MEMORANDUM State of Alaska

Department of Law

TO: The Hon. Bruce Campbell
Commissioner
Department of Transportation
& Public Facilities

DATE: December 1, 1993

FILE NO: 665-91-0131

TEL. NO.: 451-2811

FROM: Leone Hatch
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SUBJECT: Acquisition of
Contaminated property

QUESTION PRESENTED

The Alaska Department of Transportation & Public Facilities (DOT&PF) has requested an opinion discussing the potential liability, costs, and risks associated with contaminated property acquisition in the Minnie Street area in Fairbanks. Several specific questions were raised. They are addressed at the conclusion of the general discussion.

SHORT ANSWER

Any acquisition of property known to be contaminated should be undertaken with extreme care, and with the recognition that the state may be required to address the contamination itself and then pursue the responsible parties for costs. There is always a possibility that such a pursuit will be unsuccessful due to judicial proof requirements and insolvency. The need for such property acquisitions should be carefully weighed against the potential costs.[1]

DISCUSSION

I. FACTUAL BACKGROUND

The Minnie Street area is known to be contaminated with a number of hazardous substances. Historically, industry in the area has included gold ore processing and petrochemical storage and sale. The ground water is shallow, at approximately six feet with seasonal variations. The municipal water supply is on the opposite side of the Chena River. Floating petroleum product, both aged and recent, has been verified in the area of proposed acquisition. PCBs, lead, arsenic, cadmium, chromium, and mercury have also been identified in soil samples.

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[1] The Federal Highway Administration (FHWA) adheres to a policy requiring investigation of potentially contaminated property prior to acquisition. Office of Environmental Policy Guidebook, Chapter 22, Hazardous Waste, at 11. The FHWA financially participates in remediation only at its discretion.

II. LEGAL CONTEXT

Contaminated land is subject to both state and federal law. The federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the 1986 Superfund Amendments and Reauthorization Act (SARA) which updated CERCLA are both applicable and complex. 42 U.S.C. • 9601 et seq.[2] The state has also enacted legislation designed to address liability for damage caused to natural resources by the release of hazardous substances. AS 46.03.822. While there is a large body of case law developing around CERCLA to aid in its interpretation, the state provisions have yet to be interpreted by a court of record.

The state law is similar to the federal law. Both state and federal law feature provisions establishing strict liability (liability without regard to fault) for persons meeting specific statutory requirements. Similar exceptions and defenses are provided as well, including the "eminent domain" defenses discussed below. Notable practical differences consist of a specific inclusion of hydrocarbon contamination in state law and a specific exclusion of petroleum in federal law,[3] a lack of an

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[2] In a recent CERCLA opinion a federal judge noted:

> Numerous courts have complained about the inartful, confusing, and ambiguous language and the absence of useful legislative history. See, e.g., Exxon Corp. v. Hunt, 475 U.S. 355, 363, 106 S. Ct. 1103, 1109-10, 89 L. Ed. 2d 364 (1986) (CERCLA is "not a model of legislative draftsmanship"); United States v. Alcan Aluminum Corp., 964 F.2d 252, 258 n.5 (3d Cir. 1992) ("[T]he statute is riddled with inconsistencies and redundancies.")

U.S. v. Rohm & Haas Co., 2 F.3d 1265, 1270 n.6 (3d Cir. 1993).

[3] Pure petroleum products alone will not trigger CERCLA liability, 42 U.S.C. • 9601(14), • 9604(a)(2). However, even a small quantity of another substance may negate this exception. United States v. Western Processing Co., 761 F. Supp. 713, 724 (W.D. Wash. 1991) (sludge consisting of petroleum and rusted flakes from the interior of a storage tank found hazardous). Compare United States v. Metate Asbestos Corp., 584 F. Supp. 1143, 1146 (D. Ariz 1984)(CERCLA coverage not precluded by specific exemption of mining wastes if other criteria are met.) It is the additional contaminants around the old Alaska Gold facility that primarily bring CERCLA into play here. But see Wilshire Westwood Associates v. Atlantic Richfield Corp., 881 F.2d 801, 804 (9th Cir. 1989) (Leaded gas is excluded from CERCLA.)

explicit statutory private right of action in the state law, a lack of specific response guidelines in state law, a requirement in state law that to be recoverable the state's response costs must be reasonable, and a specific explanation of joint and several liability in the state law. Due to the greater availability of interpretive material with respect to CERCLA, the following discussion focuses on federal law.

It is useful when discussing environmental law to keep in mind that the state can wear two hats, that of regulator (enforcement) and that of landowner. The liabilities of an enforcement agency are very different from those of a landowner agency. United States v. Dart Industries, 847 F.2d 144, 146 (4th Cir. 1988). This memo addresses the perspective of the state as landowner, not as regulator.

