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**Strategies to Minimize Liability under Federal and
State Environmental Laws**

This report was prepared under TCRP Project J-5, "Legal Aspects of Transit and Intermodal Transportation Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by G. Martin Cole and Christine M. Brookbank. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

THE PROBLEM AND ITS SOLUTION

The nation's transit agencies need to have access to a program that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to their businesses. The TCRP Project J-5 is designed to provide insight into the operating practices and legal elements of specific problems in transportation agencies.

The intermodal approach to surface transportation requires a partnership between transit and other transportation modes. To make the partnership work well, attorneys for each mode need to be familiar with the legal framework and processes of the other modes. Research studies in areas of common concern will be needed to determine what adaptations are necessary to carry on successful intermodal programs.

Transit attorneys have noted that they particularly need information in several areas of transportation law, including

- Environmental standards and requirements;
- Construction and procurement contract procedures and administration;
- Civil rights and labor standards; and
- Tort liability, risk management, and system safety.

In other areas of the law, transit programs may involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit-equipment and operations guidelines, FTA financing

initiatives, private-sector programs, and labor or environmental standards relating to transit operations. Emphasis is placed on research of current importance and applicability to transit and intermodal operations and programs.

APPLICATIONS

Public transit agencies face the potential for liability under federal and state environmental laws. Liability may be imposed for the costs of cleanup of hazardous wastes on transit-owned property, and the agency may face not only the costs and effort of litigation, but delays in construction and the need for additional staff time, both of which can add to costs. There is also the uncertainty of future costs. An agency may be involved because of its own earlier dumping or disposal activities or because the agency acquired land for development that had been contaminated by a previous owner. This potential for increased costs comes at a time when these agencies must deal with shrinking budgets and expenses of replacing aging infrastructure and equipment.

This report is intended to provide insight into the potential liability of transit agencies for hazardous waste, and methods and policies that would avoid or reduce the potential liability. This publication should be useful to transit administrators, attorneys, planners, engineers, financial officials, development and contracting officers, and contract managers.

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Strategies to Minimize Liability under Federal and State Environmental Laws

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INTRODUCTION

Few laws have created as much concern and confusion for transportation agencies as federal environmental laws, specifically the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Superfund Amendments and Reauthorization Act (SARA). This article will first briefly review federal environmental laws and their underlying policies and look at how both federal and state laws can affect transit agencies. Next, the article will examine the liability of transit agencies under CERCLA in different capacities: as owners, operators, generators, and transporters. In the third section of this article, a survey of transportation agencies will be used to identify both the familiar and the recurring fact patterns that have resulted in inclusion in a lawsuit or ultimate liability for cleanup and the defenses commonly used by transit agencies. Available defenses will be examined and explained, and those potential defenses most useful to transit agencies caught up in environmental litigation will be identified. Defenses examined will include both possible defenses to liability and equitable apportionment of damages among those parties found liable.

The focus of this article will then shift to preventative measures that transit agencies should take to avoid future liability under CERCLA. The preventative measures discussed will be forward-looking with respect to the handling of hazardous waste. Finally, this article will suggest measures to take when a transit agency is named as a potentially responsible party in a lawsuit for cleanup relating to past hazardous waste handling practices. The purpose of the analysis in this article is to give transportation agencies a basic understanding of what CERCLA liability is, how it works, and what it means to the agency. Further, it is to make agencies aware of potential exposure and how to prevent future liability. Armed with this information, transportation agencies will be better prepared to deal with CERCLA and an environmental lawsuit when the situation arises.

A. OVERVIEW OF FEDERAL AND STATE ENVIRONMENTAL LAWS AND THEIR IMPACT ON TRANSIT AGENCIES

1. Overview of Federal Environmental Laws

Since the 1960s the federal government has enacted many environmental laws. The general goal of these statutes is to clean up substances harmful to the environment and the general public. Regulations and cleanup efforts are aimed at ensuring clean air, clean water, and clean soil. In its declaration of national environmental policy, Congress identified the federal government's goal as promoting conditions under which man

and nature can exist in harmony by preserving the environment, while allowing a productive society.¹ Congress also recognized that each person has a responsibility to contribute to the preservation and enhancement of the environment.² In 1967, Congress amended the Clean Air Act to regulate emissions of toxic substances into the air.³ In implementing the Clean Air Act and amendments thereto, the Environmental Protection Agency (EPA) developed national ambient air quality standards for six criteria pollutants: carbon monoxide, sulfur dioxide, nitrogen oxide, ozone, particulate matter, and lead.⁴ The Clean Air Act and the regulations promulgated thereunder provide for both primary and secondary standards and for both short- and long-term standards relating to air quality.⁵ The Clean Air Act also regulates noncriteria pollutants, including arsenic, benzene, and asbestos. Under the new air toxics program, EPA is required to establish emissions standards for sources that have the potential to emit any of 189 listed hazardous air pollutants.⁶

Congress amended the 1956 Clean Water Act in 1965 to require establishment of water quality criteria.⁷ The Clean Water Act and the regulations promulgated thereunder seek to regulate wastewater discharges either directly or through a publicly operated treatment works (POTW).⁸ Also in 1965, Congress enacted the Solid Waste Disposal Act in an attempt to regulate the land disposal of solid wastes.⁹

By the early 1970s, it became readily apparent to Congress that the Solid Waste Disposal Act was woefully inadequate to prevent the improper disposal of solid wastes, especially hazardous wastes. As a result, Congress enacted the Resource Conservation and Recovery Act (RCRA) in 1976 as a means of regulating the management and disposal of solid waste from cradle to grave, or from generation through disposal.¹⁰ RCRA was enacted as a complete replacement of the Solid Waste Disposal

¹ Pub. L. 91-190, Title I § 101 (Jan. 1, 1970) 83 Stat 852; 42 U.S.C.A. § 4331

² *Id.*

³ Pub L 90-148 (Nov. 21, 1967) 81 Stat 485

⁴ 40 C.F.R. Pt 50.

⁵ *Id.*

⁶ 42 U.S.C. § 7412(c)

⁷ Pub. L. 89-234 (Oct. 2, 1965) 79 Stat 908; The Clean Water Act, as amended, is codified at 33 U.S.C. § 1251 *et seq.*

⁸ 40 C.F.R. Pt. 122.

⁹ Pub L. 89-272, Title II (Oct. 20, 1965) 79 Stat 997. *See also*, 40 C.F.R § 258

¹⁰ Pub. L. 94-580 (Oct 21, 1976) 90 Stat 2795. RCRA's implementing regulations may be found at 40 C.F.R. Pts. 124 and 260 through 272

Act. In 1984, RCRA was amended to specifically and comprehensively address the handling and disposal of hazardous wastes.¹¹ Unlike CERCLA, RCRA has prospective application only.

RCRA and the regulations promulgated pursuant thereto regulate both generators¹² and transporters,¹³ as well as treatment, storage, and disposal facilities (TSDF).¹⁴ Subtitle C of RCRA specifically addresses hazardous waste management and implements separate sets of regulations for large quantity generators (greater than 1,000 kilograms per month) and small quantity generators (between 100 and 1,000 kilograms per month). It also conditionally exempts generators that handle less than 100 kilograms of hazardous waste per month.¹⁵ RCRA regulates the manner and length of hazardous waste storage; provides detailed record-keeping requirements relating to the management of hazardous wastes; and requires programs for preparedness and for the prevention of spills, in addition to its land disposal restrictions and regulation of underground storage tanks.

RCRA provides a means for a state, at its option, to operate and enforce its own hazardous waste management regulations. To do so, a state must submit its program to EPA for its review and approval. The state program must be consistent with the federal program and must not be:

1. Unreasonably restrictive of, impede, or ban the free movement of hazardous waste across state boundaries;
2. Unreasonably protective of either human health or the environment; and
3. Less stringent than the federal program.¹⁶

A majority of the states have opted to operate and enforce at least part of the federal program. To the extent a state has taken over administration and enforcement of the federal program, that part of the federal program is inapplicable.¹⁷

In 1986, Congress enacted the Emergency Planning and Community Right to Know Act (EPCRA), which requires facilities to report the storage of hazardous chemicals to various state and community agencies, including the local fire department.¹⁸ Under EPCRA, reporting requirements are triggered when the amount of a hazardous substance equals or exceeds the "threshold planning quantity," as established by regulation, which is different for each such substance.¹⁹ Ten thousand pounds is the standard threshold for most hazardous substances under

federal law. Five hundred pounds is the standard threshold for most extremely hazardous substances. However, the more hazardous the chemical, the lower the reporting threshold will likely be.

In addition to EPCRA, there are also Occupational Safety and Health Administration (OSHA) hazard communication standards relating to workplace safety.²⁰ Among the OSHA requirements applicable to transit agencies are the maintenance of Material Safety Data Sheets (MSDS), use of warning labels on hazardous chemical containers, communication with and training of employees with regard to the dangers of hazardous chemicals, and preparation of a written hazard communication program.²¹

Of particular importance to transporters is the Hazardous Materials Transportation Act (HMTA).²² The HMTA and the regulations promulgated thereunder by the Department of Transportation (DOT)²³ regulate the safe transport of hazardous materials. The HMTA and its regulations include requirements for the classification of materials, packaging, transportation and handling, and incident reporting.

As can be seen by the variety and breadth of coverage of the foregoing federal environmental laws, it is important to recognize the existence and purpose of each to spot issues relating to the operations of any given transit agency. A full exposition of each statute is, however, beyond the scope of this paper. It is important to note that many of the statutes have citizens suit provisions allowing individuals to act as private attorneys general to enforce by injunction the various environmental laws and regulations. Further, the agency responsible for administering the particular environmental statute at issue has authority, in most instances, to impose civil penalties of \$25,000 or more per day per violation.

The statutes previously reviewed are of prospective application only and regulate current management and disposal of pollutants. These statutes leave open the question of what to do with sites that have previously been seriously contaminated through the dumping and other disposal of hazardous substances. This is the subject of CERCLA, as amended by SARA (collectively known as CERCLA). CERCLA has been the basis for many complex and expensive lawsuits. Transit agencies need to have an understanding of what CERCLA is and how it works to effectively prevent or defend such suits. In addition, transit agencies need to understand how state environmental laws can work in conjunction with CERCLA.

¹¹ Pub. L. 98-616 (Nov 8, 1984), 98 Stat. 3221.

¹² 42 U.S.C. § 6922; 40 C.F.R. Pt. 262.

¹³ 42 U.S.C. § 6923; 40 C.F.R. Pt. 263.

¹⁴ 42 U.S.C. § 6924; 40 C.F.R. Pt. 264.

¹⁵ 40 C.F.R. Pt. 262.

¹⁶ 42 U.S.C. § 6926; 40 C.F.R. §§ 123.1 *et seq.*, 271.1 *et seq.*

¹⁷ 1 SUSAN M. COOKE, LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP LIABILITY AND LITIGATION, § 1.03 (1987).

¹⁸ Pub. L. 99-499, Title III (Oct 17, 1986) 100 Stat. 1728, codified at 42 U.S.C. § 11001 *et seq.*

¹⁹ 42 U.S.C. § 11022(b); 40 C.F.R. § 370.20(b)

²⁰ 29 C.F.R. § 1910.1200

²¹ *Id.*

²² 49 U.S.C. § 5101 *et seq.*

²³ 49 C.F.R., Subtitle B, Chapter 1, Subchapter C, Pts 171 through 180

2. Review of Federal Law under CERCLA and the Policies Underlying Those Statutes

Congress passed CERCLA in 1980 for the purpose of providing a federal response to uncontrolled releases of hazardous substances.²⁴ CERCLA can cover any type of industrial, commercial, or noncommercial facility even if other regulations apply to that facility. CERCLA was enacted to provide for funding of extensive environmental regulation through a "Superfund" trust.²⁵ The idea was to fund this trust from taxes on special industries, such as crude oil and commercial chemical industries, rather than use general government revenues.²⁶

Several key objectives were hoped to be accomplished by CERCLA. The first was to develop a comprehensive program to set priorities for the nation's worst waste sites.²⁷ Another objective was to clean up abandoned hazardous waste sites and make responsible parties pay for cleanup whenever possible.²⁸ The most obvious objective was to set up a hazardous waste trust fund (Superfund) to pay for cleanup when responsible parties cannot be found or no longer exist, as well as to respond to emergency hazardous waste situations, including hazardous substance spills.²⁹ Finally, CERCLA has the objective of advancing scientific and technological capabilities in all aspects of hazardous waste management, treatment, and disposal.

