

# ELR

## NEWS & ANALYSIS

## Legal Background to Off-Site Contamination

by John Pendergrass

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*Editors' Summary: The law governing off-site contamination began with common law and has grown to include federal legislation such as Superfund, the Resource Conservation and Recovery Act, the Clean Water Act, and the Oil Pollution Act. John Pendergrass traces the development of this area of law from its beginnings in tort and third-party liability to present-day state and federal statutes. In this Article, he offers a study of the chronology of brownfields legislation, concluding with some remarks about the future of off-site contamination law.*

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### I. Introduction

This Article introduces the law that governs off-site contamination. The chapter roughly follows the chronological development of the law, starting with common law since the causes of action that apply to off-site contamination are traditional ones such as nuisance and trespass. Third-party liability for off-site contamination is also essentially a common-law development. Following the common law is a discussion of the federal Superfund law and similar state laws. Other federal laws that deal with contamination issues include the Resource Conservation and Recovery Act (RCRA), the Clean Water Act (CWA), and the Oil Pollution Act (OPA). Brownfields legislation first developed in the states and is discussed in relation to state voluntary cleanup laws. Federal brownfields legislation is also discussed in relation to state brownfield laws.

### II. Common Law: Nuisance, Trespass, and Third-Party Damages

People have been dumping their waste in their backyards, in the vacant lot next door, and just outside the city limits, since they first settled in communities. This works as long as it is possible to avoid living too close to noxious wastes. But such practices inevitably lead to conflicts about incompatible land uses. Courts in England and the United States de-

veloped methods of resolving such disputes on a case-by-case or common-law basis.

### III. Nuisance

The common-law concept of private nuisance protects private landowners, or other persons in possession of land, from any unreasonable interference with their use and enjoyment of the land. A similar, but distinct, doctrine of public nuisance protects the public from activities that would endanger the public health and safety or offend public morals.

Anything that disturbs, damages, or interferes with the use of land by its owners, or others with property rights in the land, may be considered a private nuisance under the common law. A private nuisance affects one or a few persons whereas a public nuisance is defined as one that affects a large number of people in the same way. Even as late as the 1970s, private nuisance law was one of the principal methods available to individuals for combating pollution. Its effectiveness in dealing with pollution problems was and continues to be limited, however, since only landowners, lessees, or other persons in possession of land can use the doctrine of private nuisance. In addition, many common-law rules further limit the circumstances in which a private landowner may use the private nuisance doctrine to prevent or stop a polluter from harming the landowner. For example, under the common law, the pollution must be an unreasonable interference with the landowner's use of his or her land. Unreasonableness depends on the circumstances in each individual case. Determining unreasonableness necessarily requires that the landowner's interest be balanced against the utility of the conduct alleged to cause the nuisance. The courts typically decide that the conduct is a nuisance if the harm outweighs the utility of the conduct. Thus it is difficult to determine in advance what will be unreasonable. In addition, the pollution must interfere with the landowner's use of his or her land.

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Even where the harm to the landowner is severe, courts may hold that there is no nuisance. If the landowner comes onto the scene after the activity alleged to cause the nuisance is already established, courts are likely to hold that the landowner “came to the nuisance,” and therefore, cannot complain that the activity unreasonably interferes with his or her use and enjoyment of the land.

When courts do hold that there has been a nuisance, they have broad powers to remedy the nuisance. The court may simply order the person causing the nuisance to pay money damages to compensate the landowner for the interference with the use and enjoyment of the land. The court may also issue an injunction prohibiting the defendant from continuing the nuisance. In the case of an industrial facility, an injunction might require the company to install pollution control equipment or even to move the facility if technology could not prevent the nuisance. This is illustrated by *Spur Industries, Inc. v. Del E. Webb Development Co.*,<sup>1</sup> where the court held that a cattle feedlot was a nuisance and must move because suburbs had developed nearby and no technology could eliminate the attendant odors and insects. Because requiring huge capital expenditures for technology or relocation often causes social problems, courts are typically hesitant to use the full powers of injunction when the activity causing the nuisance is of higher value than the affected land.

#### IV. Trespass

Another common-law theory often used as an alternative to a nuisance claim is trespass. Like nuisance, trespass developed to protect owners or occupiers of real property from acts that harmed their interest in the land. The cause of action of trespass protects the property holder’s interest in possession of the land from an entry onto the land by another without the consent of the person in possession.

Since trespass allowed recovery for an invasion of property simply based on the lack of consent, courts had little trouble in holding it could apply when a defendant caused or allowed hazardous substances to invade neighboring property. In *Sterling v. Velsicol Chemical Corp.*,<sup>2</sup> a chemical company that disposed of hazardous chemicals on its property and allowed them to migrate into the groundwater and then off-site to contaminate the groundwater and subsurface underlying numerous neighboring property owners and occupiers was held liable for trespass. The court determined the damages based on the diminution of the market value of the property caused by the defendant or, as in this situation, the difference in the value of the property in its contaminated state compared to if it were not contaminated.

