings in the project. Third, support from the state environmental agency, including approval or participation in development of work plans and remedial decisions, will help to counter an argument that particular costs were unnecessary or that a selected remedy was not cost effective.

5. Cost Recovery Under State Law

State environmental cleanup laws generally allow for the same type of cost recovery action or contribution from other potentially responsible parties as CERCLA does. However, a major difference may be that the state statute may have less stringent procedural requirements than the NCP. Under a state cost recovery statute, a transportation agency's cooperation with its state environmental agency may have greater evidentiary value than it would in a CERCLA action, and it may even be conclusive evidence that requirements were followed. State statutes also may allow for recovery of costs for cleanup of petroleum contamination, which is not recoverable under CERCLA.[230]

6. Recovery from Superfund

Under Section 106, if a party is ordered to perform a remedial or removal action by EPA and does so, and it is not a responsible party under Section 107, then that party may be entitled to reimbursement from the federal Superfund.[231] Although there are no reported cases on this, recovery should be available for a transportation agency that complies with an EPA order and can prove that it is not a responsible party under Section 107, particularly since the condemnation defense is available to show that the agency is not liable as an owner for contamination that occurred prior to the agency's acquisition of the property. Also, if acquisition under the government's eminent domain power can be characterized as an "involuntary" acquisition, then the agency may be able to show that it is not a PRP because its activities do not make it an "owner."

In addition to the federal Superfund, some states have funds that pay the response costs of nonliable parties, such as costs for remediating leaking underground storage tanks. A number of state transportation agencies reported that they have been able to recover from state trust funds for cleanup of underground storage tanks when they have had to clean up former gas station sites.

F. CERCLA REAUTHORIZATION

CERCLA is periodically reauthorized by Congress, providing an opportunity for an overall look at the effectiveness of the statute and the program and a consideration of ways that it can be improved. The most recent such reauthorization was in 1986, which resulted in the passage of the Superfund Amendments and Reauthorization Act (SARA).[232] Congress is currently in the process of CERCLA reauthorization in the 1995 session, having failed to pass a reauthorization bill in 1994.

Transportation agencies should provide input to those who are rewriting CERCLA and should not leave state and local input to the environmental regulatory agencies. There are a number of areas in which transportation agencies should make certain that their concerns are communicated to Congress, among them a clarification that the presumption of consistency with the NCP applies to all state agencies, not just regulatory agencies. This could be done by adding the term "state agency" to the definition of "state." This presumption should also be broadened to include local agencies.

Transportation agencies have an interest in retaining the condemnation defense in Section 101(35), and they should monitor the development of any reauthorization bill to see that it remains in CERCLA. Another area that could be addressed is the problem of storm water discharges; transportation agencies may have some creative solutions as to how this can be treated so as to not put an additional burden on taxpayers for funding cleanup.

Last, some form of alternative dispute resolution should be provided for in CERCLA, particularly where disputes arise between EPA and other government agencies. Those who have "negotiated" consent decrees and agreed orders with EPA have found that there is no process for resolving differences when EPA and the PRP disagree on a legal or factual issue. CERCLA by its very nature creates an adversarial relationship between EPA and any PRP, and many disputes have no possible resolution short of litigation. While citizens generally find the idea of litigation distasteful, they are particularly angered when a great deal of money is spent by government agencies suing each other.

G. CONCLUSION

Although encounters with contaminated property have created a myriad of problems for transportation agencies and will continue to do so, many agencies are learning from their own experiences and from those of other agencies how to best limit the liability that might result from acquiring and building on these sites. Learning how to best handle being a PRP will improve the agency's chances of decreasing or eliminating the agency's financial liability for contaminated sites.

APPENDIX A

Sample Indemnification Agreement—Construction Contract

Pursuant to [cite statute authorizing indemnification provision], the Agency shall indemnify, defend and hold harmless the Contractor, its subcontractors and the agents, officers, and employees of each from all losses and expenses, including legal expenses and attorney fees, incurred because of civil suits or claims to the extent that they arise out of the handling, treatment, or disposal of hazardous materials removed from the site, provided that this indemnification does not apply to any losses or claims that are the result of the Contractor's failure to comply with the terms or conditions of this contract, the Contractor's own sole negligence, the subcontractors' sole negligence, or the concurrent negligence of both; and provided further that in the event of concurrent negligence of both the Agency and the Contractor and/or subcontractors, this agreement shall apply only to the extent of the Agency's negligence.