SARA was passed by Congress in 1986 to enhance CERCLA. SARA did not alter the basic principles of CERCLA, but it addressed certain issues as a means of strengthening CERCLA.³⁰ One way this was accomplished was by increasing the size of the Superfund. Costs of cleaning up hazardous waste sites were far exceeding estimates made when CERCLA was originally passed.³¹ The Superfund is used to front funds for cleanup of sites. In a cost recovery suit, the potentially responsible parties (PRP) who are eventually found liable must pay their proportionate share back into the Superfund. While the Superfund is available for cleanup costs, the basic tenet remains the same—that the persons who caused the problem should clean it up or pay for such cleanup.

Another way SARA added to CERCLA was by strengthening EPA's authority under CERCLA. For example, SARA gave EPA the authority to mandate cleanup of hazardous waste sites and to enter into settlement agreements.³² SARA also established training

requirements for employees who handle hazardous materials.³³ Congress enacted SARA for two main purposes. First, Congress wanted to define notification responsibilities necessary for the development and implementation of state and local emergency response plans prepared in the event of the release of an extremely hazardous substance.³⁴ Congress also wanted to define the reporting requirements that provide the public with important information on hazardous chemicals in their community.³⁵ EPCRA was enacted as part of SARA to meet these purposes.

Overall, the general goal of CERCLA is to clean up the nation's worst hazardous waste sites with extreme vigor. This is so evident from the legislative history, prompting one author to observe that "fairness to potentially responsible parties ("PRPs") was not a major priority."³⁶ In fact, the government has taken an expansive approach in defining and pursuing PRPs.³⁷ Under CERCLA, a common way PRPs become involved is in a cost recovery suit. Such a suit can be initiated upon the release or threatened release of a hazardous substance from a facility that causes the government to incur response costs.³⁸ Response costs include the cost of investigation, cleanup, and enforcement.³⁹

If a PRP falls within one of the three categories of responsible persons,⁴⁰ that party is strictly liable.⁴¹ Liability may be joint and several, or liability may be apportioned.⁴² A PRP found to be a responsible party will be liable for cleanup costs of hazardous wastes. The Solid Waste Disposal Act definition of "hazardous waste" has been incorporated into CERCLA: "A solid waste, or combination of solid wastes, which because of its quality, concentration, or physical, chemical, or infectious characteristics may—(A) cause...an increase in mortality or...serious...illness; or (B) pose a substantial...hazard to human health or the environment when improperly...managed."⁴³ The characteristics that generally identify substances as hazardous are corrosivity, toxicity,

³³ 42 USC 9660 (Pub. L. No. 99-499 Title II § 209(b)), (Oct 17, 1986) 100 Stat. 1708

³⁴ 2 COOKE, *supra* note 17, § 12 05

³⁵ *Id*

³⁶ 3 COOKE, *supra* note 17, § 14 01[1] at 14-15 Though the legislative history is scant, courts have attempted to effectuate clean up of hazardous waste sites as rapidly as possible "Fairness" is not a priority as demonstrated by the government's expansive approach to its definition of PRPs, thus pulling into the definition of a PRP entities that have been removed from the activities giving rise to CERCLA action by the passage of time or by corporate structure.

³⁷ *Id.* at 14-16.

³⁸ CADE, *supra* note 28, at 5

³⁹ 3 COOKE, *supra* note 17, § 14 01[2][d]

⁴⁰ Discussed in more detail, *infra* Part B

⁴¹ 42 USC 9607(a). *See also* CADE, *supra* note 28.

⁴² *Id*

⁴³ 42 U S C § 6903(5) (Solid Waste Disposal Act) CERCLA incorporates this definition into its definition of a "hazardous substance." *See* 42 U S.C. § 9601(14) and 42 U.S.C 6921(b).

²⁴ 2 COOKE, *supra* note 17, § 12 02[4].

²⁵ *Id*

²⁶ *Id.* § 12 03[4][d]

²⁷ 42 U S C. § 9605(a)(8)(B).

²⁸ DEBORAH L. CADE, *Transportation Agencies as Potentially Responsible Parties at Hazardous Waste Sites*, LEGAL RESEARCH DIGEST 34 (Trans. Research Board), Nov. 1996 at 5.

²⁹ 3 COOKE, *supra* note 17, § 13.01.

³⁰ *Id.* § 14 01[a]

³¹ *See* H R Report No 253, 99th Cong, 1st Sess., pt 1 at 55 (1985).

³² 3 COOKE, *supra* note 17, § 14 01[1]

ignitability, and reactivity.⁴⁴ CERCLA provides some statutory exceptions to what is considered hazardous waste.⁴⁵

CERCLA is the springboard for the National Priorities List (NPL). This list identifies the nation's worst hazardous waste sites and targets them for cleanup.⁴⁶ EPA may use money from the Superfund to commence cleanup and then seek reimbursement, or EPA may initiate a suit for cleanup. The former is known as a cost recovery suit; the latter is for a mandatory injunction. Liability under CERCLA includes the costs of investigating the site to determine whether to place the site on the NPL. Parties can be liable for cleanup costs whether or not those costs have already been incurred by the government. Enforcement costs can also be assessed against the parties.

Transit agencies may become involved in cost recovery suits or suits for cleanup at these sites. Frequently, transit agencies are named as PRPs because of disposal of the agencies' own waste products at the sites. The most problematic waste items for transit agencies are waste oil, waste tires, and used lead-acid batteries. Transit agencies may also become involved in CERCLA suits as an agency transporting waste for its customers. Involvement in CERCLA suits is a concern for transit agencies because the cost of CERCLA suits can be great. CERCLA suits are complex in that they involve a large number of parties and spin-off suits are common when the larger PRPs attempt to spread the cost of cleanup to smaller PRPs. Because the cost of defending these suits is great, and because the potential exposure to liability is great, transit agencies should familiarize themselves with CERCLA and other federal and state environmental laws to reduce the exposure to such liability.

3. Overview of State Law Affecting Hazardous Waste Liability

a. General Overview

All states have some statutory scheme of environmental laws. These statutes may range from comprehensive waste disposal regulations to statutes mirroring RCRA and CERCLA. Many states have their own funds available for certain types of cleanups under certain conditions. Knowledge of what statutes are in effect and how they work together with federal environmental laws is important to transit agencies. These laws can affect agencies as transporters in their business relationships, and they can affect agencies' day-to-day operations. Many states have been given the authority to administer their own RCRA programs, rendering the federal programs, at least in part, inapplicable. Because a state-by-state analysis is beyond the scope of this article, various state provisions will be discussed generally with some specific examples used for illustration.

Many state statutes have provisions similar to those in CERCLA that essentially mirror the federal program. For example, some states have their own priority lists of hazardous waste sites throughout the state.⁴⁷ The states may also rank the sites by priority for cleanup similar to the NPL. Some states also have available their own funds to cover cleanup costs. When such funds are available, the state generally regulates the circumstances under which money may be expended from the fund.⁴⁸ Hazardous substance release notification is required by some states, and some states may have in place a response action plan to clean up releases of hazardous substances.⁴⁹

An area where a state may differ slightly from CERCLA is in what damages may be available. States may allow for recovery of damages to natural resources or may allow for attorney fees. Some states have innovative provisions such as "superlien" provisions, voluntary cleanup programs, or property transfer restrictions. Some of these provisions and restrictions may be important to transit agencies when buying or selling property.

A "superlien" is a lien that can be imposed on property to guarantee payment of cleanup costs.⁵⁰ Some states give priority to the superliens over other claims on the property. Connecticut's superlien statute, for example, provides that a lien shall be placed against real estate on which a spill occurred or from which the spill emanated.⁵¹ Such a lien takes precedence over all transfers and encumbrances recorded within the preceding 3 years of the superlien. New Hampshire gives the superlien priority over all prior encumbrances whether recorded or inchoate.⁵²

Voluntary cleanup programs are part of several states' environmental statutes in order to aid in cleanup and to lessen the burden on state agencies. These programs provide incentives for private parties to clean up a site. State involvement can vary from different degrees of oversight to approval of the cleanup. Participation in such voluntary programs may help shield a participant from future liability.

In Colorado, owners of contaminated property are permitted to submit for approval a cleanup proposal to the Colorado Department of Public Health and Environment (CDPHE).⁵³ Included in the plan must be an environmental assessment of the property, a description of the risk posed to public health and the environment, and a description of relevant cleanup standards. Upon approval, the property owner has 24 months to complete cleanup. As an incentive to promote voluntary cleanup, the CDPHE may not use information given in the

⁴⁷ 3 COOKE, *supra* note 17, § 13 02[1]

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ CONN. GEN. STAT. § 22a-1330.

⁵² N.H. REV. STAT. ANN. § 147-B:10-b.

⁵³ COLO. REV. STAT. § 25-16-301 *et seq.*

⁴⁴ 42 U.S.C. 692(a); 42 U.S.C. 9601(14).

⁴⁵ See discussion on the petroleum exclusion, *infra*, Pt. D 2.

⁴⁶ See 42 U.S.C. 9605 and CADE, *supra* note 28, at 5, 6 and

voluntary cleanup to seek penalties against the owner under environmental laws.

Ohio also has a voluntary cleanup program in place.⁵⁴ Unlike Colorado's program, Ohio's program is not limited to contaminated property owners; instead, any interested person can deal with site contamination and receive a covenant not to sue from the state. After the site meets the applicable cleanup standards, the Ohio Environmental Protection Agency will issue a covenant not to sue and will protect the owner from civil liability associated with further action at the site. Although titled as a "voluntary" program, parties in Ohio can use and benefit from this provision whether or not the action was truly voluntary.⁵⁵ A similar form of contribution protection exists under CERCLA.⁵⁶

Some states impose property transfer restrictions on contaminated sites. Such restrictions may require that a property be "clean" before it may be sold or transferred, or that a notice of contamination must be recorded before the sale or transfer of the property. The Illinois Responsible Party Transfer Act of 1988 (RPTA) covers transfers of real estate presenting potential environmental liability.⁵⁷ Under RPTA, a transferer of property must disclose any environmental defects. In addition, a disclosure document must be recorded with the appropriate county recorder's office and the Illinois Environmental Protection Agency. Violations of RPTA can result in liability for damages, costs, and attorney fees. Indiana has enacted a disclosure law that is very similar to that of Illinois.⁵⁸

Deed notice requirements are part of other environmental property transfer laws. Massachusetts requires that notice of any hazardous waste disposal must be recorded with the Registry of Deeds prior to transfer of the land.⁵⁹ Texas requires that prior to disposal of industrial solid waste or municipal hazardous waste, a statement describing the planned disposal must be recorded in the county deed of records.⁶⁰ The owner of the property used as a hazardous waste disposal facility must record in the deed to the property that it was used for the purpose of hazardous waste disposal.⁶¹

b. Dealing With Used Items--Batteries, Tires, and Oil

Dealing with customers' waste that is transported is not one of the greatest concerns for transit agencies. Instead, the greatest concern is what to do with the transit agency's own waste products. For example, questions arise in the context of how to dispose of used vehicle batteries, worn-out tires, and used oil. This is a legitimate

concern, especially for agencies that repair and service their own vehicles.

RCRA Regulation Of Reclaimable Wastes.--Certain reclaimable waste products commonly generated by transit agencies are exempt from RCRA regulations on hazardous waste if the wastes are reclaimed and certain other conditions are met. Thus, the reclamation of spent leadacid batteries, industrial ethyl alcohol, and used oil are exempt from regulation under RCRA so long as the materials are properly reclaimed. The fact that RCRA may provide an exemption to these materials if reclaimed under certain circumstances is not, however, the end of the inquiry. As stated earlier, many states have adopted their own hazardous waste programs, which may not be less stringent than the federal RCRA program. The RCRA standards should be viewed as minimum standards subject to state enhancement. Therefore, a resort to state law is always going to be required to make a final determination concerning the proper disposition of these materials.