Trespass is an intentional tort requiring the defendant to intend the act that is the entry without consent onto the plaintiff’s land, but the defendant need not have intended the consequences or damage to the land. In *Shockley v. Hoechst Celanese Corp.*,<sup>3</sup> the defendant had delivered drums of waste chemicals to a former employee who operated a chemical

reclamation facility across the street from the defendant’s property. During his reclamation operations the independent contractor spilled chemicals, which contaminated the groundwater under that property and eventually migrated to the adjoining property. The court held the defendant Hoechst Celanese Corporation liable for trespass based on the ample evidence that it intended the act of delivering the chemicals to its former employee and that it knew or should have known that the result would follow.<sup>4</sup> The plaintiff in *Shockley* filed claims under theories of strict liability, negligence, and nuisance, in addition to trespass, and the court reasoned that the defendant’s knowledge of the abnormally dangerous nature of the chemicals was sufficient to establish that it knew or should have known of the consequences of its act.<sup>5</sup> Thus, a claim for trespass may be allowed where the entry onto the land occurred via contamination that reaches groundwater, which then flows onto the property of the plaintiff.

#### V. Strict Liability

The common law developed other methods for dealing with situations where one property owner’s actions actually damaged the property of another. The rule of strict liability is particularly important in cases where land is contaminated with hazardous substances. The English courts first articulated a rule of strict liability for injuries that result from unnatural uses of land or dangerous activities almost one and one-half centuries ago in *Rylands v. Fletcher*.<sup>6</sup> This rule of strict liability has been adopted by the courts in most states as applicable to “abnormally dangerous activities.”<sup>7</sup> The general rule is:

(1) One who carries on an abnormally dangerous activity is subject to liability for harm . . . resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.<sup>8</sup>

It is based on a public policy that “requires the defendant to make good the harm which results to others from abnormal risks which are inherent in activities that are not considered blameworthy because they are reasonably incident to desirable industrial activity.”<sup>9</sup> In other words, society will tolerate an activity that creates abnormal risks because the person engaging in the dangerous activity is required to ensure the public against the risk.<sup>10</sup> This rule has been applied to cases involving contamination of wells and groundwater,<sup>11</sup> streams,<sup>12</sup> and land.<sup>13</sup> Many legislatures, beginning with

4. *Id.*

5. *Id.*

6. 3 H. & C. 774, 159 Eng. Rep. 737 (1865), *rev’d*, 1866 L.R. 1 Ex. 265, *aff’d*, 1868 L.R. 3 H.L. 330.

7. RESTATEMENT (SECOND) OF TORTS §519 (1977).

8. *Id.*

9. *McLane v. Northwest Nat. Gas Co.*, 467 P.2d 635, 637 (Or. 1970).

10. *Arlington Forest Assocs. v. Exxon Corp.*, 774 F. Supp. 387, 389 (E.D. Va. 1991).

11. *Branch v. Western Petroleum, Inc.*, 657 P.2d 267, 13 ELR 20362 (Utah 1982).

12. *Cities Serv. Co. v. Florida*, 312 So. 2d 799 (Fla. Ct. App. 1975).

13. *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 517 F. Supp. 314 (N.D. Ill. 1981).

1. 108 Ariz. 178, 494 P.2d 700 (Ariz. 1972).

2. 647 F. Supp. 303, 17 ELR 20081 (W.D. Tenn. 1986), *rev’d in part*, 855 F.2d 1188, 19 ELR 20404 (6th Cir. 1988) (the appellate court reversed most of the claims for medical injuries of the plaintiffs, but affirmed the claim for damage to property, including the method of determining the amount of damages).

3. 793 F. Supp. 670, 23 ELR 20155 (D.S.C. 1992).

New Jersey's<sup>14</sup> and followed by the U.S. Congress and then other states, have adopted strict liability as the standard of liability to apply where hazardous substances contaminate land or water.

## VI. Third-Party Damages

In most cases of contamination of land by hazardous substances, the owner or occupier of the land had no formal relationship with the party responsible for the contamination other than being adjacent or neighboring landholders. In such cases, the property holder who makes a claim for injuries to his or her land is referred to as a third-party claimant because the claim is not based on a contract or other formal relationship with the defendant. Most of the cases discussed in the preceding subsections on nuisance, trespass, and strict liability involve third-party damage claims.

The plaintiff in *Shockley*, for example, owned property adjacent to the property on which Hoechst Celanese's former employee had operated the chemical reclamation facility.<sup>15</sup> The plaintiff's trespass claim did not rely on any contractual relationship with Hoechst Celanese and thus was a claim for third-party damages. Similarly, plaintiffs bringing claims for private nuisance are third parties because they allege that a neighboring landowner's use of land was unreasonable and injured them.

## VII. Superfund (Comprehensive Environmental Response, Compensation, and Liability Act)

While the federal environmental regulations era began with the Clean Air Act and the CWA in the early 1970s, by the late 1970s, publicity about contamination at Love Canal and Valley of the Drums made the U.S. public aware of the risks inherent in the uncontrolled and undocumented methods that had for decades been used to dispose of hazardous substances. In response to the public uproar, Congress enacted the Superfund statute late in 1980. The Superfund statute, formally known as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),<sup>16</sup> dominates any discussion of legal issues related to contamination of land by hazardous substances. Although it is not the only law governing such issues and frequently will not control the outcome, it is significant in many cases of contamination and provides legal background in nearly all cases. Where it does not apply, such as in cases of contamination by petroleum,<sup>17</sup> that is generally due to exemptions or exclusions in the statute covering specific situations.