APPENDIX B

Sample Indemnification Agreement—Acquisition

The State of Washington Department of Transportation ("WSDOT") seeks to acquire for highway purposes property located in _____, Washington, that was formerly owned and operated by _____. This property is described in Exhibit A. The term "site" as used in this agreement means all of the property described in Exhibit A.

_____ hereby agrees to indemnify WSDOT and hold WSDOT harmless for any costs or liabilities associated with the removal or remediation of any hazardous substances that have been released or otherwise come to be located on the site as a result of _____'s operations at the site, including those hazardous substances that may have migrated from the site through groundwater, surface water, or soil to other properties. "Hazardous substances" shall include gasoline and other petroleum products and other substances designated as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq., the Clean Water Act, 33 U.S.C. § 1251 et seq., the Clean Air Act, 42 U.S.C. § 7401 et seq., and the Washington Model Toxics Control Act, RCW 70.105D. et seq. "Costs" shall include but not be limited to all response costs, disposal fees, investigatory costs, monitoring costs, civil or criminal penalties, and attorney fees and other litigation costs incurred in complying with applicable state and federal environmental laws. "_____'s operation of the site" shall include any activity relating to the use of the site as a gasoline station during the time that _____ owned the site.

_____ agrees that it will take responsibility for and properly dispose of hazardous substances excavated at the site by WSDOT's contractor, whether contained in soil or water. ____ further agrees that it shall retain any and all liabilities arising from the offsite disposal, handling, treatment, storage, or transportation of any hazardous substances, including petroleum products, removed from the site by _____ or its employees or agents or contractors, whether contained in soil or water.

_____ acknowledges that additional hazardous substances will or may remain on the site, and agrees to take responsibility for any further remedial action that may be required at the site.

To the extent that _____ must perform work on the site after transfer of ownership of the site to WSDOT, WSDOT shall allow _____ and its agents, employees, and contractors reasonable access to the site for the purpose of conducting any remedial action, including investigatory and monitoring activities.

In consideration of the actions that will be performed at the site by _____ pursuant to this agreement, WSDOT agrees that it will pay _____ the fair market value of the property with no discount or adjustment for the presence of hazardous substances. In addition, WSDOT agrees not to sue _____ under state or federal law for recovery of response costs incurred at the site. This covenant not to sue shall take effect upon execution of this agreement by WSDOT and is conditioned upon the satisfactory completion of the remedial action by _____. This covenant not to sue extends only to _____, and does not extend to any other person. This covenant not to sue is made only by the Washington State Department of Transportation, and does not bind any other agency of the State of Washington.

Notwithstanding any other provision of this agreement, WSDOT reserves the right to seek reimbursement of response costs from _____ if conditions at the site that were previously unknown to WSDOT are discovered after the execution of this agreement, or if information is received by WSDOT after the execution of this agreement, and these conditions or this information indicates that the remedial action taken is not sufficiently protective of human health or the environment.

ENDNOTES

[1] 42 U.S.C. § 9601 *et seq.* (1988 ed.), Pub. L. No. 96-510, 94 Stat. 2767 (Dec. 11, 1980).

[2] 42 U.S.C. § 6901 *et seq.* (1988 ed.), Pub. L. No. 94-580, 90 Stat. 2795 (Oct. 21, 1976).

[3] 42 U.S.C. § 9607(a) (1988 ed.).

[4] O'Neil v. Picillo, 682 F. Supp. 706 (D.R.I. 1988), *aff'd* 883 F.2d 176 (1st Cir. 1989), *cert. den.* 493 U.S. 1071 (1990).

[5] 42 U.S. C § 9607(b).

[6] 42 U.S.C. § 9607(a)(4)(A), (B); 40 C.F.R. pt. 300.

[7] 42 U.S.C. § 9613(f)(1).

[8] 42 U.S.C. § 9605(a)(8)(B).

[9] State of New York v. General Electric Co., 592 F. Supp. 291 (N.D.N.Y. 1984).

[10] B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1197 (2d Cir. 1992).