Reclamation Of Spent Lead-Acid Batteries.--One item of environmental concern to transit agencies is the disposal of spent lead-acid batteries used in trucks, buses, and other vehicles. Such batteries contain lead and sulfuric acid, the disposal of which can be harmful to the environment. Under RCRA regulations, generators and transporters of spent lead-acid batteries are not regulated so long as the batteries are reclaimed.⁶² Thus, it is important for a transit agency to use a properly licensed reclaimer, who may simply be the local retailer, in disposing of its spent lead-acid batteries. If properly reclaimed, the spent batteries will not be considered a RCRA hazardous waste.⁶³

For this reason, most states prohibit disposal of leadacid batteries and require recycling. Typically, an agency must take the used battery to one of three places: a battery recycling center, a battery retailer, or a state approved lead smelter. A recycling center or lead smelter will remove the harmful lead for reuse. A retailer may only be required to take used batteries in a number that matches the number of new batteries purchased. The retailer is then responsible for ensuring that the batteries go to the proper recycling center.

Reclamation Of Industrial Ethyl Alcohol.--Waste industrial ethyl alcohol, widely used as a solvent, is generally considered to be a RCRA hazardous waste as a result of its characteristic ignitability and/or its potential contamination through mixture with other hazardous wastes.⁶⁴ So long as waste industrial ethyl alcohol is reclaimed, however, it is excluded from RCRA regulation.⁶⁵ *Reclamation of Used Oil.*--On September 10, 1992, EPA promulgated regulations governing the management of used oil that is reclaimed and recycled. If the

⁵⁴ OHIO REV CODE ANN. § 3746 01 *et seq.*

⁵⁵ *Id.*

⁵⁶ 42 U S C. § 9622(f)

⁵⁷ ILL. REV STAT. ch 765, para 90/1-90/7.

⁵⁸ IND CODE. ANN §§ 13-7-22 5-1 through 22.5-22.

⁵⁹ MASS. GEN L. ch. 21C, §§ 1-14.

⁶⁰ 30 TEX. ADMIN CODE § 335.5.

⁶¹ *Id* at § 335 220.

⁶² 40 C.F.R. Part 266, Subpart G; 40 C.F.R § 261.6(a)(2)(iv) (1996).

⁶³ *Id.*

⁶⁴ 50 Fed Reg. 614, 649 (Jan 4, 1985).

⁶⁵ 40 C.F.R. § 261.6(a)(3)(i) (1996).

management standards set forth in the regulations are met, the used oil is exempt from RCRA hazardous waste regulation.⁶⁶ For purposes of the used oil management standards, "used oil" is defined as any oil refined from crude oil or any synthetic oil that has been used and, as a result of such use, has been contaminated by physical or chemical impurities.⁶⁷ The used oil may not, under most circumstances, be mixed with any other hazardous waste without losing its exempt status under the regulations.⁶⁸

The used oil generator standards require a generator to store used oil in a tank or other appropriate container regulated under Parts 264 and 265 of 40 C.F.R. The containers and tanks must not leak and must be in good condition. The containers, tanks, and pipes are subject to labeling requirements.⁶⁹

Upon detection of a release or spill of used oil, a generator must take certain steps to stop, contain, and clean up the release, as well as repair or replace any faulty tanks or containers that caused the release.⁷⁰ Underground storage tanks (UST) have separate requirements upon detection of a release.⁷¹ Used oil generators are, in addition to these requirements, still subject to the spill prevention control and countermeasures set forth at 40 C.F.R., Part 112, and the UST standards in 40 C.F.R., Part 280.⁷²

Used oil generators must, except under certain limited circumstances, ensure that their used oil is transported for reclamation by a transporter with an EPA identification number.⁷³ One such exception is for self-transporting small quantities of used oil to aggregation points owned by the generator or used oil collection centers.⁷⁴ Used oil collection centers must be licensed by a state or local government to manage used oil.⁷⁵

To qualify for the exception for self-transportation of small quantities to aggregation points owned by the generator, the following requirements must be met:

1. The generator must own the transport vehicle or employ the owner.
2. No more than 55 gallons of used oil may be transported at any one time.
3. The aggregation point must be owned or operated by the generator.⁷⁶

⁶⁶ 57 Fed. Reg. 41575 (1992).

⁶⁷ 40 C.F.R. § 279.1.

⁶⁸ 40 C.F.R. § 279.10

⁶⁹ 40 C.F.R. § 279.22(a-c)(1996).

⁷⁰ 40 C.F.R. § 279.22(d).

⁷¹ See 40 C.F.R., Pt 280, Subpt. f.

⁷² 40 C.F.R. § 279.22.

⁷³ 40 C.F.R. § 279.24

⁷⁴ 40 C.F.R. § 279.24(a) (used oil collection center); 40 C.F.R. § 279.24(b) (aggregation points).

⁷⁵ 40 C.F.R. § 279.24(a)(3).

⁷⁶ 40 C.F.R. § 279.24(b).

Used oil aggregation points are subject to the used oil generator management standards.⁷⁷ Aggregation points may also accept do-it-yourself oil.⁷⁸

Generators who transport their own used oil other than in compliance with the small quantity exceptions cited above must comply with the transporter management standards.⁷⁹ Those standards apply to anyone who transports used oil, collects and transports used oil, or owns or operates a used oil transfer facility.⁸⁰

While the foregoing items are exempt from regulation under the federal RCRA statutes and regulations if properly reclaimed, the inquiry does not end there, as many states have statutory analogues to RCRA that either render the RCRA regulation inapplicable or add additional requirements. As a result, it is important that transit agencies be alert to state laws both where they are located and where they dispose of such items. For example, in addition to the RCRA reclamation requirements, states may place similar disposal requirements on other vehicle fluids, such as anti-freeze, brake fluid, and automatic transmission fluid.

Another area of concern for transit agencies is the disposal of waste tires, which are tires that because of wear, damage, or defect are not repairable or retreadable. Many states prohibit the disposal of whole tires in landfills. Tires may need to be shredded or split into small particles for disposal. As with used batteries, waste tires may be traded in with the purchase of new tires, and the retailers would then be responsible for proper disposal or recycling.

Disposal of used or waste products from routine maintenance of vehicles should be examined with both federal and state laws in mind. Improper disposal of batteries, tires, oil, and other fluids could trigger an agency's involvement in a cleanup of a particular site under federal laws. Even proper disposal of such items under RCRA does not insulate a party from potential CERCLA liability because RCRA compliance is not a defense under CERCLA. Additionally, state fines can be levied. Improper disposal of used batteries, for example, can bring fines of up to \$1,000 per battery in some states. Fines can also be imposed on a per tire basis or for quantities of used oil improperly disposed. For this reason, transit agencies should research and know the state laws of where they are located or where they do business.

The state statutes discussed above are by no means an exhaustive or thorough examination of state environmental laws. These illustrations should help alert transit agencies to some of the state environmental laws and regulations in addition to federal laws. In states that have environmental regulations similar to or narrower in scope than CERCLA, agencies may be able to use CERCLA as their guide through clean up and litigation. However, an agency should take care to check for additional

⁷⁷ 40 C.F.R. § 279.32(b).

⁷⁸ 40 C.F.R. § 279.32(a).

⁷⁹ 40 C.F.R. § 279.20(b)(1).

⁸⁰ See 40 C.F.R. § 279.40-47.

state requirements. Some, like the voluntary cleanup provisions, could be greatly beneficial. Others, like property transfer restrictions, may cause problems in property sale and acquisition. Day-to-day operations could be affected by recycling and disposal requirements for used batteries, tires, and oil. Whatever the case may be, transit agencies need to look at federal and state laws together to take the most beneficial path toward cleanup or avoiding liability.

c. Underground Storage Tanks And Above-Ground Storage Tanks

As part of their normal business operations, many transit agencies keep USTs or above-ground storage tanks (AST). Typically, agencies use these tanks for the storage of oil or fuel used in servicing trucks, buses, or other vehicles. ASTs are tanks completely above the ground, and USTs are tanks partially or entirely below the ground and not in a basement area.

The problem agencies face with ASTs and USTs is that eventually even a well-constructed tank will develop leaks through pinholes or through areas that have corroded over time. This can cause contamination of the soil and any ground or surface waters at or near the tank site.

Most states regulate ASTs, USTs, or both. A common way states regulate ASTs and USTs is through registration requirements. Typically, each tank must be registered with the state's environmental agency or other governing body. Along with registration of tanks, the owner may be required to pay a registration fee plus annual fees. These fees are used to fund the state's AST or UST funds.

Tank owners should keep themselves in compliance with registration requirements and current in payment of fees. Tank owners who are in compliance may then be entitled to state funds to help pay for cleanup when a spill or a leak is detected from the owner's tanks. Availability of state funds is greatly beneficial, especially to small-business owners for whom large environmental cleanup costs could result in bankruptcy.

States may also have provisions regulating the transfer of property where ASTs and USTs are located. States may require that all tanks on the property be registered and up-to-date on payment of fees before transfer of the property is permitted. Owners who fail to register tanks or who fail to pay the required fees may be subject to hefty fines. These delinquent owners may be unable to sell the property without spending a large amount of money to bring the tanks up-to-date. For this reason, many properties with nonregistered tanks have been abandoned. The large amount of fees and penalties makes the property unattractive to prospective buyers. States have addressed this problem by making certain allowances such as grace periods to register tanks.

Transit agencies need to be aware of state AST and UST regulations both for tanks on property the agency already owns and for tanks on property the agency buys. If the agency is in compliance, state funds would be

greatly beneficial when a leak occurs. If not in compliance, an agency may bear substantial fines.

d. State Laws

The information in Table 1 will aid agencies in identifying whether or not the agency should conduct research into state laws regarding waste disposal of USTs and ASTs. The table indicates areas where the state has enacted laws governing the disposal of used batteries, waste tires, and waste oil. Also indicated are states that regulate USTs and ASTs. State cleanup funds are available in most states under some circumstances. Although this information is not intended as a substitute for research of state law and is subject to change, it should give agencies some indication of what areas the agency needs to research further.

4. Impact on Transit Agencies

Transit agencies need to be aware not only of federal environmental laws, but also of environmental laws of the states in which they are located and the states to which any waste is transported. As discussed above, the ramifications of federal and state laws can be farreaching, and liability for cleanup can run into the millions of dollars. For this reason, transit agencies should understand how these laws may affect them.

Depending upon the agency's level of involvement with hazardous materials, it could be held liable as an owner/operator, as a generator, or as a transporter.⁸¹ An agency may be a generator by virtue of disposing of its own hazardous waste. An agency may also be liable if it owns or acquires land found to be contaminated. Transporter liability may attach to agencies who transport hazardous materials. If an agency finds any of the fact scenarios discussed in Section C applicable to it, that agency should examine the environmental laws in its locale, as well as the federal environmental laws discussed throughout this article.

B. LIABILITY OF TRANSIT AGENCIES UNDER CERCLA

The purpose behind CERCLA was to create a broad definition of parties who may be liable for cleanup costs, and courts have interpreted CERCLA in line with that purpose. Liability under CERCLA is strict. Therefore, if a transit agency falls within the broad definition of responsible parties, that agency is liable for cleanup costs absent a recognized defense.⁸² Three categories of responsible parties are defined by CERCLA: (1) past and present owners and operators of a facility, (2) off-site generators who arranged for the transport of hazardous substances to a facility, and (3) transporters of hazardous

⁸¹ An excellent discussion of transit agency liability is found in *Transportation Agencies as Potentially Responsible Parties at Hazardous Waste Sites* by Deborah L. Cade, *supra* note 28.

⁸² Defenses to liability and defenses used in the apportionment of damages are discussed *supra*, Section D.