It addresses the cleanup of sites where hazardous substances were deposited, stored, disposed of, placed, or otherwise came to be located.<sup>18</sup> Congress modeled CERCLA

partly on New Jersey's Spill Compensation and Control Act (Spill Act) of 1976, which was the first statute to require cleanup of land contaminated with hazardous substances, and partly on the CWA requiring cleanup of spills of oil or hazardous substances into surface water.<sup>19</sup>

## VIII. Revolving Fund

The basic scheme of CERCLA is simple. Superfund takes its name from the revolving fund set up to finance hazardous waste site cleanups. The money for the fund came partly from a tax on chemical feedstock manufacturers and petroleum companies and partly from general revenues. Congress initially set the amount of the fund at \$1.6 billion, thinking that would be enough to clean up most of the hazardous waste sites in the country, but added \$8.5 billion in 1986 and another \$5.1 billion in 1990 to extend funding through September 30, 1994. At the end of 1995, the taxing authority expired and has not been reauthorized and thus the Superfund program is now funded entirely through annual appropriations from general revenues.<sup>20</sup> It is a revolving fund because Congress envisioned that money from the fund would be used to clean up some sites, but that the government would recover most of those funds from the parties responsible for the hazardous waste at the sites. The government has not been successful in recovering most of the money spent from the fund, though it certainly has had success in cost recovery actions.<sup>21</sup>

## IX. Liability

Congress gave the federal government, and state and tribal governments, several tools to enable them to recover the costs of cleanup from responsible parties. The most important of these tools is a strict liability provision very similar to the one for spills of oil and hazardous substances contained in the CWA,<sup>22</sup> which derives from the common-law rules on strict liability. Congress specified several categories of people that were liable for the cost of cleaning up a contaminated site, including: the current owner or operator of a site; anyone who owned or operated a site at the time of disposal of any hazardous substance at the site; anyone who arranged for disposal or treatment, or who arranged for transportation for disposal or treatment, of hazardous substances owned or possessed by that person and those hazardous substances ended up at the site; and anyone who transported hazardous substances to the site if that person selected the site.<sup>23</sup> Thus, except for limited defenses, including that the release or threatened release of a hazardous substance was caused solely by an act of God, an act of war, or an act or omission of a third party, those responsible for hazardous substances at a site that was cleaned up with Superfund money are liable for the cost of the cleanup.<sup>24</sup> Notably absent from these defenses is fault. Under CERCLA, the government need not prove that a person was negligent or otherwise at fault, just

14. See *infra* note 61 and accompanying text.

15. *Shockley*, 793 F. Supp. at 670.

16. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.

17. *Id.* §9601(14):

The term "hazardous substance" . . . does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

18. *Id.* §9601(9) (definition of "facility").

19. See *infra* notes 44 & 61 and accompanying text.

20. KATHERINE N. PROBST & DAVID M. KONISKY, SUPERFUND'S FUTURE 2 (Resources for the Future 2001).

21. Fiscal Year 2004 Superfund Annual Report, §II.

22. 33 U.S.C. §1321(b)(3). For a discussion of the oil spill provisions of the CWA, see *infra* notes 43-45 and accompanying text.

23. 42 U.S.C. §9607(a).

24. *Id.* §9607(b).

that the person meets one of the above criteria. In connection with the strict liability provision, the government is authorized to sue the responsible parties for the government's cost of cleanup. The government is also authorized to order, or if need be to sue, responsible parties to clean up the site.<sup>25</sup>

Although the statute is clear about who is liable and about the limited set of defenses, it is silent as to how to apportion liability when more than one party was responsible for the hazardous substances at the site. Parties that contributed some but not all of the hazardous substances at a site argued that they should not be responsible for the entire cost of the cleanup since they were not responsible for all the hazardous substances released into the environment.

The courts, however, uniformly decided that each party that had contributed waste to a site that was subject to a cleanup action would be "jointly and severally" liable for the entire cost of the cleanup. This meant that each party that had contributed any amount of waste to the site was potentially liable for the entire cost of the cleanup of that site. This seemingly harsh standard, which could place a crushing financial burden on parties that had contributed relatively small amounts of waste, was based on the common-law rules of strict liability. Furthermore, that a party was potentially liable for the entire cost did not preclude it from obtaining a contribution toward that liability from the other parties that had contributed waste to the site. The imposition of the joint and several liability standard simply was intended to leave it to the responsible party, rather than to the government, to find those other responsible parties and to obtain contributions from them. The policy was to focus the government's resources on effective cleanup and not waste them on determining which of the potentially responsible parties (PRPs) should pay for the cleanup.