[11] United States v. Alcan Aluminum Corp., 964 F. 2d 252, 257 (3d Cir. 1992); *See also* SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT OF 1980, S. Doc. No. 97-14, 97th Cong., 2d Sess. 1983.

[12] B.F. Goodrich, 958 F.2d at 1204.

[13] *Id* at 1199, 1204.

[14] 155 Bankr. 890 (E.D. Penn. 1993).

[15] 42 U.S.C. § 9601(20)(D).

[16] 42 U.S.C. § 9607(b); 42 U.S.C. § 9601(35)(A)(ii).

[17] Lincoln Properties Ltd. v. Higgins, 823 F. Supp. 1528, 1537 (E.D. Cal. 1992).

[18] 42 U.S.C. § 9607(a)(1).

[19] 42 U.S.C. § 9601(35)(A), Pub. L. No. 99-499, 100 Stat. 1616 (October 17, 1986).

[20] 42 U.S.C. § 9601(20)(D).

[21] United States v. Peterson Sand and Gravel, Inc., 806 F. Supp. 1346 (N.D. Ill. 1992).

[22] Washington State Department of Transportation v. Washington Natural Gas Company et al., No. C89-415TC (October 21, 1992).

[23] 42 U.S.C. § 9601(35)(A)(ii).

[24] *Id.*

[25] 42 U.S.C. § 9601(35)(A)(i).

[26] *Id.*

[27] 42 U.S.C. § 9601(35)(A).

[28] 42 U.S.C. § 9607(b).

[29] 976 F.2d 1338 (9th Cir. 1992).

[30] *Id.* at 1341.

[31] *See* Lincoln Properties Ltd. v. Higgins, 823 F. Supp. 1528, 1536 (E.D. Cal. 1992).

[32] Kaiser, 976 F.2d at 1342.

[33] *Id.* at 1340 n.1.

[34] *Id.* at 1342. Note, however, that the contractor's work must involve some preexisting contamination in order for this result to occur. Ordinary construction debris is not likely to be considered a "hazardous substance." *See* Gallagher v. T.V. Spano Building Corp., 805 F. Supp. 1120 (D. Del. 1992) (developer did not "dispose of hazardous substances" when construction debris was buried under right of way).

[35] For further discussion of this issue, *see* B. CLAWSON, *Construction Contractors & Hazardous Waste*, TRANSPORTATION CONSTRUCTION REPORTER June/July 1994.

[36] *See, e.g.*, WASH. REV. CODE 4.24.115 (agreement may not indemnify for indemnitee's own sole negligence); OKLA. STAT. ANN. title 15, §§ 421-430 (agreement to indemnify for indemnitee's own negligence must be expressed unequivocally, must be part of an arms-length transaction between parties of equal bargaining power, and must not violate public policy).

[37] 42 U.S.C. § 9619(a)(2).

[38] Washington State Department of Transportation v. U.S. Environmental Protection Agency, 917 F.2d 1309 (D.C. Cir. 1990).

[39] General notice letter from EPA to Washington State Department of Transportation, dated July 24, 1989 (Pallister Paint site).

[40] Notes of telephone conversation with Lawrence Bobbitt, General Counsel to Wyoming Department of Transportation, September 26, 1994.

[41] Correspondence from Environmental Protection Agency to Washington Department of Transportation regarding Northwest Transformer Superfund site, Lynden, Washington, dated August 15, 1988.

[42] Conversation with Norm Malone, Indiana Department of Transportation, Land Acquisition, Buying Section, June 1, 1995.

[43] *See* United States v. Ward, 618 F. Supp. 884 (D.N.C. 1985).

[44] 42 U.S.C. § 6924(l).

[45] 823 F. Supp. 1528, 1534 (E.D. Cal. 1992).

[46] *Id.* at 1535.

[47] *Id.* at 1534.

[48] 42 U.S.C. § 9601(35)(A).

[49] 823 F. Supp. at 1537.

[50] *Id.*

[51] *See* United States v. Peterson, Sand and Gravel, Inc., 806 F. Supp. 1346, 1357-59 (N.D. Ill. 1992) ("[C]ontrol is the touchstone of ownership, both generally and for the purposes of CERCLA.")