TABLE 1. LAWS GOVERNING DISPOSAL OF USED BATTERIES, TIRES, AND OIL.

STATE	USED BATTERIES	WASTE TIRES	WASTE OIL	UST	AST	FUNDS
Alabama			X	X	X	X
Alaska			X	X		X
Arizona	X	X	X	X		X
Arkansas	X	X	X	X	X	X
California	X	X	X	X		X
Colorado		X	X	X		X
Connecticut	X	X	X	X	X	X
Delaware			X			
District of Columbia			X	X		X
Florida	X	X	X			X
Georgia	X			X		
Hawaii	X	X	X	X		X
Idaho	X					X
Illinois	X	X	X	X		X
Indiana	X	X	X	X	X	X
Iowa	X	X	X	X	X	X
Kansas			X	X	X	X
Kentucky	X	X	X	X		X
Louisiana	X	X	X	X		X
Maine	X					X
Maryland	X	X	X	X		X
Massachusetts			X			X
Michigan	X	X	X	X		X
Minnesota	X	X	X	X	X	X
Mississippi	X	X		X		
Missouri	X	X	X			X
Montana			X	X	X	X
Nebraska	X	X	X	X	X	X
Nevada	X					
New Hampshire	X					
New Jersey	X					
New Mexico		X	X	X		X
New York	X	X	X	X		X
North Carolina	X		X			X
North Dakota	X					
Ohio			X	X		
Oklahoma	X	X	X	X	X	X
Oregon	X		X			
Pennsylvania				X		X
Puerto Rico						X
Rhode Island	X	X	X	X		
South Carolina	X		X	X		X
South Dakota	X	X	X	X	X	X
Tennessee	X	X	X	X		X
Texas	X	X	X	X	X	X
Utah	X		X	X		X
Vermont	X			X		
Virgin Islands			X			
Virginia	X					X
Washington	X		X	X		X
West Virginia			X	X		X
Wisconsin	X		X			X
Wyoming	X		X	X	X	X

substances to a facility.⁸³ The lines distinguishing these three categories of responsible parties are sometimes blurry. In addition, certain activities can create liability for a transit agency under more than one category. For these reasons, understanding the differences in the definitions of responsible parties is important.

1. Liability as an Owner/Operator

CERCLA defines "owner and operator" as any person owning or operating the facility that is the subject of the cleanup.⁸⁴ This circuitous definition offers little in the way of guidance, so courts have had to interpret the statute to define the scope of "owner and operator." Courts have broadly interpreted the owner and operator language in line with CERCLA's remedial purpose.

CERCLA liability can attach to current owners and operators of the property regardless of the current owner/operator's role, if any, in contributing to the hazardous substances at the site.⁸⁵ Issues that have arisen in this regard include what quality of an interest in the property must be held to be considered an owner. Generally, an owner is one who holds the land in fee simple, but such is not always the case.⁸⁶

The statute uses the term "owner and operator," but in interpreting the phrase, courts seem to treat the phrase in the disjunctive rather than the conjunctive. Thus, "owner and operator" has been applied for practical purposes as owner or operator. Hence lies the possibility that a person with less than a fee simple title to property can be held as an owner and operator of a facility. When imposing CERCLA liability as an owner and operator on an individual with less than a fee simple interest, courts look to the issue of control of the deposit of hazardous substances on the property.⁸⁷ Courts examine both actual control of the disposal of hazardous substances and the ability to control.⁸⁸

Under this line of reasoning, passive landlords who did nothing to prevent the dumping of waste will be held liable, as will the tenant who exercises control over the property even though the tenant holds no true "ownership" interest.⁸⁹ This scenario has been extended to tenants who sublet the property and the subletter who disposes of waste on the property.⁹⁰ Current owners of property who exercise no active participation in disposal

activities may be held liable as owners, but not as operators.⁹¹ Even employees of companies and shareholders of corporations, under certain circumstances, may be held liable.⁹²

CERCLA liability extends to former owners and operators of the property; however, the statute expressly applies only to those prior owners and operators who owned or operated the facility at the time the disposal of hazardous substances occurred.⁹³ The problem with this exclusion is that CERCLA defines "disposal" very broadly to include the discharge, deposit, injection, dumping, spilling, leaking, or placing of the hazardous materials such that the materials may enter the environment.⁹⁴ Although active placement is not necessarily required, at least one court has construed the CERCLA definition of disposal to require some affirmative action so that passive migration of the substances will not trigger liability.⁹⁵

As noted earlier, courts treat the "owner and operator" language to mean owner or operator. A party with no ownership interest in the property may be held liable as an operator. Operator liability is imposed when a party directs the storage and disposal of hazardous waste on the site or when the party actually deposits the waste on the site; the liability may extend to a contractor who excavates a contaminated site and uncovers or spreads contamination.⁹⁶ In addition, a party involved in a joint venture with another party who directs disposal or deposit of hazardous waste may be held liable as an operator.

Transit agencies can unknowingly put themselves in the position of being potentially responsible as an owner and operator or as a generator. Any hazardous waste problems on an agency's property could raise liability as an owner. Another potential situation for owner liability is when the transit agency acquires new land for expansion, such as widening a highway, extending an airport's runway, or constructing a new transit facility. If those properties acquired are contaminated when purchased, the agency may have to defend against CERCLA litigation as a current owner and operator.

2. Liability as a Generator

The second classification for PRPs under CERCLA is as a generator of hazardous substances, a person who arranges for the disposal or treatment of hazardous substances

⁸³ See 3 COOKE, *supra* note 17, § 14.01[2][b].

⁸⁴ 42 U.S.C.A. § 9601(20)(A).

⁸⁵ 42 U.S.C.A. § 9607(a)(1) (To hold a current owner liable, CERCLA does not require hazardous substances to have been disposed of during the current owner's ownership.)

⁸⁶ 3 COOKE, *supra* note 17, § 14.01[4][c][iii]. Excluded from the definition of "owner" are persons with only an indicia of ownership, such as to protect a security interest. See 42 U.S.C. § 9601(20)(A).

⁸⁷ *Id.* § 14.01[4][c][ii][A].

⁸⁸ *Id.*

⁸⁹ *Id.* See also *United States v. SCRDI*, 653 F.Supp.984 (D.S.C. 1984).

⁹⁰ *Id.*

⁹¹ *City of Phoenix, Ariz v Garbage Services Co.*, 816 F. Supp. 564 (D. Ariz 1993).

⁹² See generally Annotation, Liability of Individual Shareholder or Director of Corporation that Owned Contaminability Facility in Action pursuant to CERCLA, 122 ALR Fed. 321.

⁹³ 42 U.S.C. § 9607(a)(2).

⁹⁴ 42 U.S.C §§ 6903(3), 9601(29).

⁹⁵ *United States v. CDMG Realty Co.*, 96 F.3d 706 (3d Cir 1996).

⁹⁶ CADE, *supra* note 28, at 7 & 8; *United States v. SRDI*, 21 Env't Rep. Case (BNA) 1577 (D.S.C 1984).

that the person owned or possessed.⁹⁷ The definition continues and extends liability to any person who by contract or by agreement otherwise arranged for disposal or treatment, or arranged with a transporter for disposal or treatment, of hazardous substances owned or possessed by such person.⁹⁸ The key word in this definition is "arrange." CERCLA does not define "arrange," but similar to most CERCLA provisions, courts have interpreted the term very broadly. Courts have construed language in the definition of a generator expansively to give effect to the congressional intent of charging all who participated in the generation and disposal of hazardous waste with the cleanup costs.⁹⁹ Liability for environmental damage attaches only to parties who transact in hazardous substances for disposal or treatment.¹⁰⁰

Courts may decline to find liability as a generator if the person is selling a useful product.¹⁰¹ For example, one court found no liability for a company that manufactured and sold polychlorinated biphenyl's (PCBs) to another company as a dielectric fluid for use in electrical equipment.¹⁰² Sale of a product *per se* is not a disposal arrangement giving rise to liability. Instead, to impose liability, additional evidence must show that the transaction included an arrangement for ultimate disposal.¹⁰³ For this reason, courts will scrutinize the facts carefully when this argument is made to avoid liability as a generator. A party cannot contract away responsibility for hazardous waste disposal by simply calling itself a supplier or referring to the transaction as a sale.

As with owner/operator liability, generator liability is a fact-specific issue. The key is knowledge of the ultimate disposal. Some sort of affirmative action regarding disposal of hazardous waste is required before liability will be imposed. One court has held that liability ends with the party who made the crucial decision of how hazardous substances were to be disposed of or treated.¹⁰⁴

However, courts will not apply the above rule to allow parties to use purposeful ignorance to escape liability.¹⁰⁵ Because consent decrees are so commonly used in CERCLA cases, no court has dealt with this issue in detail. But the important aspect of generator liability is the

act of arranging for the disposal of hazardous waste rather than the specific arrangement made. This suggests that a generator cannot escape liability even if the waste ends up at an unexpected location, such as a transporter choosing a different location or illegally dumping the waste.¹⁰⁶ In such a situation, both the generator and the transporter of the waste can be held liable as generators. A transporter may also be held liable as a generator if the handling of the hazardous substances changes or worsens the nature of the substance. An example would be mixing wastes from two or more generators.

Transit agency operations can also create liability as a generator of hazardous waste. This can occur when the agency has to dispose of its own waste such as used batteries or waste tires, or when the agency attempts to recycle used oil. Because the term "arrange" is key in the definition of generator, an agency contracting to dispose of hazardous materials could find itself liable as a generator. Further, the fact that an agency complied with all current laws and regulations at the time of disposal is irrelevant to establishing liability under CERCLA, but may become relevant in the apportionment phase of the litigation.

3. Liability as a Transporter

The third class of PRPs defined by CERCLA is a transporter, who is any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such a person from which there is a release or threatened release.¹⁰⁷ Courts have interpreted this definition literally, holding a person liable as a transporter if the person selects the disposal site.¹⁰⁸ The transporter does not have to be the only person who selected the site, nor does the transporter have to have the final say in selection of the site. Courts will look for substantial input by the transporter in selecting the site and the decision maker's reliance on the alleged transporter's expertise in making the selection.¹⁰⁹ Courts have rejected an agency defense that common carrier status insulates it from liability if it selects the site.¹¹⁰ Such a view by courts may be based on the idea that a sophisticated transporter is frequently in the best position to ensure proper disposal of waste.¹¹¹

On the contrary, when a transporter delivers hazardous substances to a location selected by another, the transporter is not liable for releases at the facility, but is liable for any releases occurring during the period of transportation. For example, a transporter will be liable

⁹⁷ 42 U.S.C. § 9607(a)(3).

⁹⁸ *Id.*

⁹⁹ *See, e.g., Arizona v. Motorola, Inc.*, 774 F. Supp. 566 (D. Ariz. 1991) (holding that a disposal occurred even though hazardous materials were placed in a landfill in accordance with applicable regulations at that time).

¹⁰⁰ *Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp. 651, 654 (N.D. Ill. 1988) *aff'd* 861 F.2d 155.

¹⁰¹ *See California v. Summer Del Caribe, Inc.*, 821 F. Supp. 574 (N.D. Cal. 1993); *United States v. Westinghouse Elec. Corp.*, 22 Env't Rep. Cas. (BNA) 1230 (S.D. Inc. 1983); *Florida Power and Light Co. v. Allis-Chalmers Corp.*, 893 F.2d 1313 (11th Cir. 1990).

¹⁰² *Florida Power*, 893 F.2d at 1319.

¹⁰³ *Id.*

¹⁰⁴ *Jersey City Redevelopment Auto. v. PPG Indust.,* 655 F. Supp. 1257, 1260 (D.N.J. 1987).

¹⁰⁵ 3 COOKE, *supra* note 17, § 14.01[4][d][ii], pp. 14-18 *et seq.*

¹⁰⁶ *Id.*

¹⁰⁷ 42 U.S.C. § 9607(a)(4).

¹⁰⁸ *Tippins, Inc. v. USX Corp.*, 37 F.3d 87, 94 (3d Cir. 1994).