A. National Priority List

The relevant portion of CERCLA is commonly referred to as "Superfund." Superfund establishes a pool of money for the Environmental Protection Agency's (EPA's) use in addressing the nation's most egregious contaminated sites.[4] If a private party does not take on a response to the contamination in a timely and competent manner, EPA may step in and conduct a response using the Superfund for expenses. The portion of the proposed acquisition area where Alaska Gold was located is currently in EPA's site investigation list (CERCLIS) database. This site could be upgraded to the National Priorities List (NPL) after further investigation. 42 U.S.C. • 9605(c). Sites on the NPL are commonly referred to as Superfund Sites and are subject to full EPA scrutiny and oversight under CERCLA. Id. But see United States v. Colorado, 990 F.2d 1565, 1580 (10th Cir. 1993) cert. denied 62 U.S.L.W. 3378 (Jan. 24, 1994) (listing on the NPL does not affect a state's right to enforce state hazardous waste laws approved by EPA under the Resource Conservation Recovery Act (RCRA), 42 U.S.C. • 6973 et. seq.).

When a site is considered sufficiently hazardous, EPA moves to identify the persons or entities who may be legally responsible for the contamination under 42 U.S.C. • 9607. These are the potentially responsible parties (PRPs).[5]

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[4] The state legislature has established a similar resource, the Oil and Hazardous Substance Release Fund, which is administered by the Alaska Department of Environmental Conservation (ADEC). AS 46.08.005 et. seq. The use of this fund may be triggered by oil contamination as well as by that of other hazardous substances. AS 46.08.040(a)(1).

[5] If EPA finds that an emergency exists and it is not clear who the responsible parties are, EPA may conduct a removal before waiting to identify the parties. 40 C.F.R. • 300.415(b) (1993).

B. Liable Parties

CERCLA's definition of persons who come within the scope of liability is very broad. The specific definitions of initial interest are "the owner and operator of a vessel or a facility" and "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. • 9607(a)(1)-(2). One may be liable as an "owner" if, even without record title, one has control of the site or authority to designate the use of the property. Lincoln Properties v. Higgins, 823 F. Supp. 1528, 1533 (E. D. Cal. 1993). The definition of "owner and operator" has been held to include lessees. U.S. v. Mexico Feed & Seed Co., 980 F.2d 478, 484 (8th Cir. 1992); Pape v. Great Lakes Chemical, 1993 WL 424249 (N.D. Ill. 1993); United States v. South Carolina Recycling and Disposal, Inc., 653 F. Supp. 984 (D. S.C. 1984). Although not all courts agree, "disposal" has been held to include "passive" disposal; i.e., the migration of a contaminant when the landowner has remained passive. Nurad, Inc. v. William E. Hooper & Sons, 966 F.2d 837, 846 (4th Cir. 1992); U.S. v. Otto Skipper, No. 89-102-CIV-7-F (E.D. N.C.), noted in EPA Superfund Report, Sep. 26, 1990 (construction activities that stir up or expose hazardous waste may be a passive form of disposal). Contra, United States v. Petersen Sand and Gravel, Inc., 806 F. Supp 1346, 1353 (N.D. Ill. 1992).

There is no question that a state or local government may be held liable as a PRP. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989). 42 U.S.C. • 9601(21). The federal government may be liable as well, but is dealt with separately under CERCLA. 42 U.S.C. • 9620.[6] The general tendency of the courts construing CERCLA's liability provisions has been to broaden the statute's reach, not curtail it. See Opinion of the Nevada Attorney General 92-12 (Dec. 4, 1992) (CERCLA liability through involuntary tax deed transfer); Robert I. McMurry & David H. Pierce, Environmental Contamination and its Effect on Eminent Domain, ALI-ABA Course of Study, Eminent Domain and Land Valuation Litigation 1993.

The Ninth Circuit has held that a governmental contractor who disturbed previously unknown contaminated soil while grading and excavating was liable as an operator under

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The state has similar response capacity to effect a containment action without notice to PRPs. AS 46.08.140 (Emergency Powers).

[6] A federal district court recently held that the waiver of liability to state law applies only to facilities currently owned or operated by the federal government. Rospatch Jessco Corp. v. Chrysler Corp., 829 F. Supp. 224, 227 (W.D. Mich. 1993).

CERCLA. Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp, 976 F.2d 1338 (9th Cir. 1992). See also Tanglewood East Homeowners v. Charles-Thomas Inc., 849 F.2d 1568 (5th Cir. 1988). This type of operator liability could be imputed to the contractor's employer through contractual privity and notions of common law. See Bailey v. Jefferies-Eaves, Inc., 414 P.2d 503, 511 (N.M. 1966) (imputed negligence).

C. Acquisition by Eminent Domain

SARA added two provisions of potential interest to governmental condemnors.[7] One is an alteration to the general definition of "owner or operator." 42 U.S.C. • 9601(20). The second is an addition to the "innocent landowner defense" found in 42 U.S.C. • 9607(b) which was accomplished indirectly through a definitional change to "contractual relationship." 42 U.S.C. • 9601(35).

1. "Owner or Operator"

After SARA, the definition of "owner or operator" reads:

> The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any state or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility . . .

42 U.S.C. • 9601(20) (D). In such a case, the person or entity which had control immediately before transfer is deemed to be the "owner or operator." 42 U.S.C. • 9601(20)(A).