In 2004, the U.S. Supreme Court overturned years of practice in adjudicating contribution claims by holding that §113(f) of CERCLA allowed an action for contribution only if the party paying for the cleanup had been sued by an authorized government agency or resolved its liability to the government through an administrative or judicial settlement.<sup>26</sup> Based on prior decisions in lower courts, many responsible parties had decided to avoid litigation and take control of the cleanup process by paying for the cleanup without any governmental enforcement action and seek contribution from other responsible parties later. This was particularly true at less contaminated or brownfield sites that were not listed on the national priorities list (NPL) and thus not eligible for cleanup funding under the Superfund statute. Such sites typically are cleaned up under state voluntary cleanup programs (VCPs) or brownfields programs, which are premised on voluntary action by property owners, other PRPs, and prospective purchasers. Because these programs have been based on the fundamental premise of avoiding litigation, state VCP and brownfields program administrators and officials at the U.S. Environmental Protection Agency (EPA) have been concerned that fewer property owners or other responsible parties will be willing to pay for the cost of cleanup if they have no prospect of obtaining contributions from other PRPs without subjecting themselves to enforcement actions by state and tribal governments. Moreover, state officials lack the personnel and other re-

sources to bring such actions in numbers approximating the number of sites that have been cleaned up under VCPs.

## X. Cleanups

Whenever there is a release, or a substantial threat of a release, into the environment, of any hazardous substance, or any pollutant or contaminant that may present an imminent and substantial danger to the public health and welfare, CERCLA authorizes EPA to remove, or take other remedial action, with respect to the hazardous substance or pollutant or contaminant.<sup>27</sup> Removal is a temporary response to immediate emergencies, whereas remedial actions are intended to be permanent solutions, including treatment that renders the hazardous substances benign or less dangerous.

### A. How Clean Is Clean?

The original Superfund statute was ambiguous as to what would constitute a sufficient cleanup. The statute specified that the government was to remove the sources of immediately hazardous releases and take remedial action to permanently treat and dispose of other hazardous wastes. CERCLA did not, however, define what would be considered a complete cleanup. Environmentalists and surrounding residents wanted contaminant levels reduced to their background, or original pre-disposal, levels. The responsible parties, on the other hand, wanted cleanups to remove hazards to human health, but saw no need to reduce contaminants to background levels, particularly where those might not be known. As of yet, the courts have not definitively resolved this issue.

### B. Technological Problems

Related to the "how clean is clean" issue was the problem of technological ability to effectively clean up a site. Congress apparently assumed that technology would be sufficient to achieve permanent remedies. In many cases this assumption was overly optimistic. Technology simply did not exist that would permanently reduce the dangers from many hazardous substances. Some technologies that might greatly reduce those risks presented problems of their own. For example, dioxin, polychlorinated biphenyls (PCBs), and other toxic organic compounds can be destroyed by incineration. However, even at extremely high destruction efficiency levels required by EPA rules, 99.9999%, incineration still leaves some residues of the original dioxin or other organic compound. These residues continue to be hazardous and require safe disposal. Unfortunately, incinerators tend to discharge those residues into the air, creating an air pollution problem.

### C. Superfund Amendments and Reauthorization Act of 1986

Congress responded to these issues in 1986, by passing the Superfund Amendments and Reauthorization Act (SARA). The amount of the revolving fund was increased from \$1.6 billion to \$8.5 billion. Even with the larger amount of money, the fund was not sufficient to clean up all the sites

25. *Id.* §9605(a).

26. *Cooper Indus., Inc. v. Aviall Servs., Inc.* 543 U.S. 157, 34 ELR 20154 (2004).

27. 42 U.S.C. §9604(a)(1).

without contributions from responsible parties. Thus, the liability provisions of Superfund remained important. The 1986 Amendments placed new emphasis on the litigation process used to determine liability of responsible parties for cleanup costs. Although SARA did not specifically adopt the joint and several liability standard used by the courts, Congress made it clear in its debates and in the reports describing the amendments that it approved of the courts' adoption of that standard. The amendments also added a citizen suit provision, which allows any person to file a lawsuit to correct a violation of the law.

In SARA, Congress attempted to answer the question of "how clean is clean." SARA requires a cleanup to meet any standards from other federal or state statutes that are "legally applicable" or "relevant and appropriate."<sup>28</sup> Thus, if a standard under another federal or state statute would be by its terms legally applicable to a site, then the cleanup must meet that standard. Similarly, if a standard from another federal or state statute, though not legally applicable, would be relevant and appropriate to be applied to the site, then the cleanup must meet that standard as well. This standard is a compromise between the positions of the environmentalists and responsible parties because the level of allowable residual contamination depends on other environmental laws.

Furthermore, SARA codified a presumption in favor of permanent cleanup remedies, including permanent treatment. The statute does not define a permanent remedy, however, it does state that land disposal is not a permanent remedy and is therefore a disfavored technique. This was intended to eliminate the problem that wastes from Superfund sites were simply being transported around the country for disposal at new sites where they were contributing to new releases of hazardous substances.