¹⁰⁹ *Id.*

¹¹⁰ *United States v. Hardage*, 761 F. Supp. 1501 (W.D. Okla. 1990); 42 U.S.C. § 9601(20)(B) and (C); 3 COOKE, *supra* note 17, § 14.01[4][e].

¹¹¹ *Tippins*, 37 F.3d at 95.

for spills or leaks as a result of improper loading or as a result of an accident en route.¹¹²

The pitfalls and complications of CERCLA are a source of great concern for transit agencies. Transit agencies need to know what situations are going to create liability as an owner/operator, generator, or transporter, and what situations will not result in liability. What agencies need to know is what to watch for and how to prevent future lawsuits. It is important for agencies to note that in addition to CERCLA liability, other federal and state environmental laws may impose additional responsibilities on agencies.

C. SURVEY OF TRANSIT AGENCIES THAT HAVE BEEN SUED UNDER CERCLA AND RELATED STATE ENVIRONMENTAL LAWS

As part of this research, a survey of transit agencies was conducted to identify any troublesome and recurring fact patterns that affect agencies with regard to environmental issues. Specifically, the focus was on fact patterns that give rise to inclusion in lawsuits and any fact patterns that give rise to the defenses available to parties who find themselves embroiled in environmental litigation. Of the more than 400 surveys sent out, approximately 6 percent of recipients (23 agencies) responded. This section is devoted to analyzing the actual issues that transit agencies are currently facing.

1. Questionnaire

After asking the identity of the agency and its location, the questionnaire asked if the agency had ever been sued or otherwise made a party in a state or federal environmental action. Upon an affirmative answer, the survey requested the agency to identify the court in which the action was brought and what fact scenario led up to the agency's inclusion in the suit. Participants were then asked to describe any defenses against liability that were used. The survey also requested a report of the outcome or resolution of the action. Finally, the survey asked transit agencies to identify the issues of main concern for the agency with regard to environmental laws.

2. Fact Patterns Producing Liability or Inclusion in Lawsuits

Only 8 of the 23 respondents to the survey have been or are currently involved in environmental litigation. Of those agencies, half indicated that the disposal of their agency's waste products was the basis for environmental lawsuits. Thus, the survey results indicated that transit agencies were more likely to be named as PRPs in a CERCLA litigation as a generator, than as either an owner/operator or a transporter. Specifically, agencies cited the disposal of used lead-acid batteries from agency vehicles and the disposal of used oil. Perhaps because of this, disposal of such items is a main area of concern for

agencies. Typically, the lawsuits were cost-recovery suits brought against the agency and numerous other contributors to a waste site. One respondent to the survey indicated that an underground storage tank leak was the basis for a cleanup action. Five respondents were sued under CERCLA, and three respondents were sued pursuant to the California Environmental Quality Act (CEQA), a state law. CEQA is an area of concern for California agencies because of its extensive requirements of environmental studies and environmental impact reports.

3. Fact Patterns Giving Rise to Defenses to Liability

Many of the same defenses were indicated by the respondents. For example, in CERCLA actions, agencies have argued that the government failed to comply with CERCLA requirements for a cost-recovery suit. Agencies have also argued that the government exceeded its authority for cleanup costs. The underlying argument with this defense is that the government did not pick the most cost-effective method of cleaning up the site. Because the majority of all CERCLA cases end in settlement, gauging the effectiveness of such defenses is difficult. As discussed earlier, because the underlying purpose of CERCLA is to make sure that the sites get cleaned up, courts will take a broad view of what constitutes reasonable costs undertaken by a party initiating cleanup of a site.¹¹³ For this reason, an expensive cleanup method may be found reasonable, even if a less expensive alternative is available.¹¹⁴

Respondents also indicated defenses asserted to limit any apportioned amount of cleanup costs. For example, arguments that the harm was divisible were used to avoid joint and several liability. Other agencies argued that their contribution to the site was *de minimus*, or very slight, so that their portion of cleanup costs should be small. The defense most often asserted by agencies accused of violating CEQA was compliance with the law.

D. DEFENSES THAT MAY BE ASSERTED BY TRANSIT AGENCIES AGAINST LIABILITY

Once the court makes the determination that an agency is a PRP, avoiding CERCLA liability is difficult. Parties within the definition of responsible parties are strictly liable unless they can successfully raise an affirmative defense.¹¹⁵ The only statutory defenses to liability provided by CERCLA are an act of God,¹¹⁶ an act of war,¹¹⁷ or an act or omission of a third party.¹¹⁸ The

¹¹³ See, e.g., *In re, Bell Petroleum Serv., Inc.*, 3 F.3d 889 (5th Cir. 1993)

¹¹⁴ *Id.*

¹¹⁵ BRIAN J. PINKOWSKI, *Simplifying CERCLA Defenses to Liability*, THE URBAN LAWYER, Vol 28, No 2, Spring 1996 at 219.

¹¹⁶ 42 U.S.C. § 9607(b)(1).

¹¹⁷ 42 U.S.C. § 9607(b)(2).

¹¹⁸ 42 U.S.C. § 9607(b)(3)

¹¹² See *Environmental Trans. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503 (7th Cir 1992)

third party upon whose act or omission this defense is based must have no connection, contractual or otherwise, with the party seeking to avoid liability.¹¹⁹ This means that a third party cannot be an employee or one contracted to dispose of the party's wastes. Courts will not allow parties to contract away liability to make this defense available.¹²⁰

Courts are reluctant to allow additional affirmative defenses at this stage of the litigation. Courts seem more receptive to equitable defenses during the apportionment stage,¹²¹ but some recent case law may indicate a change in this area. For this reason, transit agencies should consider an initial affirmative defense to liability. Some defenses to be considered include an Eleventh Amendment immunity of states, the petroleum exclusion found in CERCLA, the service station dealers exemption found in CERCLA, a condemnation defense to the voluntary ownership requirement, and a "due diligence" or "innocent landowner" argument. Other defenses such as questioning CERCLA's retroactivity and whether CERCLA violates the Commerce Clause of the U.S. Constitution have met with little success. This section examines each of these potential defenses to liability.

1. Eleventh Amendment Immunity of States and "Arms of the State" from Private Suits

The first defense that may be available against liability is available only to transportation agencies that are state agencies. For those agencies, an argument can be made that the Eleventh Amendment of the U.S. Constitution shields the agency from a federal court claim or counterclaim brought by private individuals. In determining whether an entity is immune from suit under the Eleventh Amendment, courts will consider what state law calls the entity, whether the entity has political and financial autonomy, and whether the entity operates like a political subdivision. Generally, Eleventh Amendment immunity will only be extended if the agency is an "arm of the state" and not a separate entity or political subdivision.¹²² The Eleventh Amendment provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."¹²³ Thus, a state is generally immune from suits brought by private entities or individuals in federal court. Courts have construed this restriction to bar federal

¹¹⁹ *Id.*

¹²⁰ *United States v. A & F Materials Co.*, 582 F. Supp. 842 (S.D. Ill. 1984); 3 COOKE, *supra* note 17, § 14.01[4][d][ii] at 14-119.

¹²¹ *See Pt. E supra.*

¹²² *Daddow v. Carlsbad Minn Sch. Dist.*, 898 P.2d 1235 (N.M. 1995), *cert. denied* 133 L. Ed.2d 700, and cases cited therein.

¹²³ U.S. Const., Amend 11.

jurisdiction in cases in which a citizen sues the citizen's own state.¹²⁴

Federal jurisdiction over suits of unconsenting states was not contemplated by the Constitution when establishing the United States' judicial power.¹²⁵ Two exceptions to state immunity from suit by private citizens exist. The first is when a state consents to suit.¹²⁶ The second is when Congress abrogates state sovereign immunity by clearly expressing an intent to do so.¹²⁷ It is the second of these two exceptions that is currently in a state of flux with regard to CERCLA litigation, as many of the CERCLA cost recovery suits are brought by private entities or individuals.

Previously, the U.S. Supreme Court in *Pennsylvania v. Union Gas*,¹²⁸ a plurality opinion, ruled that Congress expressed a clear intent to abrogate state sovereign immunity and allow private suits when it passed CERCLA. In a more recent Supreme Court decision, *Seminole Tribe of Florida v. Florida*, the court revisited the issue of congressional abrogation of Eleventh Amendment immunity and explicitly overturned the previous decision.¹²⁹ This case did not specifically address CERCLA, but it overturned the basis upon which private citizens had previously been permitted to sue states under CERCLA, namely under the Commerce Clause.¹³⁰

In light of this decision, one district court has dismissed a private citizen's CERCLA claims against a state. In *Prisco v. New York*,¹³¹ the court held that state sovereign immunity applies unless abrogated by Congress under the Fourteenth Amendment or waived by the state itself. The court found that neither had occurred in this case, and dismissed all of plaintiffs CERCLA claims against state defendants. However, the plaintiff had also alleged claims under RCRA; the court found that these claims could go forward, as they were for "prospective injunctive relief"¹³² and therefore were permissible under the *Ex parte Young* doctrine.¹³³ The court noted that the CERCLA claims "cannot survive under the *Ex parte Young* exception to sovereign immunity" since the CERCLA claims were "limited to damages as allowed by [42 USC] section 9607."¹³⁴ The court distinguished the "private enforcement action" allowed the plaintiff under

¹²⁴ *Prisco v. New York*, 1996 U.S. Dist. LEXIS 14944, at *43 (S.D.N.Y. Oct 9, 1996), 43 ERC (BNA) 1964.

¹²⁵ *Seminole Tribe of Florida v. Florida*, 517 U.S. , 116 S Ct 1114, 1122, 134 L. Ed 2d 252, 265 (1996); *Hans v Louisiana*, 134 U.S. 1, 15 (1890); *Prisco*, 1996 U.S. Dist LEXIS at *43, 43 ERC (BNA) 1964.

¹²⁶ *Prisco*, *supra* note 124.

¹²⁷ *Id.*

¹²⁸ 491 U.S. 1, 109 S. Ct. 2773, 105 L. Ed. 2d 1 (1989).

¹²⁹ 517 U.S. at ___, 116 S Ct at 1128, 134 L. Ed. 2d. at 273.

¹³⁰ *Id.*

¹³¹ *Supra*, note 124.

¹³² *Id.* at 51.

¹³³ 209 U.S. 123, 52 L. Ed 714, S. Ct. 441 (1908)

¹³⁴ *Prisco*, *supra*, at 51, 52

RCRA's citizen suit provision from the "detailed remedial scheme for the enforcement against a State of a statutorily created right" at issue in *Seminole Tribe*.¹³⁵

Thus, transportation agencies that are "arms of the state" may have a viable defense to a suit for apportionment or recoupment brought by private parties. By claiming the agency is immune from suit under the Eleventh Amendment, the agency may be able to protect itself from even initial liability under CERCLA.

2. The Petroleum Exclusion

CERCLA contains certain exclusions from its definition of hazardous substances. One such exclusion is the petroleum exclusion. CERCLA excludes from its definition of hazardous substances:

[P]etroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance .and the term does not include natural gas, natural gas liquids, liquified natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas)¹³⁶

To fall within the exclusion, use of the petroleum must not result in *elevated* levels of hazardous substances.¹³⁷ Stated another way, the used oil must not contain higher levels of hazardous substances than those contained in new or virgin oil.

The exclusion does allow for small amounts of hazardous substances such as those occurring naturally in oil or the small amounts added during the refining process.¹³⁸ The exclusion extends to used petroleum products limited to instances when the use did not cause an increase in the concentration of hazardous substances. Additionally, a party cannot use the petroleum exclusion to the extent the used oil contains nonindigenous hazardous substances or a higher concentration of indigenous hazardous substances as a result of use of the oil.¹³⁹ The used oil will also fall outside the exclusion if hazardous substances are added to or mixed with virgin oil. For example, the Third Circuit found that the petroleum exclusion did not apply to an emulsion used during a hot rolling process when hazardous substances were added during the process.¹⁴⁰

Transportation agencies should note that the petroleum exclusion is not an affirmative defense, but is instead a statutory exception. One court has found that the party asserting this statutory exception will bear the

burden of proving that it meets the exception.¹⁴¹ This exception could prove valuable for an agency not only with respect to materials it is contracted to haul, but also with the oil and other petroleum products used in its day-to-day operations.