Whether or not an acquisition by the exercise of eminent domain falls within this provision is a matter left for interpretation. The transfer is involuntary from the perspective of the landowner prior to condemnation, but it is rarely involuntary from the perspective of the government as are the transfers specifically listed. See Opinion of the Nevada Attorney General

[7] References to condemnation used herein are intended to include all acquisitions under threat of, or through eminent domain. Neither state nor federal law requires an actual condemnation action in court. 42 U.S.C. • 9601(35); AS 46.03.822(c)(2).

92-12 (Dec. 4, 1992) (CERCLA liability through involuntary tax deed transfer).

If the power of eminent domain is exercised to protect the public health, as when an environmental authority condemns contaminated land to remediate it, the argument for application is stronger than when the land is taken for a more discretionary or less immediately necessary purpose. See Kessler v. Tarrats, 476 A.2d 326 (N.J. 1984) (police power requires the state to safeguard the vital interests of its citizens in the context of state hazardous waste cleanup action); Robert I. McMurry & David H. Pierce, supra. Opinion of the Nevada Attorney General 92-12 (Dec. 4, 1992) (CERCLA liability through involuntary tax deed transfer).

No controlling authority on the point has been located. When two statutory provisions are addressed to the same matter, they should be interpreted harmoniously, giving effect to each. When interpreting confusing and conflicting statutes, specific language is presumed to modify the general. Matter of Hutchinson's Estate, 577 P.2d 1074, 1075 (Alaska 1978). The existence of the specific eminent domain defense in 42 U.S.C. • 9601(35), • 9607(b)(3) discussed below suggests that in most cases (when the condemnation is more or less discretionary) condemnors should look to the "innocent landowner defense" rather than to the governmental involuntary transfer exclusion in the definition of "owner or operator." McMurry and Pierce, supra, at 6.

2. "The Innocent Landowner Defense"

CERCLA contains a narrow selection of defenses to strict liability for a small class of landowners. This is typically referred to as the "innocent landowner" or "third party" exception.[8] 42 U.S.C. • 9607(b)(3). This exception applies to one who would otherwise be an owner PRP who has not caused the contamination, could not have foreseen and prevented the contamination, was not aware of the contamination at the time of acquisition, and does not have a contractual relationship[9] with a party who did cause the contamination.[10] It is the

[8] State law contains a similar provision, but without some of the troublesome ambiguities discussed below. AS 46.03.822(b).

[9] A contractual relationship has been held to include the sale, purchase, and most rentals of property as well as employment and construction contracts.

[10] Recent decisions have verified that the discharge may not be allowed to continue after the "innocent landowner" has taken title. Steego Corp. v. Ravenal, 830 F. Supp. 42, 51-52 (D. Mass. 1993).

contractual relationship requirement as amended by SARA which may excuse the condemnor.

To utilize the defense, the PRP must act responsibly with respect to the contamination once the innocent PRP comes or should come to know of it. 42 U.S.C. • 9607(b). It is not clear what is dictated by the responsible action requirement, but in the context of CERCLA it likely means a cleanup or containment response if the contamination is an immediate threat to human health or the environment, or is unstable or migratory. Care should be taken to comply with other environmental legislation concerning the storage, transport, and ultimate disposal of contaminated soil and materials.

The SARA Conference Report indicates that at a minimum, a condemnor is expected to bring contamination to EPA's attention. Joint Explanatory Statement of the Committee of Conference (Landowner Liability), reprinted in Environmental Law Institute, Superfund Deskbook (1992). A federal court in an unpublished decision refused to accept an innocent landowner defense from the Utah Department of Transportation concerning an old contaminated right of way. United States v. Sharon Steel Corp., No. 86-C-0924J (D. Utah Feb. 13, 1988). That court held that the state must affirmatively demonstrate that it used due care with respect to the contamination.[11]

SARA has added language to the third party defense specifically exempting from liability a governmental entity which takes through eminent domain. Under no circumstances does this exemption apply if the condemnor by any act or omission has caused or contributed to the contamination. 42 U.S.C. • 9601(35)(D). While at first blush, this language would seem to insulate DOT from most liability, the reality may not be so simple.

Only one court of record has discussed this new language directly as it applies to condemnors. United States v. Petersen Sand and Gravel, 806 F. Supp. 1346 (N.D. Ill. 1992). This decision is from a lower court in a different circuit, but its views are well reasoned and comport with the general rule

[11] State law also contains an exemption for a condemnor who: (1) is not an employer or otherwise in contractual privity with a culpable third party; (2) exercised due care with respect to the contamination; and (3) took reasonable precautions with respect to the third parties' acts or omissions. Although the statutory requirements are arguable, it could be convincingly asserted that the contamination must be discovered and an effort made to "contain and clean up" the contamination within a reasonable period of time in accordance with a specific provision of state law that has no federal counterpart. AS 46.03.822(b)(1)(C)(2).

that effect should be given to the plain meaning of a statute. Wilshire Westwood Associates v. Atlantic Richfield Corp., 881 F.2d 801, 803 (9th Cir. 1989). The court in Petersen stated that a condemnor:

> . . . needs to show four requirements to escape liability as an innocent owner: (1) the release was caused solely by an act or omission of a third party who was not an employee or agent of the [condemnor]; (2) the [condemnor] exercised due care with respect to the hazardous substance concerned; (3) the [condemnor] took precautions against foreseeable acts or admissions of any third party; and (4) the disposal or placement of the hazardous substance on, in or at the site occurred before the [condemnor] acquired the property. 42 U.S.C. •• 9601(35)(A)(ii), 9607(b)(3). [Bracketed material substituted for the name of the condemnor defendant.][12]

Petersen, 606 F. Supp. at 1361. In effect, according to Petersen, the SARA amendment released the governmental condemnor from the requirement faced by other would be innocent landowners that possession be taken without knowledge of the contamination after reasonable inquiry. All other requirements must still be satisfied.[13]

The Petersen approach, however, is not universal. An heir bears the same status as a condemnor in 42 U.S.C. • 9601(35). At least one lower court has found that an heir may not take with knowledge of the contamination and use the innocent landowner defense. United States v. Pacific Hide and Fur Depot, Inc., 716 F. Supp. 1341, 1349 (D. Idaho 1989). Unlike Petersen, the Fur Depot Court did **not** find a statutory exemption to the

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[12] It is important to understand that the four criteria noted in Petersen are questions of fact. They must be proven in court by the party asserting the defense. This necessity makes early summary judgement difficult, if not impossible, in many circumstances. A trial reviewing the facts supporting the defense is likely. Such a trial could be very costly.

[13] According to the FHWA, the Department of Justice (DOJ) has not consistently interpreted this provision. Individual attorneys within the office have differed as to whether the governmental condemnor must be ignorant of the contamination prior to acquisition to take advantage of the provision. This office has not been able to confirm the DOJ's position. Cf. United States v. Pacific Hide and Fur Depot, Inc., 716 F. Supp. 1341, 1348-49 (D. Idaho 1989) (EPA through the DOJ took the position that there is always a duty of inquiry).

requirement for lack of knowledge, although it did apply a minimal, if not nonexistent, duty to inquire based upon an analysis of what was "appropriate inquiry." Compare United States v. Serafini, 706 F. Supp. 346, 353 (M.D. Pa. 1988) (duty is to make "appropriate inquiry," which in some cases may be minimal or nonexistent dependant upon the context and local business practices.) The Fur Depot decision seems to be contrary to the plain language of the statute and in conflict with Petersen.

Some support for the Fur Depot decision may be found in Congressional records. The legislative history of the SARA amendment to section 101(35) implies that the condemnor must be unaware of the contamination at the time of the transfer. The Committee explains:

> . . . Furthermore, a government authority acquiring property by such methods shall notify, in a timely manner, the United States Environmental Protection Agency and the Department of Justice upon discovering the existence of a hazardous substance on the property.

Joint Explanatory Statement of the Committee of Conference (Landowner Liability), reprinted in Environmental Law Institute, Superfund Deskbook (1992). This language assumes a lack of knowledge of the contamination at the time the title is transferred which is not found on the face of the statute. Likewise, the Conference Committee intended to impose a duty of inquiry upon an heir which is difficult to discern on the face of the statute. The Committee noted:

> The duty to inquire under this provision shall be judged as of the time of acquisition.
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> . . . .
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> Similarly, those who acquire property through inheritance or behest without actual knowledge may rely upon this section if they engage in a reasonable inquiry . . . and those who acquire property by inheritance without knowing of the inheritance shall not be liable, if they satisfy the remaining requirements of section 107(b)(3).

Joint Explanatory Statement, supra. It is unclear whether these quotations refer to the duty to act reasonably with respect to known contamination (i.e., discover it and respond promptly) or the requirement that the new owner take the property without knowledge of the contamination. The first interpretation makes more sense in the context of the plain language of the statute. We feel that the better position is that a condemnor need not be

ignorant of the contamination to utilize the 42 U.S.C. • 9607(b)(3) defense. There is, however, a risk of an adverse ruling. This risk should be carefully considered in any knowing acquisition of contaminated property which could be subject to CERCLA.

D. Potential Consequences to PRPs

1. Response Action

When EPA initially reviews a site, it has two basic choices in response actions, removal, or remediation. It may conduct, or order a PRP to conduct, an emergency removal if it finds that there is an "imminent and substantial danger to the public health or welfare." 42 U.S.C. • 9604(a)(1), 101(23); 40 C.F.R. • 300.5 (1993) (Remove or removal defined). 40 C.F.R. • 300.415 (1993) (removal action). Once the site is stabilized, it may conduct, or order conducted, an investigation and longer term remediation action. 42 U.S.C. • 9604(b); 40 C.F.R. • 300.5 (1993) (remedy or remedial action defined), 40 C.F.R. • 300.430 (1993) (remedial investigation/feasibility study and selection of remedy). All private and regulatory responses should be consistent with the National Contingency Plan (NCP) to avoid enhanced liability and support future cost recovery. (Discussion supra). See 40 C.F.R. 300 et seq. (NCP).