#### *D. Small Business Liability Relief and Brownfields Revitalization Act (Brownfields Amendments)*

In 2002, Congress amended Superfund to encourage cleanup and redevelopment of brownfields, largely by adopting as part of the law a number of administrative policies that EPA had implemented during the preceding decade. Many of these policies were intended to reduce or eliminate liability for innocent landowners and others for whom strict liability was considered particularly unfair. The Brownfields Amendments also authorized new grants to states and tribes to establish or enhance their non-NPL cleanup programs.<sup>29</sup>

The liability relief provisions of the 2002 Brownfields Amendments did not alter the fundamental nature of Superfund liability; it remains strict, joint, several, and retroactive. However, they did provide exceptions for certain classes of parties. A person who contributed less than 110 gallons or 200 pounds of materials containing hazardous substances to a site is not liable if the contribution occurred before April 1, 2001, and the materials did not contribute significantly to the cost of the cleanup or restoration of natural resources.<sup>30</sup> A similar exception from liability was provided for small businesses, including small tax-exempt nonprofits, and residential owners and lessees who contrib-

uted only municipal solid waste to a site.<sup>31</sup> The exception for innocent landowners was clarified and expanded by specifying what actions a purchaser must take in order to qualify for the exception.<sup>32</sup> A key element of qualifying as an innocent landowner is that the person made all appropriate inquiries into the condition of the property before purchasing it and did not know and had no reason to know of contamination. In addition, the landowner must comply with any land use controls on the property, and not impede the effectiveness or integrity of any institutional controls, used at the property as part of a cleanup.<sup>33</sup> The Brownfields Amendments also created a liability limitation for prospective purchasers. A prospective purchaser is defined as "a person (or a tenant of a person) that acquires ownership of a facility after the date of the enactment of [this Act—January 11, 2002]."<sup>34</sup> A bona fide prospective purchaser, "whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility[.]"<sup>35</sup> will not be held liable under CERCLA provided that the prospective purchaser has not exacerbated the existing contamination and certain other conditions are met.<sup>36</sup> Finally, the federal government was authorized to consider the ability to pay of the PRP in settling claims for response costs.<sup>37</sup> A condition applied to all of these provisions was that the person complies with requests for information.

In the second portion of the 2002 Brownfields Amendments, Congress built on state VCP and brownfields programs, which states had begun developing in the 1980s in response to the large number of sites that did not meet the criteria for listing on the NPL but which required cleanup nevertheless.<sup>38</sup> In these Brownfields Amendments, Congress modified the definition of a brownfield that most states and EPA had been using and defined a brownfield site as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."<sup>39</sup> Sites are excluded from being treated as brownfields if they

31. *Id.* §9607(p).

32. *Id.* §9601(35)(A) & (B) (this section actually defines a contractual relationship as the term is used in §107(b)(3), the liability section, but it is typically referred to as the innocent landowner defense).

33. *Id.* See [www.lucs.org](http://www.lucs.org) (last visited Dec. 11, 2006) (this website is devoted to land use controls and institutional controls in the context of cleanups of hazardous substances), OFFICE OF SOLID WASTE & EMERGENCY RESPONSE (OSWER), U.S. EPA, INSTITUTIONAL CONTROLS: A SITE MANAGER'S GUIDE TO IDENTIFYING, EVALUATING, AND SELECTING INSTITUTIONAL CONTROLS AT SUPERFUND AND RCRA CORRECTIVE ACTION CLEANUPS (2000) (OSWER 9355.0-74FS-P, EPA 540-F-00-005), and ENVIRONMENTAL LAW INST. (ELI), PROTECTING PUBLIC HEALTH AT SUPERFUND SITES: CAN INSTITUTIONAL CONTROLS MEET THE CHALLENGE? (2000) (this report contains a description of types of institutional controls, including land use controls).

34. 42 U.S.C. §9601(40).

35. *Id.* §9607(r)(1).

36. *Id.* §9601(A)-(H).

37. *Id.* §9622(g)(7).

38. See OFFICE OF BROWNFIELDS CLEANUP & REDEVELOPMENT, U.S. EPA, STATE BROWNFIELDS AND VOLUNTARY RESPONSE PROGRAMS: AN UPDATE FROM THE STATES (2005) (EPA 560-R-05-001), ELI, AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50-State Study, 2001 UPDATE 37-43 (2002) [hereinafter STATE STUDY] (contains a description of state voluntary cleanup programs and state brownfields programs).

39. 42 U.S.C. §9601(39)(A).

28. *Id.* §9621(d).

29. *Id.* §9628(a).

30. *Id.* §9607(o).

are: listed or proposed to be listed on the NPL; the subject of a planned or ongoing removal action; the subject of a formal enforcement action under CERCLA; a permitted facility or a subject of a formal enforcement action under the CWA, RCRA, Toxic Substances Control Act (TSCA), or Safe Drinking Water Act; required to undertake corrective measures under RCRA; a land disposal unit subject to closure requirements under the Solid Waste Disposal Act; a federal facility; part of a facility where PCBs have been released that are subject to cleanup under TSCA; or part of a facility that has received assistance for cleanup under the Leaking Underground Storage Tank Trust Fund under RCRA.<sup>40</sup> State insurance trust funds that assist in reimbursements for cleaning up petroleum contamination from leaking underground storage tanks (LUSTs) are widespread in the United States. A site also may be considered a brownfield site for purposes of receiving revitalization funding grants if it meets the above standards and is contaminated with controlled substances, petroleum or petroleum products (despite their exclusion from the definition of hazardous substances), or mine-scarred lands and is a relatively low-risk site, has no viable responsible party, and will be cleaned up by a non-lia- ble person.<sup>41</sup>

A significant change made by these Brownfields Amendments was to authorize EPA to provide grants to assess and clean up brownfield sites. Before these amendments, EPA's brownfields program had been built around its limited authority under CERCLA to provide grants for pilot programs.