Disposal of its own waste can make an agency liable as a generator of hazardous substances. The petroleum exclusion may allow an agency to escape liability under CERCLA if the agency has done nothing more than dispose of used oil or other lubricants used in trucks, buses, airplanes, and other vehicles and the agency can prove that no new hazardous contaminants were added to the used oil. If an agency chooses to use this exception, the agency must take care not to mix the oil with other substances and must check to make sure that its use of the oil did not cause higher levels of contaminants. Annual testing and documentation should occur with regard to each type and source of used petroleum products to rely on this exemption. The test reports should be maintained and/or stored indefinitely as CERCLA actions may reach back in time indefinitely.

3. Service Station Dealers Exemption

The next "defense" that could be available to some transportation agencies is the service station dealers exemption. A service station dealer is defined as "any person...where a significant percentage of the gross revenue of the establishment is derived from the fueling, repairing, or servicing of motor vehicles."¹⁴² The exemption from CERCLA liability applies to the release of recycled oil if the oil is not mixed with any other hazardous substance and is stored, treated, transported, or managed in compliance with applicable regulations or standards.¹⁴³

The aim of the service station dealers exemption was to encourage gas stations, service stations, and oil change businesses to recycle the oil used in their business and to accept for recycling the oil from "do-it-yourself" individuals who change their own oil.¹⁴⁴ Because waste oil is usually a big concern for transportation agencies, this exemption could be valuable. But, because the definition of a "service station dealer" requires a significant portion of gross revenue to come from the listed activities, this exception will be limited to a small number of transit agencies who fit that description. Like the petroleum exclusion, the service station dealers exemption will not exempt waste oil that has a higher concentration of hazardous substances by mixing or through use.

4. Other Potentially Applicable Defenses

The petroleum exclusion and the service station dealers exemption are both statutory "defenses" to liability

¹³⁵ *Id* at 54

¹³⁶ 42 U.S.C. § 9601 (14)

¹³⁷ *Ekotek Site PRP Comm. v. Self*, 881 F. Supp 1516, 1524 (D. Utah 1995) *aff'd* on reconsideration 932 F Supp. 1319 (1996).

¹³⁸ *Id.*; *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 266-67 (3d Cir 1992)

¹³⁹ *Ekotek*, 881 F Supp. at 1524.

¹⁴⁰ *Alcan*, *supra*, note 162

¹⁴¹ *Ekotek Site PRP Comm. v Self*, 932 F.Supp. 1319, 1324 (D. Utah 1996)

¹⁴² 42. U.S.C. 9614(c)(1).*Id.*; *See also*,

¹⁴³ Solid Waste Disposal Act, 42 U S C A § 6935.

¹⁴⁴ 132 Cong Rec. 29,722 (Oct 8, 1986)

under CERCLA. Recently, courts have shown a willingness to entertain nonstatutory defenses such as Constitutional arguments and interpretations of CERCLA according to general principles of law. Below is a discussion of four defenses that have been tried with some success. These are defenses to the liability portion of a CERCLA action after an agency has been named a PRP.

a. Condemnation as a Defense

One potential defense that may be available to transit agencies applies to those governmental agencies, not otherwise immune under the Eleventh Amendment, that acquire contaminated property by eminent domain.¹⁴⁵ At first glance, one of the statutory defenses seems applicable, namely, when third parties have contaminated the property. The problem with the third-party defense is that the agency has a contractual relationship with the previous owner when it purchases contaminated property, thus precluding use of this defense. However, CERCLA excludes from the definition of an owner and operator a governmental entity that acquires the property involuntarily.¹⁴⁶ Transit agencies may be able to argue that acquisition of a property is not voluntary. The reasoning behind this is that unlike private parties who may choose whether or not to buy a piece of land, transportation agencies may have little or no choice in which property to buy for expansion.¹⁴⁷ Replacement or expansion of a highway, for example, may be mandated, and the agency must purchase land abutting the current highway.

This defense, commonly called the condemnation defense, is available to a government agency that has the power of eminent domain whether or not condemnation proceedings took place.¹⁴⁸ A party may use this defense after a direct purchase because the party could have proceeded with condemnation; thus the property was under threat of condemnation.¹⁴⁹ To raise this defense, government agencies should still conduct an investigation of the site before acquisition. This defense is successful only when the agency proves that the property was contaminated prior to the agency's acquisition and that the agency handled any hazardous substances with due care.¹⁵⁰

b. "Due Diligence" or the Innocent Landowner Defense

Another potential defense that may be available is the "due diligence" argument, also known as the "innocent landowner" defense. As discussed previously, all current owners are generally held liable under CERCLA even if no dumping occurred during their ownership period.

¹⁴⁵ CADE, *supra* note 28 at 12.

¹⁴⁶ *Id.*; 42 U.S.C. § 9601(35)(A); and 42 U.S.C. § 9601(20)(D)

¹⁴⁷ CADE, *supra* note 28 at 6-7.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 7:

¹⁵⁰ *Id.*

CERCLA allows for a limited affirmative defense based on the absence of causation, known as the innocent landowner defense.¹⁵¹ This defense allows the present owner to be shielded from liability if the landowner can establish by a preponderance of the evidence three things. First, the landowner must prove that another party was the sole cause of the contamination. Second, the other, responsible party must not have caused the contamination with a contractual agency or employment relationship with the owner. Third, the owner must have exercised due care to guard against foreseeable acts of the third party.¹⁵² When determining the validity of the innocent landowner defense, courts will look at whether the landowner followed commercially reasonable and customary practices, any special knowledge or experience of the landowner, the relationship between the purchase price and the actual fair market value of the property, what information was reasonably ascertainable, and how easily the contamination could be detected.¹⁵³

c. Retroactivity of CERCLA

Recent case law suggests that courts may consider additional nonstatutory defenses. Perhaps the most notable of these defenses is the one that says that CERCLA was not intended to be applied retroactively. The retroactivity argument stems from the 1994 Supreme Court decision in *Landgraf v. USI Film Products*.¹⁵⁴ *Landgraf* dealt with certain provisions of the civil rights acts with respect to that statute's retroactivity. In finding that the provisions in question were not to be retroactively applied, the Court focused on the traditional presumption against retroactive legislation.¹⁵⁵ Defendants have attempted to use the *Landgraf* decision to challenge the retroactivity of CERCLA.

The first case to tackle the question of CERCLA's retroactivity after *Landgraf* was the District Court for Nevada in *Nevada v. U.S.*¹⁵⁶ In *Nevada*, the court interpreted *Landgraf* as clarifying two previous Supreme

¹⁵¹ *Westfarm Assoc. Ltd. Partnership v. Washington Suburban Sanitary Comm'n*, 66 F.3d 669, 682 (4th Cir. 1995) (quoting *United States v. Monsanto*, 858 F.2d 160 (4th Cir. 1988))

¹⁵² *Id.*

¹⁵³ 3 COOKE, *supra* note 17, § 14.01[8] [b] [iv]

¹⁵⁴ 511 U.S. 244; 114 S.Ct.1483; _____ L. Ed. 2d. _____ (1994).

¹⁵⁵ "As Justice Scalia has demonstrated, the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal. In a free, dynamic society, creativity in both commerce and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Landgraf*, 511 U.S. at 266 (internal footnotes, citations, and quotations omitted).

¹⁵⁶ 925 F.Supp. 691 (D. Nev. 1996)

Court decisions¹⁵⁷ that seemed to erode the traditional presumption against retroactive legislation. The court found that *Landgraf* confirmed the validity of such presumption, but did not set forth a new rule of law regarding retroactive application of legislation. The court also interpreted *Landgraf* as not requiring a clear statement of congressional intent, but instead as requiring clear evidence of congressional intent.¹⁵⁸

The court relied heavily on an early CERCLA case that reasoned that Congress implicitly authorized retroactive application of some provisions in CERCLA by affirmatively limiting retroactive application of one category of liability, namely, damages to natural resources.¹⁵⁹ The court reasoned that if the presumption against retroactivity was sufficient to preclude recovery for pre-enactment response costs, then the presumption would be sufficient to preclude pre-enactment damages. This result was not intended, according to the court. The court reviewed the legislative history of CERCLA and concluded that the legislative history provided ample evidence of clear intent to provide for retroactive application of CERCLA liability provisions.¹⁶⁰

Another case that explored this issue was *United States v. Olin*.¹⁶¹ At the district court level, the court refused to sign a consent decree and dismissed the action with prejudice. One reason for this ruling is that the court found that Congress did not clearly express its intent that the liability provision of CERCLA be retroactive.¹⁶² The district court in *Olin* interpreted *Landgraf* much differently than did the court in *Nevada*, and it did not follow prior CERCLA cases that found the statute to apply retroactively. The district court reasoned that these earlier cases demonstrated little regard for the presumption against retroactivity.¹⁶³

This district court decision gave defendants another viable argument for a defense to liability, but only for a short time. Upon appeal, the Eleventh Circuit reversed the district court's ruling and remanded the case for further proceedings.¹⁶⁴ The court found that although CERCLA contains no explicit statement regarding retroactive application, language elsewhere in CERCLA confirms the congressional intent that the statute should be retroactively applied.¹⁶⁵

This Eleventh Circuit decision reversed the only case thus far that found that CERCLA should not be applied

retroactively. Because of this, it would be reasonable to insert, especially in other circuits, that CERCLA should not be applied retroactively.

d. The Commerce Clause

Another defense that has been argued also suffered a blow at the reversal of the district court in *Olin*. Based on the facts in *Olin*, the district court found that CERCLA, as applied, exceeded the powers of Congress under the Commerce Clause of the United States Constitution.¹⁶⁶ This holding stemmed from the recent Supreme Court ruling in *United States v. Lopez*.¹⁶⁷ In *Lopez*, the Supreme Court struck down a federal gun statute as an attempted exercise of police power over matters historically falling within local government jurisdiction¹⁶⁸ and as an attempt to regulate an activity with no substantial effect on interstate commerce.¹⁶⁹ *Lopez* requires that a genuine causal connection exist between the regulated activity and interstate commerce.¹⁷⁰ Applied to the facts of *Olin*, the district court found it doubtful that the object of CERCLA was the regulation of economic activity that affected interstate commerce.¹⁷¹ The circuit court disagreed. The court reversed and remanded the case and reasoned that CERCLA regulates a class of activities that substantially affects interstate commerce.¹⁷²

Like the retroactivity argument, the reversal of *Olin* makes it unlikely that a Commerce Clause argument would succeed. Both the retroactivity and the Commerce Clause arguments only apply to federal law actions. Even if these arguments were viable, transit agencies would have to contend with any applicable state laws.

e. Statute of Limitations Defense

In a government and/or private party cost recovery action under Section 107(a) of CERCLA, the statute of limitations depends upon the type of cleanup action undertaken. If the action is one to recover costs relating to the removal of hazardous substances, the action must be brought "within three years after completion of the removal action" or within 6 years after EPA determines to grant a waiver under CERCLA Section 104(c)(1)(c).¹⁷³ Suits to recover costs associated with remedial actions must be brought "within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action,"¹⁷⁴ the cost of removal action may be recovered in the remedial action,

¹⁵⁷ *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1969); and *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969).

¹⁵⁸ *Nevada*, 925 F. Supp. at 693.

¹⁵⁹ *Id.* (relying on *United States v. Shell Oil*, 605 F. Supp. 1064 (D. Colo. 1985)).

¹⁶⁰ *Id.* at 695.

¹⁶¹ 927 F. Supp. 1502 (S.D. Ala. 1996); *rev'd on appeal No.* 966645, 1997 U.S. App. LEXIS 5488 (11th Cir. March 25, 1997).

¹⁶² *Id.* at 1502.

¹⁶³ *Id.* at 1516.