2. Unilateral Orders

As noted above, EPA may issue unilateral orders to PRPs to remediate contaminated sites. 42 U.S.C. • 9606. Fines for disobeying such an order may range up to $25,000.00 each day. It is very difficult to obtain judicial review of such orders before the completion of the ordered response action. 42 U.S.C. • 9613(h). E.g., Southern Pines v. United States, 912 F.2d 713 (4th Cir. 1990). Compare United States v. Colorado, 990 F.2d 1565, 1575 (10th Cir. 1993)("challenges" to response actions are barred, but "reviews" for compliance with RCRA are permissible).

3. Settlements

Despite the broad liability and the unilateral EPA enforcement tools noted herein, CERCLA directs EPA to negotiate with PRPs when possible, and encourages agreements and settlements. 42 U.S.C. • 9622. These settlements fall into three distinct categories.

First, there are arrangements by which one or more PRPs agree that they will undertake a response approved by EPA. EPA will provide separate settlements to contributors and does provide releases on occasion for individual PRPs who have shouldered what EPA deems to be the PRP's fair share of the

cleanup. Liability is assessed proportionally. 42 U.S.C. • 9622(b)-(e). Covenants not to sue based on future liability do not take effect under this section until the president certifies that the remedial action is proper and complete. 42 U.S.C. • 9622(f)(3). EPA is required to obtain reimbursement for its administrative and oversight costs when it enters into consent orders with PRPs. 42 U.S.C. • 9604.

Second, EPA may enter into a "de minimis" settlement requiring the payment of a relatively small amount of money. 42 U.S.C. • 9622(g). This procedure allows for an expedited process that will end the liability of the settling party with respect to both EPA and other PRPs. This is typically the case where the contamination has migrated onto the property in question and the landowner for some reason has failed to establish an "innocent landowner exception" to liability, or when a party has unwittingly acquired contaminated property. **De minimis settlements are not available to PRPs who have knowingly acquired contaminated property.** 42 U.S.C. • 9622(g)(1)(B).

Third, EPA may enter into a cost recovery settlement for moneys which it has expended from the Superfund in responding to contamination if a settlement may be reached before the matter is referred to the Department of Justice. 42 U.S.C. • 9622(h). Claims for contribution are barred against parties who have reached a final settlement with EPA as to the specific matters addressed in the settlement. 42 U.S.C. • 9622(h)(4).

4. Covenant not to sue.

An EPA guidance document[14] may provide another option. In some situations, EPA will issue a covenant not to sue to a prospective purchaser of contaminated property. The state must meet certain narrow criteria, one of which is a requirement that the prospective purchaser contribute a substantial amount of money to the cleanup or agree to conduct cleanup activities at the site. EPA expects the applicant to forego closing the transaction until the covenant is issued. Covenants will probably take some time to obtain. EPA Region 10 counsel advises that only two or three of these covenants have been issued by Region 10.

5. Litigation

If settlement options fail, EPA will refer any collec-

[14] U.S. E.P.A., "Guidance on Landowner Liability Under Section 107(a)(1) of CERCLA, De Minimis Settlements Under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property" June 6, 1989.

tions efforts to the Department of Justice (DOJ). The DOJ will proceed in court on EPA's behalf to obtain reimbursement to the Superfund against any remaining PRPs under a theory of strict liability. 42 U.S.C. • 9607, • 9613. When EPA seeks reimbursement, it may rely upon the virtual joint and several[15] as well as strict liability provisions found in the law. This means that in most cases, EPA may recover all of its expenditures from any potentially responsible party (PRP) who falls within one of the broad categories established in superfund for responsible parties without regard for the degree of fault of each party.[16] E.g., United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983) (Joint and several liability presumed under federal common law in the presence of indivisible harm in accordance with Restatement of Torts 2d • 886A (1981)). Cf. United States v. Northeastern Pharmaceutical and Chemical Co. (NEPACCO), 579 F. Supp. 823, 843-45 (W.D. Mo. 1984) (state common law employed to support joint and several liability), aff'd in part and re'v in part on other grounds, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987). But see United States v. Alcan Aluminum Corp., 1990 F.2d 711 (2d Cir. 1993); United State v. Alcan Aluminum Corp., 964 F.2d 252 (3d Cir. 1992) (low concentrations of hazardous substances intermingled in the waste stream may constitute divisibility in particular circumstances). Compare AS 09.17.080 (Allocation of damages in civil suits); AS 46.03.822 (Allocation of costs in environmental contribution cases).

It has been held that the court will not review the

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[15] Although the specific "joint and several" language was deleted from SARA in the final draft, courts frequently apply joint and several liability in CERCLA actions in the absence of clearly divisible harm, as they did prior to SARA. Bell Petroleum Svs v. Sequa, 3 F.3d 889, 895 (5th Cir. 1993); United States v. R. W. Meyer Inc., 889 F. 2d 1497 (6th Cir. 1989) (post-SARA); United States v. Chem-Dyne Corp., 572 F.Supp. 802 (S.D. Ohio 1983) (pre-SARA). The Chem-Dyne approach setting a presumption of joint and several liability was noted with approval by one of SARA's key sponsors, Rep. Eckart, who stated that SARA was not intended to alter this rule. 131 Cong. Rec. H11073 (daily ed. Dec. 5, 1985). The House report expresses a similar sentiment. H.R. Rep. No. 253(I), 99th Cong., 2d Sess., reprinted in 1986 U.S. Cong. & Admin. News 2835, 2856. Environmental Law Reporter, Superfund Deskbook, 521 (1992).