[52] Lincoln, 823 F.2d at 1542. The court rejected the Clean Water Act cases that construed its third-party defense as being negligence-based.

[53] *Id.* at 1543-44.

[54] *Id.* at 31.

[55] General Electric Co. v. AAMCO Transmissions Inc., 962 F.2d 281, 286 (2d Cir. 1992).

[56] 42 U.S.C. § 9607(j); 42 U.S.C. § 9601(10) (federally permitted release includes "discharges in compliance with a permit under Section of 1342 of Title 33.").

[57] 42 U.S.C. § 9607(j).

[58] 33 U.S.C. § 1342.

[59] Except where storm water discharges are contributing to a known hazardous site, storm water pollution is more likely to be addressed under the NPDES program and the Clean Water Act. *See* Natural Resources Defense Council v. Sels, No. CV 93 6073-ER (C.D. Cal. Dec. 14, 1994).

[60] Commencement Bay Nearshore/Tideflats Superfund Site, Record of Decision, September 1989, responses to comments.

[61] City of Seattle v. Amalgamated Services, Inc. et al., No. C92-792D (W.D. Wash.).

[62] Many lessees may also seek a similar indemnification from the agency to protect the lessee from any liability for what may have been on the site prior to the lease. The goal here should be to insure that both parties accept and retain responsibility for releases that result from their own activity at the site.

[63] 42 U.S.C. § 9607(e)(1).

[64] *See, e.g.*, Purolator Products Corp. v. Allied Signal, Inc., 772 F. Supp. 124, 129 (W.D. N.Y. 1991); Jones-Hamilton Co. v. Kop-Coat, Inc., 750 F. Supp. 1022 (N.D. Cal. 1990).

[65] 742 F. Supp. 1448 (N.D. Ind. 1990).

[66] *Id.* at 1457.

[67] 42 U.S.C. § 9607(b)(3).

[68] Burlington Northern v. Woods Industries, 815 F. Supp. 1384, 1392 & n.12 (E.D. Wash. 1993).

[69] *See* 42 U.S.C. § 6924(a).

[70] 840 F. Supp. 180 (D. Conn. 1993).

[71] *Id.* at 186, 189.

[72] *Id.* at 188.

[73] Pallister Paint Site, Everett, Washington, letter to WSDOT dated July 24, 1989.

[74] 42 U.S.C. § 4601 *et seq.*

[75] Whether this was because WSDOT's arguments were persuasive or for other reasons will remain a mystery.

[76] 823 F. Supp. 1528 (E.D. Cal. 1992).

[77] *See, e.g.*, Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 845 (4th Cir. 1992).

[78] 33 U.S.C. § 1344.

[79] 42 U.S.C. § 9607(j).

[80] 42 U.S.C. § 9604(e).

[81] 42 U.S.C. § 9604(e)(2).

[82] *See, e.g.*, WASH. REV. CODE 70.105D.

[83] 42 U.S.C. § 9605(a)(8).

[84] 40 C.F.R. pt. 300.

[85] 42 U.S.C. § 9613(a); *see* Washington State Department of Transportation v. Environmental Protection Agency, 917 F.2d 1309 (D.C. Cir. 1990).

[86] 42 U.S.C. § 9622(a), (e).

[87] 42 U.S.C. § 9606 (a).

[88] 42 U.S.C. § 9606(b); *see* Aminoil Inc. v. United States, 646 F. Supp. 294, 299 (C.D. Cal. 1986) (treble damages will be awarded to EPA only if party has acted in bad faith, such as for purpose of delay); United States v. Reilly Tar & Chemical Corp., 606 F. Supp. 412, 421 (D. Minn. 1985) (PRP's challenge to the cost effectiveness of EPA's selected remedy was good faith defense to Section 106 order, even if unsuccessful, and PRP would not be subject to treble damages).

[89] 42 U.S.C. § 9613(j)(1).

[90] No. C89-415TC (W.D.Wash. October 21, 1992).

[91] WSDOT v. Washington Natural Gas Company, U.S.D.C. No. C89-415TC (October 21, 1992), aff'd 51 F.3d 1489 (9th Cir. 1995).

[92] 806 F. Supp. 1346, 1357 (N.D. Ill. 1992).

[93] *Id.*

[94] *Id.*

[95] 42 U.S.C. § 9607(d)(1) and (2).