¹⁶⁴ *United States v. Olin Corp.*, No 96-6645, 1997 U.S. App. LEXIS 5488 (11th Cir. March 25, 1997).

¹⁶⁵ *Id.* at 20-21.

¹⁶⁶ *Olin*, 927 F. Supp at 1532, 1533.

¹⁶⁷ 514 U.S. 549, 115 S. Ct. 1644, 131 L. Ed. 2d 626 (1995).

¹⁶⁸ *Id.* at 561-562, 131 L. Ed. 2d at 638-39.

¹⁶⁹ *Id.* at 563, 131 L. Ed. 2d at 640.

¹⁷⁰ *Id.*

¹⁷¹ *Olin*, 927 F. Supp. at 1532.

¹⁷² *Olin*, 1997 LEXIS 5488 at *10.

¹⁷³ 42 U.S.C. § 9613(g)(2)(A).

¹⁷⁴ 42 U.S.C. § 9613(g)(2)(B).

thus extending the statute of limitations, under those circumstances, to the full 6 years.¹⁷⁵

Courts interpreting when cost recovery actions are deemed to accrue, for statute of limitations purposes, focus on when the response activity, either removal or remedial, has been completed. For these purposes, and given the remedial nature of CERCLA, courts have liberally construed these provisions.¹⁷⁶

The statute of limitations for private party contribution actions is found at Section 113(g)(3) of CERCLA. That section provides:

No action for contribution for any response, costs or damages may be commenced more than three years after--(a) the date of judgment in any action under this chapter for recovery of such costs or damages, or (b) the date of an administrative order under § 1922(g) of this title (relating to *de minimus* settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.¹⁷⁷

Courts are split as to whether cost recovery and contribution actions are mutually exclusive remedies. Those courts that hold that cost recovery and contribution actions are mutually exclusive have found that cost recovery actions may only be brought by "innocent" parties,¹⁷⁸ which has the effect of limiting such actions to those brought by the state and federal governments. Other courts hold that the cost recovery and contribution actions are not mutually exclusive and allow private parties to allege both cost recovery and contribution claims in private party litigation under CERCLA.¹⁷⁹ The split in the circuits is significant for two reasons. Cost recovery actions may impose joint and several liability for the entire cost of the cleanup upon the defendants of such suits, whereas contribution actions require damages to be apportioned.

¹⁷⁵ *Id.*

¹⁷⁶ *See*, Kelley v. E P Dupont DeNemours & Co., 17 F. 3d 836, 840 (6th Cir. 1994)

¹⁷⁷ 42 U.S.C. § 9613(g)(3)

¹⁷⁸ *See, i e.*, United Technologies Corp v. Browning Ferris Indust 33 F. 3d 96, (1st Cir 1994) *cert. denied* 115 S. Ct. 1176; 130 L Ed. 2d 1128 (1995).

¹⁷⁹ *Compare*, United States v Atlas Minerals & Chemicals, Inc., 41 Env't Rep. (BNA) 1417 (E D Pa. 1995); Amcast Indust. Corp v Detrex Corp, 2 F 3d 746 (7th Cir. 1993) *cert. denied*, 114 S. Ct. 691, 126 L Ed 2d 658 (1994); Town of Wallkill v Tesa Tape, Inc., 891 F Supp. 955 (S.D.N Y 1995); and United States v. SCA Services of Indiana, Inc, 849 F Supp. 1264 (N.D.Ind. 1994) (nonreliable PRPs may bring both § 107 cost recovery action and § 113 contribution action); with United Technologies Corp v. Browning-Ferris Indust. *Supra. See, i e.* United Technologies Corp. v. Browning-Ferris Indust.; United States v Colorado & Eastern R.R Co., 50F.3d 1530 (10th Cir 1995); Kaufman & Broad-South Bay v Unisys Corp., 884 F. Supp. 357 (E.D Cal. 1995); and Reichold Chemicals, Inc v. Textron, Inc., 888 F. Supp. 1116 (N D Fla. 1995) (exclusive remedy of PRP seeking contribution from other PRP is a § 113(f) contribution claim).

The second area of significance, for statute of limitations purposes, is that in those jurisdictions that hold the actions to be mutually exclusive, private party cleanup actions must be judged under the more rigorous 3-year statute of limitations for contribution actions.¹⁸⁰ As a result, resolution of this split in the circuits in favor of finding cost recovery and contribution actions to be mutually exclusive remedies would be a major victory for those defending against CERCLA claims brought by private parties, eliminating the *in terrorem* effect of the imposition of joint and several liability, as well as the shortening of the limitations period.

All of these defenses discussed can be used by transit agencies if the facts allow it. These defenses are defenses against initial liability after being named as a PRP. If one of these defenses is not available to an agency, or if such defense fails, more defenses are available at a different stage of the litigation. Because courts may apportion liability for costs among the many defendants, transit agencies may assert equitable defenses.

E. DEFENSES AVAILABLE IN THE APPORTIONMENT PHASE OF A CERCLA ACTION--EQUITABLE APPORTIONMENT

Once a transit agency has been found potentially responsible as an owner/operator, a generator, or a transporter, the next concern is how to defend itself in the apportionment phase of the litigation. Liability for damages under CERCLA can be joint and several.¹⁸¹ However, CERCLA also provides that the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.¹⁸² Because the cleanup costs involved in environmental actions can run into millions of dollars, responsible parties will want to vigorously pursue equitable apportionment of damages. Generally, a volumetric allocation of each party's wastes is constructed from the site facility's disposal records to arrive at each PRP's percentage share of waste at the site. That percentage is then applied to the various costs and estimated costs of cleanup to determine a PRP's share of responsibility. A premium may also be added to certain costs to account for the risk of increased future costs and potential remedy failure.

1. The Gore Factors

Six equitable factors that courts often use were delineated in an unsuccessful amendment to CERCLA proposed by then-Representative Albert Gore.¹⁸³ These "Gore factors" may be considered along with any other equitable factors as a means to deviate from a strict volumetric allocation. Transit agencies will want to keep them in mind during the apportionment stage of the litigation.

¹⁸⁰ *See* United Technologies Corp., *supra* note 178.

¹⁸¹ 42 U.S.C. § 9613(f)(1), CADE, *supra* note 28 at 5

¹⁸² *Id.*

¹⁸³ United States v. Atlas Minerals and Chemicals, Inc. 41 ERC (BNA) 1417. (E.D.P.A. 1995)

The first factor is the ability of a party to demonstrate that the party's contribution to a release or disposal of hazardous waste can be distinguished from those of other parties.¹⁸⁴ Parties may be able to distinguish their release in one of several ways. A party can distinguish its disposal from others by attempting to sever the harm done at the site. For example, a party who has disposed of only one contaminant at a site where several contaminants are found may argue that it should only be liable for cleanup for damage from the one contaminant it released. Parties may also distinguish their contribution when the site can be severed geographically, and when the party only disposed of waste in one specific area of the site. Accurate record keeping is imperative to asserting this equitable defense.

The second Gore factor is the amount of hazardous waste involved in cleanup at the site. Parties may attempt to distinguish their harm from others based on the volume of waste disposed on the site. This defense is desirable when a party can prove it only disposed of a small portion of the total waste found at the site. Again, this approach can only be effective when a party has kept thorough and accurate records of the volume of hazardous waste disposed of at the site.

The third equitable defense examines the toxicity of the hazardous waste at the site. The defense is based on the idea that those who release substances that are more toxic are more responsible for the hazardous conditions they created.

The fourth equitable defense is the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of hazardous waste. As discussed with the categories under which a party may be liable, the key will be the ability to control the disposal. Although active participation in selection of a site and disposal of hazardous waste will almost certainly indicate liability, intentional ignorance on the part of a party who has the ability to control the disposal will not shelter the party from liability. However, the courts may take into account the equitable defense of one who had little or no involvement in the process, and who, in fact, had no ability to correct matters.

Fifth, the court may view as an equitable defense the degree of care exercised by the parties in the handling of the hazardous waste concerned. The court will also take into account the character of such waste. Parties who negligently or carelessly handle hazardous waste will be viewed more harshly by courts than a party who exercises care and follows applicable guidelines. Transit agencies should note, however, that following guidelines for disposal can be an equitable defense to lessen their share of damages, but will not necessarily shield that party from liability completely.¹⁸⁵

Under the sixth Gore factor, the courts may consider the degree of cooperation by the parties with federal,

state, and local officials to prevent harm to public health or the environment.¹⁸⁶ Cooperation in cleanup will be favorably looked upon by courts. Cooperation will also make the cleanup process easier for the transit agency.

The Gore factors are by no means an exclusive or exhaustive list of equitable defenses in a contribution action.¹⁸⁷ The legislative intent behind the broad language in Section 113(f)(1) of CERCLA was to give the court flexibility in exercising its discretion in each case.¹⁸⁸ The purpose of the allocation stage of a CERCLA action is to place the costs of response on those responsible for creating the hazardous condition.¹⁸⁹ Attempting to allocate costs in this way creates a fact-sensitive inquiry. For this reason, allocation of costs must be made on a case-by-case basis.¹⁹⁰ In practice, however, utilization of the Gore factors most often takes place in resolving apportionment questions between different categories of PRPs; for instance, they are used to apportion the costs among owner/operators, transporters, and generators.

Courts must look at the totality of the circumstances and may use several, few, or only one determining factor in apportioning the costs of cleanup.¹⁹¹ In addition to the Gore factors, courts may also look to:

- The financial resources of the party,
- The party's knowledge of environmental problems at the facility,
- The party's awareness of the environmental risks undertaken,
- The financial interests a party had in the site,
- The efforts made by a party to prevent harm to the public, and
- The party's good faith attempts to reach a settlement.¹⁹²

In a Seventh Circuit decision on apportionment, the court looked at only one factor--the party's relative fault. In *Environmental Transportation Systems, Inc. v. ENSCO*,¹⁹³ a power company contracted with a transporter to haul transformers that contained PCB-laced mineral oil for disposal at a site. The transporter did not participate in the decision to haul the transformers without first draining them. En route, the truck was involved in a one-vehicle accident in which the truck flipped over on one side, spilling approximately 100 gallons of PCB-laced oil. The driver of the truck, an employee of the transporter, was found to be at fault for the accident and was cited for driving too fast. The spill required cleanup of the PCBs along the highway.

¹⁸⁶ Atlas, 1995 LEXIS 13097; 41 ERC (BNA) 1417, 1478.

¹⁸⁷ *Id.* at 1479.

¹⁸⁸ *Id.*, citing to *United States v. R.W. Meyer, Inc.* 932 F.2d 568 (6th Cir. 1991)

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*; *Environmental Transportation Systems, Inc. v. ENSCO, Inc.*, 969 F.2d 503, 509 (7th Cir. 1992).

¹⁹² Atlas, 1995 LEXIS 13097; 41 ERC 1479; ENSCO, 969 F.2d at 509.

¹⁹³ 969 F.2d 503 (7th Cir. 1992)

¹⁸⁴ *Id.* at 1478; the "Gore Factors" are all listed at p. 1478 of the case

¹⁸⁵ See, *U.S. v. Monsanto*, 858 F.2d 160 (4th Cir. 1988); *Arizona v. Motorola, Inc.* 774 F. Supp. 566 (D. Ariz. 1991)

The district court held that the transporter was responsible for all of the cleanup costs incurred as a result of the accident.¹⁹⁴ The court reasoned that even if the transformers were improperly loaded, the sole cause of the accident was the employee driving too fast.¹⁹⁵ Because the court used this one equitable factor, the power company was not required to incur any of the cleanup costs. This case demonstrates how one solid equitable defense can be used to shift apportionment of the damages from one party to another.

Because the equitable defenses discussed are so fact sensitive, a transportation agency should not feel limited to only those equitable defenses discussed here. An agency certainly should use any of the Gore factors or other defenses that are appropriate for the fact situation. In addition to those defenses, the agency may find other equitable defenses in the facts of its situation. Any defense that will help spread out the costs of a cleanup can be beneficial.