### XI. The Clean Water Act and the Oil Pollution Act

Much of the environmental legislation in the United States has been passed in response to catastrophic events and the national laws dealing with oil spills can be traced to two such events separated by two decades. The first occurred in 1969, when a large oil spill off the coast of Santa Barbara, California, received widespread publicity and led the federal government, through the U.S. Department of the Interior, to develop a national contingency plan for responding to oil spills. Congress incorporated that contingency plan into the Federal Water Pollution Control Act,<sup>42</sup> along with liability and other provisions aimed at preventing such spills and cleaning up those that do occur. The second catastrophe was the *Exxon Valdez* oil spill in Alaska in 1989, which led to the passage of the OPA, which incorporated and expanded on the provisions of the earlier law.

### XII. Cleanups of Oil and Hazardous Substance Discharges to Water

Although the CWA is primarily directed at control of discharges of pollutants into U.S. waters through a system of permits and regulations, it also prohibits the discharge of oil or hazardous substances into the waters of the United States.<sup>43</sup> In addition, this provision requires owners or operators of vessels or facilities that discharge oil or hazardous substances

in quantities that may be harmful to clean up the spill<sup>44</sup> and to report it to the federal government.<sup>45</sup>

If the owner/operator does not clean up the spill, then the government may recover from the owner/operator its cost for cleaning up the spill. The statute includes a no-fault strict liability standard that holds an owner or operator liable for the cost, up to specific monetary limits set in the statute, of the cleanup. There are four limited defenses to the strict liability standard. Owners or operators may avoid liability if the spill was caused by an act of God, an act of war, negligence by the U.S. government, or an act or omission by a third party.<sup>46</sup> If the discharge was caused solely by the act or omission of a third party, then the third party, rather than the owner or operator of the facility or vessel, is liable for the cost of the cleanup. However, the third party is not considered the sole cause of the discharge if the owner or operator was negligent in allowing a situation to develop where a third party could cause a discharge.

### XIII. The Oil Pollution Act

In 1990, in response to the *Exxon Valdez* oil spill, Congress passed the OPA,<sup>47</sup> which raised the liability limits and extended liability to include damage to natural resources, real or personal property, subsistence use of natural resources, tax revenue, profits or earning capacity, and public services.<sup>48</sup> The OPA provides for the same defenses as CERCLA, not allowing negligence of the government as a defense, but does not allow the defenses if the responsible party fails to report the spill as required, does not cooperate with and assist as requested in removing the spilled substance, or refuses to comply (without sufficient cause) with an order to clean up the spill.<sup>49</sup>

### XIV. The Resource Conservation and Recovery Act

RCRA<sup>50</sup> governs the transportation, treatment, storage, and disposal of hazardous waste, including two separately administered cleanup programs. The first of these cleanup programs is called corrective action and applies to facilities that treat, store, or dispose of hazardous waste.<sup>51</sup> A state may administer the hazardous waste regulatory program instead of the federal government if it submits a program that meets the minimum requirements set by the statute. EPA has authorized 48 states (only Alaska and Iowa are not authorized), Guam, and the District of Columbia to administer at least the base regulatory program.<sup>52</sup> The second cleanup program is for LUSTs that contain petroleum, petroleum-based substances, or hazardous substances (tanks that contain hazardous wastes are considered hazardous waste facilities and covered by the corrective action program).<sup>53</sup>

44. *Id.* §1321(c)(1).

45. *Id.* §1321(b)(5).

46. *Id.* §1321(f)(1).

47. *Id.* §§2701-2761, ELR STAT. OPA §§1001-7001.

48. *Id.* §2702(b)(2).

49. *Id.* §2703.

50. 42 U.S.C. §§6901-6992k, ELR STAT. RCRA §§1001-11011.

51. *Id.* §6924(u) & (v).

52. See U.S. EPA, *State and Regional Authorization Information*, at [http://www.epa.gov/epaoswer/hazwaste/state/stats/stats\\_bystate.htm](http://www.epa.gov/epaoswer/hazwaste/state/stats/stats_bystate.htm) (last visited Dec. 11, 2006).

53. 42 U.S.C. §6991b(c) & (h).

40. *Id.* §9601(39)(B).

41. *Id.* §9601(39)(D).

42. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607 (now known as the Clean Water Act).

43. *Id.* §1321(b)(3).