[96] 42 U.S.C. § 9613(a).

[97] *Id.*

[98] Washington State Dep't of Transportation v. U.S. Environmental Protection Agency, 917 F.2d 1309 (D.C. Cir. 1990).

[99] Kent County, Delaware, Levy Court v. U.S. EPA, 963 F.2d 391 (D.C. Cir. 1992).

[100] Long Beach Unified School District v. Dorothy B. Godwin California Living Trust, 32 F.3d 1364 (9th Cir. 1994).

[101] *See, e.g.*, Kaiser Aluminum v. Catellus Dev. Co., 976 F.2d 1338 (9th Cir. 1992).

[102] Washington's cleanup law, the Model Toxics Control Act, does not have a condemnation defense. WASH. REV. CODE 70.105D.010 *et seq.*

[103] This highway was also realigned to avoid one of the most contaminated areas, another former coal gasification plant.

[104] Arizona, Florida, Illinois, Louisiana, Massachusetts, New Mexico, and Washington are among those states whose transportation departments either have developed or are developing right-of-way acquisition guidelines for contaminated property.

[105] 40 C.F.R. § 300.5 (1994).

[106] *See, e.g.*, WASH. REV. CODE 47.01.170.

[107] A complete examination of methods of obtaining access to property for environmental studies is beyond the scope of this article. For a thorough treatment of this topic, the reader is referred to an article titled *Access to Contaminated Properties for Evaluation*, prepared by James S. Thiel, General Counsel for the Wisconsin Department of Transportation, for presentation at the Transportation Research Board 1993 Workshop on Transportation Law. A copy of this article is available from the Transportation Research Board.

[108] MICH. STAT. ANN. § 8.265(4)(5).

[109] MICH. STAT. ANN. § 8.265(4)(2).

[110] *Id.*

[111] Correspondence from Harry S. Morrow, Assistant Attorney General, State of Colorado.

[112] 633 N.E.2d 19, 259 Ill. App. 3d 602, *review denied* 642 N.E.2d 1276 (1994).

[113] Correspondence from Bill Jameson, Assistant Attorney General, State of Arizona. The Gabrielli case and the separate cost recovery action were settled before trial.

[114] 861 P.2d 1287 (Kan. 1993).

[115] 861 P.2d at 1293.

[116] American Cyanimid Co. v. King Industries, 814 F. Supp. 209 (D.R.I. 1993).

[117] 5 Cal.Rptr. 2d 687 (Cal. App. 2 Dist. 1992), review denied.

[118] *Id.* at 689.

[119] *Id.* at 689 n.8.

[120] *Id.* at 689 n.9.

[121] 629 So.2d 932 (Fla. App. 4 Dist. 1993), rehearing denied.

[122] *Id.* at 934.

[123] *Id.*

[124] Since the environmental statutes generally require that a plaintiff have incurred "response costs," a property owner would have to incur response costs at least in the amount of the diminished value of its property. The property owner may have a case for contribution against other PRPs where it has in effect paid the agency part or all of the agency's cleanup costs in the form of reduced compensation for its property. Such a case should be no different than a case where the owner has been sued for cost recovery, and has in turn sued other PRPs for contribution.

[125] No. 520173 (Conn. Super. July 1992).

[126] *Id.*

[127] Unlike a number of states, Washington's underground storage tank laws do not provide for reimbursement for cleanup performed by an innocent landowner. *See* WASH. REV. CODE 90.76.005 *et seq.*

[128] Later, the company signed an agreement taking responsibility for the cleanup, and cleaned up the property prior to WSDOT's construction. (State of Washington v. Exxon Corporation, Thurston County No. 91—2-01947-6.)

[129] 549 A.2d 38, 112 N.J. 593 (1988).

[130] 549 A.2d at 41.

[131] *Id.* at 45.

[132] *Id.* (citing P. Patchin, *Valuation of Contaminated Properties*, THE APPRAISAL JOURNAL 7 (Jan. 1988)).

[133] Northwest Cooperage Co. v. Ridder, Nos. 36278-36280 (Wash. Bd. of Tax Appeals, July 12, 1990) (Tax Lexis 208).