F. PREVENTIVE MEASURES THAT TRANSIT AGENCIES SHOULD TAKE TO AVOID CERCLA LIABILITY

Knowing what defenses are available in an environmental lawsuit is important, but equally important to an agency is knowing what incidents trigger lawsuits and how to best protect itself against future lawsuits. Transit agencies will want to examine their current practices with regard to hazardous waste handling to see what practices are good and what practices may need to be changed or updated. Several steps can be taken to help an agency manage its hazardous waste risks. Other steps may be taken to show at a later date why the agency's liability should be limited. Discussed below are some of the steps and strategies currently used by transit agencies that responded to the questionnaire, including careful documentation, due diligence, and indemnification agreements.

1. Documentation of Waste Streams of a Potentially Hazardous Nature

If careful documentation of wastes hauled is not already part of a transit agency's business practice, it should be. Careful and thorough records can help an agency defend against a future suit in several ways. Records of what sites were used may even help avoid initial liability if the agency can show that the site in question was not used or was used only for nonhazardous substances. Even if liability cannot be avoided, accurate records will be reliable proof of an agency's waste handling practices. They can show the degree of care exercised by the agency, and will help in the apportionment phase of future litigation. For example, all agencies are required to maintain an MSDS on any potentially hazardous substances. By carefully maintaining the MSDS, the documents

can be easily reviewed at a future date to identify the type and amount of waste handled. Agencies should also keep track of what their potential waste stream is. In other words, they should keep track of what comes in and what goes out of the agency, as well as the parties who ultimately dispose of the waste.

The agency should keep records of what type of waste is being handled. Clear, accurate records of what waste is being transported could help a defense if a future cleanup action is for a material different than what the agency hauled. The records could also help indicate the degree of toxicity of waste hauled. If the agency can show that the materials hauled were of a low degree of toxicity, this information could help lower the agency's apportioned share of cleanup. Also, thorough records can help prove the volume of waste hauled to a particular site.

2. Due Diligence on Reclaimers/Recyclers and Other Waste Disposal Companies

Transit agencies should monitor the practices of those with whom the agency does business. For example, when an agency uses a recycler for disposing of waste oil, the agency should choose a company that recycles properly and in compliance with all pertinent environmental regulations. When disposing of other wastes, an agency should examine the waste handling practices of any landfill or disposal site used. Transit agencies should start by asking the recycling center if it has been licensed or been issued a permit by the EPA or any state regulatory agencies. Recycling centers may be required to display certification stickers or otherwise indicate they are licensed. Agencies could also place a call to their local solid waste management agency, to the state environmental agency, or to the EPA office for the appropriate region. Using one of these simple steps as a preventive measure could help flag any potential problems with the recycling center used by the agency.

3. Indemnification Agreements

Although a transit agency cannot contract away its liability under CERCLA, transit agencies may wish to consider contractual ways to reduce their portion of payment for a cleanup. One avenue to consider is an indemnification agreement. For example, a transit agency that contracts with a generator to haul waste to a disposal or treatment facility might want to include a provision that requires the generator to indemnify the agency for any future payments for cleanup as a result of that contract.

In conjunction with an indemnity clause, transit agencies may want to include a clause in the contract that specifically states which party has chosen the disposal or treatment site. Such a clause could help an agency avoid liability as a transporter, if the agency did not help select the site.

The indemnification agreement could be used any time a transit agency contracts with another party to handle hazardous substances. An important caveat to note is

¹⁹⁴ Environmental Transportation Systems, Inc. v ENSCO, Inc., 763 F Supp. 384, 388-390 (C.D.Ill. 1990)

¹⁹⁵ *Id* at 390

that an indemnification agreement will not shield an agency from initial liability. The agreement may not even prevent the agency from out-of-pocket expenses in cleanup. What the indemnification agreement will do is provide a basis that the transit agency can use to recover the monies it has spent from the waste disposal entity who agreed to indemnify the transit agency.

G. MEASURES TO TAKE WHEN A CLAIM IS MADE

Even utilizing all preventive measures available, transportation agencies are still likely to become involved in some CERCLA litigation. Suits can involve agencies' actions and practices from many years ago, including suits involving practices from pre-enactment times. When an agency does get sued under environmental laws, the agency must act quickly. The faster that an agency can assess the facts and develop a strategy, the more likely a viable defense can be formed and settlement options can be considered.

1. Document Search and Retrieval to Determine Potential Fact Witnesses

In the previous section, the importance of accurate and thorough record keeping was discussed as a preventive measure. Past record keeping can greatly help a transportation agency facing a lawsuit. An agency being sued should begin gathering all pertinent documents and records relating to the suit as soon as possible.

Employment records could be useful in identifying potential fact witnesses. These could include drivers who hauled waste to facilities or persons who negotiated deals to haul waste. Former employees may be helpful in determining what types of waste were hauled and can testify as to the agency's waste handling practices.

Another group of helpful documents are transportation logs. Obviously the more detailed the logs, the more useful the logs could potentially be. The logs can help an agency show the number of times the agency used a facility. They could show the amount of waste disposed and the type of waste disposed. This type of evidence could be especially important if the agency anticipates a divisibility of harm issue with regard to its proportional amount of the waste found at the site, degrees of toxicity, or type of waste. Such logs may also indicate if only a certain part of the facility was used to bolster a divisibility by geographical area argument.

Additionally, documents such as the contracts to haul the waste or the bids can help defend against initial liability as a transporter if those records show that the agency had no input in choosing a site. Similarly, documents relating to the purchase of a piece of property by or under threat of condemnation can help avoid liability as an owner. Even if all the records found do not help with a defense to liability or apportionment, an immediate review and assessment of the records can help the agency determine potential exposure to liability. An early grasp of the facts will aid the agency in reaching an equitable settlement.

2. Gather all Potentially Applicable Insurance Policies

Another important measure to take when sued is to gather all insurance policies that may potentially provide coverage for defense of the suit or indemnity against liability. Once the policies are gathered, the agency and its attorneys must look at the language of the policies to determine if the policies protect against environmental liabilities. If there is any prospect of coverage, the carrier(s) should be notified immediately.

Many transportation agencies have standard comprehensive general liability policies. Many of these policies contain pollution exclusions on which insurance companies base their denial of coverage and even denial of defense. Because of the great expense involved in defending environmental suits and the potential for a large amount of liability for cleanup, holders of these policies are fighting insurance companies as to the extent of these exclusions.

A recent trio of Indiana cases has helped clarify the extent of such policy exclusions in that state. In *Seymour Manufacturing Co. v. Commercial Union Ins. Co.*,¹⁹⁶ the court held that an insurance company has a duty to defend a policyholder if any prospect of coverage is present because of ambiguous policy language. The court reasoned that the duty to defend is broader than the duty to indemnify. Insurance companies must provide a defense unless and until they prove that no coverage exists.¹⁹⁷ This decision is beneficial to transportation agencies because the initial legal costs of defense must be borne by their insurance carriers unless and until the insurance company successfully proves that no coverage exists under an agency's specific policy.

In *Dana Corp. v. Hartford Accident & Indemnity Co.*,¹⁹⁸ the court held that the duty of an insurance company to defend applies to any coercive environmental proceeding, including administrative proceedings. The trial court reasoned that the term "suits" encompasses administrative actions such as formal enforcement proceedings, demand letters, or legal notices under environmental statutes, in addition to lawsuits filed in court. Also, the court in *Dana* held the insurance company liable for indemnity of cleanup costs despite the insurance company's argument that cleanup costs are "repairs" and not "damages" covered by the policy.¹⁹⁹ The court reasoned that the term "damages" was undefined by the policy and therefore should be given its plain, nontechnical meaning. Under this case, transportation agencies may be able to take advantage of their insurance carrier's duty to defend in any environmental proceeding, not just formal lawsuits. The decision may also curtail insurance

¹⁹⁶ 665 N.E.2d 891, 892 (Ind 1996).

¹⁹⁷ *Id.*

¹⁹⁸ Cause No. 49D01-9301-CP-0026 (Ind. Super. Ct. Marion Cty., Sept. 10, 1996). *See also*, *Indiana Gas Co v. Aetna Cas. & Surety Co*, 951 F. Supp. 767, 771 (N D. Ind. 1996) (citing to *Dana*)

¹⁹⁹ *Id.*

companies' arguments that cleanup costs are not "damages" under policies.

The third case that looked at the extent of insurance companies' responsibilities under general liability policies was *American States Ins. Co. v. Kiger*.²⁰⁰ In a suit by the Indiana Department of Environmental Management, the court ruled that the insurance company had to defend and indemnify a defendant for the costs of cleaning up a gasoline release from a gas station. In so ruling, the Indiana Supreme Court decided two issues: What was the proper construction of the "sudden and accidental" pollution exclusion prevalent in policies issued between 1970 and 1986, and whether gasoline for retail sale is a pollutant under absolute pollution exclusions prevalent after 1986.²⁰¹

The court construed a sudden and accidental pollution exclusion in the policy as not barring coverage for unintentional environmental contamination.²⁰² In the policy in question, coverage was excluded if the contamination is "sudden and accidental." The court rejected that "sudden" is only interpreted as "all at once." The court reasoned that "sudden" can also mean "unexpected," and therefore the term is ambiguous.²⁰³ Reasoning that ambiguous terms in insurance policies are interpreted in favor of the insured and against the insurer who drafted the policy, the court found that "sudden" means "unexpected" even if the release is gradual.²⁰⁴ A transit agency could use similar arguments in favor of coverage, if that agency has a similarly worded policy.

The court also looked at an absolute pollution exclusion clause commonly used in policies issued after 1986. The policy at issue was a garage policy with a broadly worded definition of "pollutant." The policy did not specifically list gasoline as a pollutant. The court found that coverage existed despite the absolute pollution exclusion because, if read literally, the language would negate nearly all coverage purchased.²⁰⁵ The court reasoned that if an insurance company intends a garage liability policy to exclude coverage for leaked gasoline, the policy's language must be explicit.²⁰⁶

The holding in *Kiger* could be valuable to transportation agencies that store gasoline on their property for use in their vehicles. A scrutiny of insurance policies held by the agency may reveal gaps in exclusionary clauses like those found in this trio of Indiana cases. Examination of policies held may help an agency defeat an initial denial of coverage by an insurance company. It is important to note that different states may interpret these policies in different ways. An examination of an agency's state laws should be conducted to determine the extent of its insurer's responsibilities.

3. Notify Insurance Carrier Immediately

The first thing that a transportation agency should do after receiving notice of an environmental claim against it is to notify its insurance carrier(s) immediately. In a claim dating back a number of years or for conduct by the agency spanning a considerable length of time, it is likely that more than one carrier may be potentially responsible to provide coverage. Where the policy covers a specific period of time, the policy is considered to be an "occurrence based" policy, and any number of policies may be potentially on the risk. The earlier carriers are notified, the earlier a coverage determination can be made. If one or more insurance companies finds coverage, conditionally or unconditionally, it will hire counsel to help with the defense of the case. If each of the insurance companies denies coverage, the agency is on its own to provide a defense and will need to obtain legal assistance to determine whether the insurance companies' denials of coverage were justifiable, to help with the fact and document gathering, and to timely appear and respond to the complaint. Whether hired by the insurance company or agency, an agency should assemble the experts needed to guide it through the time consuming and complex factual and legal issues that invariably arise.

CONCLUSIONS

Knowledge of CERCLA and how it may affect transit agencies is the first step in preventing an environmental lawsuit. This knowledge will also assist transit agencies in responding to any lawsuit or action that may arise. In addition, an examination of state laws and regulations may be necessary to obtain a full understanding of today's complex environmental laws. An understanding of the basic purpose and structure of these laws will give agencies the ability to spot issues of potential concern, as well as some guidance in resolving them. Knowing what to do when involved with environmental issues may prevent an environmental lawsuit. If a lawsuit is imminent, however, such knowledge is the first step toward reaching an equitable result.

²⁰⁰ 662 N.E.2d 945 (Ind. 1996).

²⁰¹ *Id.* at 946.

²⁰² *Id.* at 948.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 948-49.

²⁰⁶ *Id.* at 949.

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