## XV. Determining What Is Hazardous Waste

RCRA starts from the assumption that hazardous wastes are first solid wastes that are then determined to be hazardous. The term solid waste is, however, defined to include just about any type of waste except gases that are not in containers.<sup>54</sup> Hazardous waste is then defined as solid waste that may cause increases in deaths or serious illnesses, or pose a substantial threat to human health or the environment.<sup>55</sup> EPA has promulgated regulations that define hazardous waste more specifically, if not more useably, to include: (1) specifically listed substances or constituents; (2) wastes that meet one or more of four criteria of ignitability, corrosivity, reactivity, or toxicity; or (3) substances that are determined through testing by the generator to possess dangerous characteristics.<sup>56</sup> In practice most wastes are identified as hazardous under the first method, by being specifically listed by EPA.<sup>57</sup>

RCRA has been described as a “cradle-to-grave” regulatory scheme for hazardous waste. Thus, it covers generators and transporters of hazardous waste as well as operators of treatment, storage, or disposal facilities. The cradle-to-grave description is in many ways, however, a misnomer. The “cradle” merely starts at the point that a substance is determined to be a “waste,” even though that substance may have had a long history as a potentially toxic or hazardous substance in use as a raw material, intermediary, or even as a final product in the industrial stream. Nor is it really accurate to say that there is a “grave” for hazardous wastes since many such wastes retain their hazardous characteristics after storage or disposal. Hazardous wastes are active even after disposal because no currently used method of disposal can guarantee that the waste remains isolated from the environment forever. Chemical conversion to non-toxic substances and complete destruction are the only truly permanent solutions.

## XVI. Treatment, Storage, and Disposal Facilities

A significant aspect of RCRA is its regulation of treatment, storage, and disposal facilities. RCRA requires operators of facilities that treat, store, or dispose of hazardous wastes to obtain a permit. To obtain a permit, the facility must meet design, operation, performance, insurance, cleanup, and financial responsibility standards issued by EPA. The statute authorizes EPA to issue standards that are “necessary to protect human health and the environment.”<sup>58</sup> In addition, RCRA requires treatment, storage, and disposal facilities to comply with operation standards. For example, landfills and surface impoundments must continually monitor the quality of any leachate (liquid that percolates through the fill picking up toxic chemicals) from the facility and the quality of the groundwater surrounding the facility. If the level of a

suspect chemical in the surrounding groundwater exceeds background levels, then the permittee may be required to take corrective action to clean up the leaking contaminants. This corrective action may include pumping the leachate to prevent its spread beyond the boundaries of the permitted facility, or, if the levels exceed drinking water standards, pumping and treating the groundwater. Corrective action may also be required for any solid waste management unit within the boundaries of the treatment, storage, or disposal facility, even if it is an older facility that was closed before RCRA rules went into effect.

In most cases, RCRA requires the operator to be responsible for the facility, including groundwater monitoring, for 30 years after the facility is closed. In addition, the operator must place a restriction on the deed for the property containing the facility. The restriction informs all potential purchasers that the land includes a treatment, storage, or disposal facility that is covered by RCRA post-closure standards. Finally, the operator is required to have insurance that covers both the operation and the post-closure periods, including potential claims due to contaminated groundwater.

## XVII. Leaking Underground Storage Tanks

Subtitle I of RCRA regulates underground storage tanks (USTs) by requiring them to meet standards intended to prevent, detect, and clean up leaks. The standards cover installation, operation, release detection, repair, and closure of USTs. As with the hazardous waste program, states may administer the program and as of 2005, 34 of them do.<sup>59</sup> Subtitle I also requires corrective action if there has been a release from an UST and provides a trust fund to pay for oversight of cleanups conducted by responsible parties and to pay for the costs of cleanup where the responsible party is unknown or unable to clean up the release.<sup>60</sup>

## XVIII. States and Superfund

New Jersey was the pioneer in enacting a statute imposing strict liability for cleanup of property contaminated with hazardous substances. The state adopted the Spill Act<sup>61</sup> in 1976, for the purposes of controlling the transfer and storage of petroleum and hazardous substances, requiring prompt containment and removal of spills of such pollutants, and providing liability for damages caused by discharges of such substances.<sup>62</sup> New Jersey’s Spill Act is broader than the federal Superfund law in several ways. The Spill Act, unlike CERCLA, covers petroleum—which is also covered by the OPA.<sup>63</sup> New Jersey also authorized the fund created by the Spill Act to be used to compensate persons damaged by discharges of petroleum or hazardous substances, while Congress merely required a study of the issue of allowing the Superfund to be used for compensation. Soon after passage of

54. *Id.* §6903(27) (“the term ‘solid waste’ means any garbage, refuse, . . . and other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining, agriculture operations, and from community activities”).

55. *Id.* §6903(5).

56. 40 C.F.R. §26.

57. EPA lists more than 500 hazardous wastes. *See* U.S. EPA, *Hazardous Waste*, at <http://www.epa.gov/ebtpages/wasthazardouswaste.html> (last visited Dec. 11, 2006).

58. 42 U.S.C. §6922(a).

59. *See* U.S. EPA, *State Underground Storage Tank Program*, at <http://www.epa.gov/swrust1/fsstates.htm> (last visited Dec. 11, 2006) (the District of Columbia and the commonwealth of Puerto Rico also have approved “state” programs).

60. *See* U.S. EPA, *Overview of the Federal Underground Storage Tank Program*, at <http://www.epa.gov/swrust1/overview.htm> (last visited Dec. 11, 2006).

61. N.J. STAT. ANN. §58:10-23.11.

62. *Id.* §58:10-23.11a.

63. *See supra* note 47 and accompanying text.

the Spill Act, Congress took up the issue of responding to releases of hazardous substances and other states did not enact similar legislation until after passage of CERCLA.