[16] In 1992 EPA published a proposed rule addressing federal cost recovery actions. 57 Fed. Reg. 34742-01 (Aug. 6, 1992). If the regulation is adopted without significant change and survives judicial challenge, it will crystalize federal response costs into the broadest possible interpretation. At this time the final rule is scheduled to be promulgated in September of 1993.

reasonableness of EPA's response action's cost, only whether it is consistent with the NCP.[17] United States v. Hardage, 982 F.2d 1436, 1443 (10th Cir. 1992). EPA may also collect indirect costs and attorney's fees. NEPACCO, 579 F. Supp. at 850.

The various PRPs are free to either negotiate a cost-sharing arrangement or pursue litigation against one another for contribution. 42 U.S.C. • 9613.[18] It should be kept in mind, however, that a PRP which reaches a private settlement with EPA may be insulated from suit from the other PRPs. 42 U.S.C. • 9613(f)(3). Thus, the law seeks to relieve EPA from the burden of proving the apportionment of responsibility.

6. Private responses.

It has been suggested that a party who undertakes a private response may institute a collection action pursuant 42 U.S.C. • 9607 rather than a contribution action pursuant 42 U.S.C. • 9613. The advantage to this approach is a large body of law supporting joint and several liability when the harm is indivisible pursuant to section 107. Superfund Deskbook supra, at 522. A 1992 case seems to bear out this prediction. Amcast Indus. Corp. v. Detrex Corp., 822 F. Supp. 545 (N.D. Ind. 1992). The Amcast decision includes an exhaustive review of private response action litigation. The court decided that liability need not be apportioned in a private Section 107 action for indivisible harm, but should wait for the contribution action pursuant 42 U.S.C. • 9613. Amcast, 822 F. Supp. at 551-54.

CONCLUSION

Despite the plain language in 42 U.S.C. • 9601(35) there is some doubt associated with the application of an innocent landowner defense to a condemnor's selection of land known to be contaminated. If there is a duty to inspect **prior** to

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[17] Under state law, state response costs must be reasonable to be collected. AS 46.03.760(a)(2).

[18] In some jurisdictions, attorney's fees may be collected. General Electric v. Litton Indus. Automation Sys., 920 F.2d 1415 (8th Cir. 1990), cert. denied. 111 S. Ct. 1390 (1991). In the Ninth Circuit, three courts have refused to award such fees. Stanton Road Assoc. v. Lohrey Enter., 984 F.2d 1015, 1020 (9th Cir. 1993); Key Tronic Corp. v. United States, 984 F.2d 1025, 1027 (9th Cir. 1992); State of Idaho v. Hanna Mining Co., 882 F.2d 392, 396 (9th Cir. 1989). In Alaska, however, reasonable attorney's fees are available to a prevailing party in state actions. Alaska R. Civ. P. 82. A successful action in state court under the state law would probably yield an attorney's fee award.

condemning a piece of property, as indicated in Fur Depot, then there may be a corresponding requirement that the condemnor not take land known to be contaminated if it desires to maintain an innocent landowner defense. Even if a condemnor may take land known to be contaminated without becoming a PRP, any innocent landowner defense will be lost if the landowning agency does not exercise due care with respect to the contamination or causes or contributes to the contamination by act or omission. Disturbing the contamination during construction activities before it is remediated could be interpreted as a lack of due care or a contribution to the contamination. The defense under state law could be lost if a response action is not undertaken within a reasonable amount of time. A condemnor should proceed with great care in considering the condemnation of property known to be contaminated.

What protection the SARA amendments offer even under the most favorable interpretation could be lost at the drop of a bull- dozer's blade. Any condemnation of, or work on, contaminated property should be undertaken with a realization that a response to the contamination consistent with the NCP will likely be necessary before the project may be constructed. If the state involves itself, or increases its involvement, in a contaminated site, the risk is correspondingly increased that the state will be involved in the response action and subsequent litigation. Five reasons seem immediately apparent for the increased involvement. First, EPA may step in and issue an Order to the state as discussed above. The state may step in and conduct a response to protect itself from the costs of a federal suit or a contribution claim. Concern with respect to the local public health or contractor/employee safety may dictate a response. The project may be of sufficient importance that a state response is mandated to complete the project within a desirable time frame. Lastly, the due care requirement of the defense may require an active response under federal as well as state law.

Regardless of federal CERCLA liability, DOT&PF must consider the impact of Alaskan law. AS 46.03.822. As discussed above, this statute is based on the federal CERCLA and has similar provisions, including the eminent-domain exception to liability. However, the state statute arguably requires on its face that the state clean up the contamination once it acquires the property. AS 46.03.822(b)(1)(B). In other words, the state's mini-CERCLA requires what the "due care" standard of the federal CERCLA merely implies: the contaminated site must be cleaned up after the state acquires the property by condemnation, in order to avoid liability.