[134] *See* R.I. MCMURRY AND D.H. PIERCE, *Environmental Contamination and Its Effect on Eminent Domain*, ALI-ABA 1993 (Available on WESTLAW, C791 ALI-ABA 133); R.A. GLADSTONE, *Contaminated Property: A Valuation Perspective*, 6 No. 26, TOXICS LAW REPORTER, BNA 798 (November 27, 1991).

[135] Purolator Products Corp. v. Allied-Signal, Inc., 772 F. Supp. 124 (W.D.N.Y. 1991).

[136] The agency has a complete defense to "owner" liability with the condemnation defense. *See* section B , *supra*.

[137] *See, e.g.*, Jones-Hamilton Co. v. Kop-Coat, Inc., 750 F. Supp. 1022 (N.D. Cal. 1990).

[138] Correspondence from Brian Hutchins, Chief Counsel, Nevada Department of Transportation.

[139] Correspondence from Gary R. Welch, Assistant Attorney General, Nebraska Attorney General's Office.

[140] Washington State Department of Ecology, Interim Policy for Prospective Purchaser Agreements (Policy 520A).

[141] 60 FED. REG. 34792 (July 3, 1995).

[142] *Id.* at 34793.

[143] *Id.* at 34794.

[144] *Id.* at 34975.

[145] *Guidance on Landowner Liability under Section 107(a) of CERCLA, De Minimus Settlements under Section 122(g)(1)B) of CERCLA*, 54 FED. REG. 34235 (Aug. 18, 1989).

[146] Correspondence from Natalie Moore, Assistant Chief Counsel, South Carolina Department of Transportation.

[147] Correspondence from Thomas R. Viall, Assistant Attorney General, State of Vermont.

[148] Mich. Stat. Ann. § 8.265(8); summary provided in correspondence from Patrick F. Isom, Assistant Attorney General in Charge, Transportation Division, State of Michigan Department of Attorney General.

[149] State of Washington v. Exxon, Thurston County No. 91-2-01947-6.

[150] 40 C.F.R. § 300.415(a)(2) (1994).

[151] Conversation with David Ferree, General Counsel's Office, Iowa Department of Transportation, May 31, 1995.

[152] *Id.*

[153] General Electric v. Litton Industrial Automation Systems, Inc., 920 F.2d 1415, 1419 (8th Cir. 1990).

[154] Town of Munster v. Sherwin-Williams, Co., Inc., 825 F. Supp. 197, 203 (N.D. Ind. 1993), vacated and remanded 27 F. 3d 1268 (7th Cir. 1994).

[155] 42 U.S.C. § 9613(g).

[156] Sherwin-Williams, 825 F. Supp. at 203. The court also felt that the town

had not adequately documented the identification of the drums, further hampering the defendant's efforts to quantify what it was actually responsible for.

[157] *See* United States v. Northernaire Plating, 670 F. Supp. 742, 746-47 (W.D. Mich. 1987), *aff'd* 889 F.2d 1497 (6th Cir. 1989); City of Philadelphia v. Stepan Chemical Co., 713 F. Supp. 1484 (E.D. Pa 1989).

[158] 42 U.S.C. § 9613(b).

[159] Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (CERCLA abrogates states' Eleventh Amendment immunity to suit in federal court).

[160] 42 U.S.C. § 9613(g)(2).

[161] 42 U.S.C. § 9607(a)(4)(A).

[162] 42 U.S.C. § 9607(a)(4)(B).

[163] O'Neil v. Picillo, 682 F. Supp. 706, 728 (D.R.I. 1988), *aff'd* 883 F.2d 176 (1st Cir. 1989).

[164] United States v. Azrael, 765 F. Supp. 1239 (D. Md. 1991) (costs incurred by EPA): United States v. Shell Oil Co., 605 F. Supp. 1064 (D. Colo. 1985) (costs incurred by U.S. Army).

[165] O'Neil v. Picillo, 682 F. Supp. at 728.

[166] City of Philadelphia v. Stepan Chemical, 713 F. Supp. 1484 (E.D. Pa. 1989).

[167] *See* Town of Bedford v. Raytheon Co., 755 F. Supp. 469, 475 (D. Mass. 1991).

[168] 51 F.3d 1489 (9th Cir. 1995).