In passing CERCLA, Congress intended to establish a system for responding to what it perceived to be a limited set of emergencies and situations where there was a threat of imminent harm, rather than a system for regulating conduct.<sup>64</sup> Therefore, it focused on the federal role in responding to such situations, with the significant exception that Congress did authorize states and tribes to recover their costs of responding to a release of a hazardous substance.<sup>65</sup> As it became clear that the federal cleanup program was not able to clean up all contaminated sites, states began developing their own cleanup programs, often modeled on Superfund, which used the New Jersey statute as one of its models, but also sometimes including innovative programs.<sup>66</sup> By the late 1980s, most states had developed their own “state Superfund” programs to clean up sites that were not being addressed by the federal government.<sup>67</sup> Only seven states followed New Jersey’s lead in authorizing their cleanup funds to be used to compensate victims for injuries caused by contaminated sites where the victim was not a responsible party.<sup>68</sup>

As part of SARA, Congress recognized the important role of states in investigating and cleaning up contaminated sites by requiring EPA to involve states in the Superfund program in a “substantial and meaningful” way. At sites on the NPL, states now may take the lead in managing the cleanup, and coordinated action by EPA and state agencies is common at many of those sites. While 1,240 sites are on the NPL,<sup>69</sup> states have identified 23,000 sites as needing attention, meaning cleanup or further evaluation is necessary.<sup>70</sup> More importantly, states have cleaned up about 29,000 sites in the aggregate.<sup>71</sup> One of the significant innovations states instigated was VCPs. In the late 1980s, states such as Illinois, Minnesota, and North Carolina, began experimenting with methods of encouraging responsible parties, particularly property owners, to voluntarily clean up contamination. Voluntary cleanups typically require fewer state resources

than state-funded or enforcement-based cleanups, allowing states to use limited state funds for sites without viable responsible parties. Virtually all of the states now have VCPs, which account for almost one-half of the cleanups overseen by states.<sup>72</sup>

Another area of state innovation was brownfield programs. Starting in the early 1990s, with considerable assistance, encouragement, and support from EPA, states began developing programs to encourage the cleanup and redevelopment of brownfields. States define brownfields in a variety of ways, but the term typically refers to “abandoned, idled or underused industrial and commercial properties where expansion or redevelopment is complicated by real or perceived environmental contamination.”<sup>73</sup> As with their VCPs, which often formed the basis of the cleanup part of a state’s brownfield program, states were free to adopt a variety of incentives to encourage brownfield owners or prospective purchasers to clean up their sites as part of a plan to reuse the property.<sup>74</sup> Among the incentives states have provided for brownfield cleanup and redevelopment are grants, loans, technical assistance, income tax credits, property tax credits, expedited review of cleanup plans, free environmental assessments, and state-subsidized insurance.<sup>75</sup>

## XIX. Conclusion

The common law remains relevant and important in cases where a private party seeks to recover for injury to property that results from off-site contamination caused by another private party. Since its enactment in 1980, CERCLA has become the focus of EPA, state environmental agencies, and the public when considering cleanup of contaminated land. Despite this prominence, CERCLA may only serve as a background presence in litigation over off-site contamination if the contaminated property does not meet the criteria for listing on the NPL. CERCLA and the other federal and state cleanup laws govern the standards that apply to cleanups, procedures for conducting cleanups, liability for the cost of such cleanups, and measures to protect public health and the environment when the cleanup does not return the property to a condition suitable for any use. CERCLA has no provisions for compensating third parties for the damage to their property and provides little guidance for courts in handling such claims. Only a few state cleanup statutes authorize their cleanup funds to be used to compensate third parties and those likely have insufficient monies to fully compensate such claims. Common-law causes of action, such as nuisance, trespass, and strict liability, continue to be relied upon by plaintiffs seeking compensation for injuries caused by off-site contamination.

64. For a discussion of RCRA, which did establish a regulatory system for handling hazardous wastes, see *supra* notes 50-60 and accompanying text.

65. 42 U.S.C. §9607(A).

66. See, e.g., Illinois Responsible Property Transfer Act of 1988, 765 ILCS 90 (requiring seller of property to disclose presence of contamination prior to transfer). By 2001, 33 states had some provisions requiring disclosure of environmental conditions prior to transfer of property. STATE STUDY, *supra* note 38, at 35-36, 54.

67. U.S. EPA, AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50-STATE STUDY 5 (1989) (39 states had state cleanup funds and state enforcement authorities independent of the CERCLA cost recovery authority) (subsequent updates of this report were published by EPA in 1990, 1991, and 1993, and by ELI in 1995, 1998, and 2001).

68. STATE STUDY, *supra* note 38, at 92.

69. 69 Fed. Reg. 10646-53 (Mar. 8, 2004).

70. STATE STUDY, *supra* note 38, at 16, 60.

71. *Id.* at 13, 63.

72. *Id.* at 14.

73. See ELI, *Brownfields Basics*, at <http://www.brownfieldscenter.org/big/bfbasics.shtml> (last visited Dec. 11, 2006).

74. STATE STUDY, *supra* note 38, at 41.

75. *Id.* at 43.