Based on the foregoing, DOT&PF should consider the following alternatives which are listed in order of increasing liability exposure:

1. Do not acquire the property. If at all possible, DOT&PF should consider designing the road to avoid the contaminated site, so long as the road can be designed to comply with applicable safety and design standards. Although this option is not very attractive, it may cost less to move the road than it would to incur further liability for a multi-million dollar cleanup of a contaminated site.

2. Delay acquiring the contaminated parcel until EPA or ADEC certifies the cleanup as complete and the pollution abated. This may delay construction of the project.

3. If the site is listed as a Superfund site in the future, request a covenant not to sue from EPA. In order to avoid liability under Alaska's CERCLA, a similar covenant would have to be obtained from ADEC. This option will require the state to contribute a significant sum of money to EPA to be applied to the cleanup. However, the state will at least know the limit of its liability before acquiring the parcel. DOT&PF may want to explore the willingness of FHWA to participate in payment of this amount.

4. Condemn the parcel. If this option is chosen, DOT&PF should be aware that it is risking assumption of a multi-million dollar liability. It is important to note that the state would not be eligible for de minimis settlement under 42 U.S.C. • 9622(g) because the state was aware of the contamination prior to the acquisition of the property. I recommend the conservative approach with respect to state law. Assume that state law requires a cleanup upon transfer of the title.

SPECIFIC CONCERNS

- **"In the case of contaminated Alaska Railroad owned property, would "entry by permit" result in any different liability than "fee simple acquisition?"**

No. Lesser possessory interests have been held sufficient to trigger CERCLA liability. DOT's road-building activities in the right of way would likely classify it as an operator in any event. Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2276 (1989) (although the Union Gas case did not directly address the issue of the state's ownership interest in an easement, liability against the state was predicated upon the "owner or operator" language of CERCLA. Id. at 2277.) At best, a lesser interest in the fee may help in a contribution action if the liability is apportioned according to class of PRP. This is a tenuous benefit contingent upon a particular type of arbitrary allotment of liability.

- **"Does the Railroad's prior federal ownership make any difference (i.e. does it obligate federal involvement even**

though much of the property has been leased by the Railroad for many years)?"

Federal facilities are subject to CERCLA. 42 U.S.C. • 9620. The same statute also waives sovereign immunity to state law requiring removal and remediation at federal facilities which are not listed on the NPL. The federal government is included in the definition of a "person" under 42 U.S.C. • 9601(21). Any "person" who is liable and has not been otherwise released through settlement may be sued for contribution under 42 U.S.C. • 9613(f). The federal court which hears the contribution action will then apportion the costs among the PRPs as it sees fit.

If it can be proven that a federal agency owned the land or was an operator at the time of a disposal, there will be some federal liability. 42 U.S.C. • 9601(35)(C). If the railroad's federal owners passed the title to the state without knowledge of the contamination, or with knowledge and notice to the state, and did not itself contribute to or cause the contamination, it may fit within a loophole and be exempt from liability. 42 U.S.C. • 9607(b)(3); • 101(35). As discussed above, if EPA should take action it could pick one PRP and rely on the strict liability provisions outlined above, leaving the selected PRP to sue the others for contribution. When the contribution case is heard, the judge will likely serve out the fiscal liability proportionally in a manner that the judge deems fair. If the costs cannot be linked to specific releases, which is commonly the case, the judge will settle on some other pragmatic method. In general, the more contact a PRP has with the site, the greater the ultimate fiscal liability is likely to be. Dant & Russell v. Burlington Northern R.R., 951 F.2d 246, 249 (9th Cir. 1991). 42 U.S.C. • 9613.

- **"Are there measures to defend against or minimize liability (e.g., indemnification language in lease or purchase agreements, etc.)?"**

Most, but not all, courts have allowed indemnification agreements to take effect as between a PRP and the indemnitor; however, they are ineffective against EPA. Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1578 (E.D. Pa. 1988). Contra AM Int. v. Int. Forging Equipment, 743 F. Supp. 525, 529 (N.D. Ohio 1990) (indemnity agreement between PRPs held ineffective on policy grounds). Indemnity agreements may not be used to shift legal liability. 42 U.S.C. • 9607(e)(1). Care should be taken not to release the prior owners or lessees from liability at the time of transfer. Such a release could act to protect the released party from a subsequent contribution claim even though it will not shield the prior owner from EPA. Mardan Corp. v. C.G.C. Music Ltd., 804 F.2d 1454, 1461 (9th Cir. 1986) (holding based on state common law interpretation of release). To be

effective, an indemnity agreement must clearly and specifically encompass environmental harm. Steego Corp. v. Ravenal, 830 F. Supp. 42, 29 (D. Mass. 1993).

An indemnity agreement is only as useful to the indemnitee as the indemnitor is solvent. If an enforcement agency or another PRP seeks reimbursement from an indemnified party, the benefit of the indemnification will be limited both by the terms of the agreement itself and the actual capacity of the indemnitor to in fact shield the indemnitee. In short, if the indemnitor fails in its duties, the indemnitee will still be liable to the plaintiff.