[169] 759 F. Supp. 95, 99 (N.D.N.Y. 1991) ("The state of New York, and therefore its agencies, are 'persons' as that term is defined in CERCLA.").

[170] Clallam County v. Dep't of Transportation, State of Washington, 849 F.2d 424 (9th Cir. 1988), *cert. denied* 488 U.S. 1008 (1989).

[171] San Francisco Gas & Electric Co. v. City and County of San Francisco, 189 F. 943, 949 (9th Cir. 1911).

[172] Delon Hampton & Assoc., Chartered, v. Washington Metropolitan Area Transit Authority, 943 F.2d 355, 359 (4th Cir. 1991).

[173] S&M Investment Co. v. Tahoe Regional Planning Agency,, 911 F.2d 324, 326 (9th Cir. 1990), *cert. denied* 111 S.Ct. 963 (1991).

[174] Since CERCLA was intended to hold government agencies liable for releases of hazardous substances to the same extent as private parties, a state agency must be included in the definition of "state" since that is the only way that an agency can be considered a "person."

[175] 42 U.S.C. § 9604(d)(1)(A).

[176] 42 U.S.C. § 9611(c)(8).

[177] *See, e.g.*, Wickland Oil Terminals v. ASARCO Inc., 792 F.2d 887 (9th Cir. 1986).

[178] United States v. Wade, 577 F. Supp. 1326, 1336 (E.D. Pa. 1983).

[179] United States v. Espinoza-Leon, 873 F.2d 743 (4th Cir.), *cert. denied* 492 U.S. 924 (1989); Arizona Electric Power Co-op Inc. v. United States, 816 F.2d 1366, 1375 (9th Cir. 1987) (citing Russello v. United States, 464 U.S. 16, 23 (1983)).

[180] WSDOT v. Washington Natural Gas Co., 51 F.3d 1489 (9th Cir. 1995).

[181] *See, e.g.*, F.C.C. v. Schreiber, 381 U.S. 279, 296 (1965); United States v. Garren, 893 F.2d 208 (9th Cir. 1989); Red Top Mercury Mines, Inc. v. United States, 887 F.2d 198 (9th Cir. 1989).

[182] Daly v. Volpe, 514 F.2d 1106, 1111 (9th Cir. 1975) (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971)).

[183] Astoria Fed. Savings & Loan Ass'n v. Solimino, 111 S. Ct. 2166 (1991).

[184] Midlantic National Bank v. New Jersey Dep't of Environmental Protection, 474 U.S.494, 501 (1986).

[185] This same argument ought to apply to local governmental agencies. However, since Section 107(a)(4)(A) includes only "a State" and says nothing about local agencies or political subdivisions of a state, as it does in other sections, courts have interpreted Section 107(a)(4)(A) as specifically not including local governments.

[186] *See* United States v. Shell Oil Co., 605 F. Supp. 1064 (D. Colo. 1985) (response costs incurred by Army).

[187] United States v. Alcan Aluminum Corp., 964 F.2d 252, 258 (3d Cir. 1992).

[188] 57 FED. REG. 34743 (Aug. 6, 1992) (emphasis added).

[189] 42 U.S.C. § 9604(b)(1).

[190] KeyTronic Corp. v. United States, 114 S. Ct. 1960 (1994).

[191] KeyTronic Corp. v. United States, 766 F. Supp. 865 (E.D. Wash. 1991), *rev'd* 984 F.2d 1025 (9th Cir. 1993).

[192] 42 U.S.C. § 9613(g)(2).

[193] 40 C.F.R. § 300.700(c)(3)(i).

[194] 55 FED. REG. 8793 (March 8, 1990).

[195] 50 FED. REG. 5862 (February 12, 1995).

[196] 50 FED. REG. 49912 (November 20, 1985).

[197] WSDOT v. Washington Natural Gas Co., et al., U.S.D.C. No. C89-415TC (October 21, 1992) *aff'd*, 51 F.3d 1489 (9th Cir. 1995).

[198] *Id.*

[199] 748 F. Supp. 283 (E.D. Pa. 1990).

[200] 748 F. Supp. at 292 (emphasis in original).

[201] Versatile Metals Inc. v. Union Corp., 693 F. Supp. 1563, 1575 (E.D. Penn. 1988); *see also* N.L. Industries v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986); Wickland Oil Terminals v. ASARCO, Inc., 792 F.2d 887, 891 (9th Cir. 1986).