- **"What is the likelihood of recovering cleanup costs from responsible parties after property acquisition?"**

The litigation will require a significant amount of factual investigation that has not yet been accomplished. It will be financially stressful to all parties involved. The fiscal consequences of a response and litigation could be disastrous to the smaller businesses likely responsible for the floating product. Alaska Gold is a successor corporation and its liability will need to be firmly established. It is unclear whether Alaska Gold is sufficiently solvent to bear significant expenses. The past federal owners of the railroad are subject to the same proof requirements, and their portion in a contribution action will depend on their activities, and the state's ability to segregate the activities of the federally owned entity from those of the state owned entity.

- **"Are there other legal implications to consider?"**

The consequences of acquiring contaminated land are complex, as should be readily apparent in this opinion. It is difficult to foresee every implication that might arise, but a few further points are worth consideration.

When considering a site that has not been elevated to the NPL, as is the case in the Minnie Street area, it may be worthwhile to consult with the ADEC to investigate the availability of funds from the Oil and Hazardous Substance Release Fund for a response prior to acquisition. AS 46.08.005 et. seq. See n. 3. Supra.

If the state acquires property through a condemnation proceeding and determines that it is indeed contaminated after title becomes vested in the state, there may be a basis for reducing the deposit or perhaps obtaining a deficiency judgment reflecting the cost of any remediation effort. See Redev. Agency v. Thrifty Oil Co., 5 Cal. Rptr.2d 687 (Cal. App. 1992).

There has been a persistent problem under state law concerning the testing of potentially contaminated property prior

to acquisition. DOT may gain access to a potential condemnee's property pursuant to AS 09.55.280. While this statute authorizes DOT to "make examinations, surveys, and maps, and locate boundaries" it does not specifically authorize DOT to take samples and test for hazardous substances. Courts in other states have interpreted similar statutes inconsistently. Most of these courts have come to the conclusion that general-access statutes do not authorize the taking of soil samples without the landowner's permission. Hailey v. Texas New Mexico Power Co., 757 S.W.2d 833 (Texas App. 1988); Missouri Highway and Transportation Comm. v. Eilers, 729 S.W.2d 471 (Mo. App. 1987); County of Kane v. Elmhurst Nat'l Bank, 443 N.E.2d 1149 (Ill. App. 1982). At least two other state courts have disagreed and allowed the entry. Square Butte Electric Coop. v. Dohn, 219 N.W.2d 877 (N.D. 1974); Puryear v. Red River Auth., 383 S.W.2d 818 (Texas Civ. App. 1964).[19] Therefore, it is unclear whether the Alaska statute authorizes soil sampling for the kind of contamination at issue here.

In the past, DOT attempted to have AS 09.55.280 amended to specifically allow soil testing for hazardous substances. Unfortunately that attempt was unsuccessful. Amendment remains the best option for resolving the question. Without the amendment of AS 09.55.280, the ability of the state to test for hazardous substances over the objection of the landowner is an open question.

- **"Is it legally possible to enter and conduct cleanup prior to acquisition and still recover the full cleanup cost?"**

Private parties may investigate and remediate potential Superfund sites without EPA approval or acknowledgement. There is a right to contribution under CERCLA for private responses. Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 892 (9th Cir. 1986).

Unless the actor is a state enforcement agency acting in accordance with its own statutory authority and discretion, the holder of the fee must consent to the intrusion or be subject to a court order allowing the intrusion. All actions taken, however, should be consistent with the NCP to avoid additional liability and enhance the likelihood of collecting reimbursement from the responsible parties.[20] After a site has made the

[19] The taking of a core sample in Puryear was allowed for the purpose of determining suitability of the land for building a dam. However, a later court in the same state did not allow a utility condemnor to take soil samples. Hailey, 757 S.W.2d 833. The Puryear court felt that the statute would be useless to the agency if it were interpreted any other way under the circumstances.

[20] The State of Washington had an unpleasant experience when a

superfund list, private action can be taken with EPA approval. See 42 U.S.C. • 9604(a), • 9622(e)(6). Any action taken which worsens or spreads the contamination could trigger or further solidify the liability of the actor as operator.

DOT as a landowner agency of the state has no authority to enter land against the landowner's wishes and conduct a cleanup of the premises. ADEC may have the authority to enter the property and conduct an emergency cleanup if the facts so warrant under its statutory structure. ADEC's actions are guided by mandated priorities, which are centered upon threats to the public health and environment. See AS 46.03.010 (Declaration of Policy). An entry at DOT's request may be subject to attack as an abuse of discretion unless the site would otherwise fit within ADEC's priorities.

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court found that it failed to adhere to the NCP's requirements and thus could not recover the four million dollars in costs it had expended at a Superfund site. Washington State Dept of Trsp. v. Washington Natural Gas Co., No. C-89-0415-TC (E.D. Wa. Dec. 21, 1992). VII Inside EPA's Superfund Report, No.1 (Jan. 13, 1993).