[202] 5 U.S.C. § 551(4); *see also* Georgetown University Hospital v. Bowen, 821 F.2d 750, 757 and n. 11 (D.C. Cir. 1987), *aff'd* 488 U.S. 204 (1988).

[203] 682 F. Supp. 706, 728 (D.R.I. 1988), *aff'd* 883 F.2d 176 (1st Cir. 1989), *cert denied* 493 U.S. 1071 (1990).

[204] 57 FED. REG. 34744 (August 6, 1992) (citation omitted).

[205] 55 FED. REG. 8794 (March 8, 1990).

[206] 55 FED. REG. 8793 (March 8, 1990).

[207] 40 C.F.R. § 300.700(c)(3)(ii) (response action carried out in compliance with terms of Section 106 order or Section 122 consent decree will be considered consistent with the NCP).

[208] And with considerably less difficulty. Anyone who has negotiated an agreed order or a consent decree with EPA will appreciate the opinion in United States v. Knote, 818 F. Supp. 1280 (E.D. Mo. 1993), in which the court expressed a good deal of disgust with EPA's administration of a consent decree.

[209] 55 FED. REG. 8799 (March 8, 1990).

[210] WSDOT v. Washington Natural Gas Co. et al., U.S.D.C. No. C89-415TC (W.D. Wash. October 21, 1992) (order on motions for partial summary judgment). *See* United States v. ITT Rayonier, Inc. 627 F.2d 996 (9th Cir. 1980) (holding that EPA was estopped from suing defendants where it had participated in state enforcement action for same incident).

[211] 42 U.S.C. § 9614(b).

[212] WSDOT v. Washington Natural Gas Co. et al., U.S.D.C. No. C89-415TC (W.D. Wash. October 21, 1992), *aff'd* 51 F.3d 1489 (9th Cir. 1995).

[213] 42 U.S.C. § 9607(a)(4)(B).

[214] 974 F.2d 775 (7th Cir. 1992).

[215] *Id.* at 778

[216] *Id.*

[217] *Id.* at 786.

[218] *Id.* at 784.

[219] Matter of Chicago, Milwaukee, St. Paul & Pacific RR Co., No. 77 B 8999 (N.D. Ill. 1990).

[220] *See, e.g.*, United States v. Omer, 232 F. Supp. 746, 748 (D. Kan. 1964); Connecticut v. Duncan, 37 Conn. Supp. 825, 438 A.2d 1212, 1214 (1981).

[221] The Ninth Circuit has adopted the same rule as to when a CERCLA claim arises for bankruptcy claim filing purposes in *In re* Jensen, 995 F.2d 925 (9th Cir. 1993).

[222] 944 F.2d 164 (3d Cir. 1991), *cert. denied* 112 S. Ct. 1262 (1992) ("Paoli Rail Yard").

[223] *See* Matter of Penn Central Transportation Co., 92 Bankr. 605 (E.D. Penn. 1988).

[224] Matter of Chicago, Milwaukee, St. Paul & Pacific R.R. Co., 130 Bankr. 521 (N.D. Ill. 1991) (reorganized successor

was responsible party because it continued to own and operate site).

[225] *See In re* Paoli Rail Yard PCB Litigation, 790 F. Supp. 94 (E.D. Penn. 1992); United States v. Azrael, 765 F. Supp. 1239 (D. Md. 1991).

[226] 42 U.S.C. § 9607(d).

[227] 920 F.2d 1415, 1419 (8th Cir. 1990).

[228] *See* Metropolitan Service District v. Oregon Metal Finishers, Inc., 32 ERC 1102 (D. Or. 1990). (BNA).

[229] Correspondence from Bill Jameson, Assistant Attorney General, State of Arizona.

[230] Southern Pacific Transportation Co. v. California (Caltrans), 790 F. Supp. 983 (C.D. Cal. 1991) (under CERCLA's petroleum exclusion in Section 101(14), waste oil and petroleum-contaminated soil are not hazardous substances).

[231] 42 U.S.C. § 9606(b)(2)(A).

[232] Pub. L. No. 99-499, 100 Stat. 1613 (October 17, 1986).

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