Southeastern Environmental Law Journal

Volume 7 | Issue 2 Article 3

Fall 1998

Environmental Traps for Contractors

Leigh Ann K. Epperson

ARTICLES

ENVIRONMENTAL TRAPS FOR CONTRACTORS

Leigh Ann K. Epperson*

I. Introduction

Imagine James L. Ferry's surprise when he learned that by excavating and grading a proposed housing development he was subject to liability for environmental contamination of which he was not aware.[1] The City of Richmond, California (Richmond) purchased the land from Catellus Development Corporation (Catellus) and hired James L. Ferry & Son (Ferry). Ferry and Richmond did not know the soil contained hazardous chemical compounds, including paint thinner, lead, asbestos, and petroleum hydrocarbons. Richmond sued Catellus to recover part of its cost to remove the contaminated soil from the property. In turn, Catellus filed a third-party complaint against Ferry for contribution under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[2] To Ferry's surprise, the United States Court of Appeals for the Ninth Circuit held Ferry liable for contribution to Catellus as both an "operator" and as a "transporter" of hazardous waste.[3]

This scenario is not an isolated incident. Contractors and other construction industry professionals have found themselves subject to liability for environmental contamination. As evidenced by the Ninth Circuit's willingness to hold Ferry liable in *Kaiser Aluminum*, potential liability for environmental contractors no longer threatens only those contractors engaged in cleaning up contaminated sites — a practice commonly known as "remediation."[4] Even the unwitting contractor, like Ferry, faces liability when he or she unknowingly encounters pollution.[5] In short, the maze of environmental statutes, regulations, rules, and common law causes of action creates a ready trap for unwary contractors.

A full discussion of the state and federal environmental statutes,[6] regulations,

---

* Leigh Ann K. Epperson is an environmental attorney with Akin, Gump, Strauss, Hauer & Feld, L.L.P. Ms. Epperson received a B.A. with distinction from Colorado State University, a M.A. from the University of Texas at Dallas, and a J.D. *cum laude* from Southern Methodist University.

[1] *See* Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338 (9th Cir. 1992).

[2] Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 113(f)(1), 42 U.S.C. § 9613(f)(1) (1994).

[3] *Kaiser Aluminum*, 976 F.2d at 1343.

[4] *See id.*

[5] *See id.*

[6] *See generally* Kathiann M. Kowalski, *Environmental Laws Affecting the Construction*

rules, and common law causes of action[7] that pose a potential threat to contractors is beyond the scope of this article. Rather, this article strives to explore the federal statute that looms as the deadliest trap to contractors — CERCLA.[8] Additionally, this article highlights some of the most recent snares to emerge for contractors: property transfer statutes, storm water regulations, and wetlands regulations. This more limited scope will hopefully help the contractor recognize these deadly and trendy traps, and, where possible and necessary, escape liability.

II. CERCLA: The Deadliest Environmental Trap

A. Overview of CERCLA

Unlike many environmental statutes, CERCLA focuses on the cleanup of pollution rather than its prevention.[9] Specifically, Congress passed CERCLA in 1980 to provide a mechanism for the cleanup of inactive hazardous waste sites,

---

Industry: A Primer, CONSTRUCTION LAW., Jan. 1994, at 1 (providing a good overview of a contractor's potential liability under federal enviromental statutes.).

[7] *See generally* Lodrini v. Brito Enter., No. 100226, 1995 WL 328299 (Conn. Super. Ct. 1994) (striking a public nuisance count where plaintiff failed to allege he was a member of the general public using public premises. Plaintiff filed a nineteen count complaint against a contractor for the alleged negligent construction and installation of sewer lines on plaintiff's property. The court struck the private nuisance count because plaintiff failed to demonstrate that the contractor used the property or exercised control over it. The contractor did not move to strike the negligence, trespass, breach of warranty, strict liability for ultrahazardous activities, or statutory claims); Barton-Malow Co. v. Bauer, 627 So. 2d 1233, 1235 (Fla. Dist. Ct. App. 1993) (reversing and remanding because the trial court failed to conduct an evidentiary hearing before certifying the class. This was a personal injury lawsuit alleging that the plaintiffs sustained injuries as a result of environmental problems inside the county courthouse caused by the negligence of the general contractor and architect of the courthouse.); State v. Schenectady Chems., Inc., 479 N.Y.S.2d 1010 (N.Y. App. Div. 1984) (allowing a nuisance claim against the contractor who disposed of contamination in a presently inactive waste disposal site. The court noted that recent environmental statutes did not preempt common law causes of action); Pennsylvania Fish Comm'n v. Township of Pleasant, 388 A.2d 756 (Pa. Commw. Ct. 1978) (permitting an action against the construction company alleged to have deposited waste materials into a lagoon pursuant to an agreement with the Township).

[8] CERCLA § 101-75, 42 U.S.C. §§ 9601-75 (1994).

[9] *Compare* United States v. Mottolo, 695 F. Supp. 615, 622 (D.N.H. 1988) (holding that the expressed goals of CERCLA are to provide the federal government with the tools necessary for the prompt and effective response to the problems of hazardous waste disposal and to ensure that the parties responsible for problems bear the costs and responsibility for remedying the harmful conditions they created), *with* Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996) (citations omitted) ("RCRA's primary purpose . . . is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated.").

hazardous spills, and the release of hazardous substances into the environment.[10] The statute provides two general schemes for the cleanup of hazardous sites, spills, and releases. First, the federal government can use available monies from the Superfund to remediate sites on the National Priorities List[11] and thereafter recover the clean-up costs from potentially responsible parties (PRPs).[12] Second, and more common, the statute encourages private parties to undertake clean-up actions and then to recover their costs from other PRPs in a private cost recovery action.[13] Both schemes are potentially applicable to the construction context.

In a private cost recovery action, pursuant to CERCLA § 107, the plaintiff must prove:

(1) that the defendant is within one of four statutory categories of

---

[10] *See* United Technologies Corp. v. EPA, 821 F.2d 714, 717 (D.C. Cir. 1987); Dedham Water Co. v. Cumberland Farms, Inc., 805 F.2d 1074, 1080 (1st Cir. 1986); New York v. Shore Realty Corp., 759 F.2d 1032, 1037 (2d Cir. 1986).

[11] Sites are listed on the National Priorities List (NPL) by means of rulemaking. CERCLA § 105, 42 U.S.C. § 9605 (1994). Such sites may be subject to either "removal" (short-term, generally prompted by an emergency) action or "remedial" (longer-term, generally permanent) action by EPA using available monies from the Superfund. *Id.* The Superfund is created by taxes and fees and administered by EPA for the purpose of cleaning up CERCLA sites.

[12] CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A) (1994).

[13] CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1994). The elements of a cost recovery action under CERCLA § 107(a) are outlined in the text. CERCLA § 113(f) provides for a similar contribution action: "Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. . . ." 42 U.S.C. § 9613(f) (1994). A split of authority exists as to whether a PRP can bring both a cost recovery action and a contribution action, or whether a PRP is limited to a contribution action. *See* Timothy W. Bouch, *Statutory Policy v. Statutory Language: CERCLA Sections 107 and 113*, FOR THE DEFENSE, April 1996, at 15-20. In essence, those courts and commentators in favor of allowing PRPs to bring § 107 cost recovery actions believe that it promotes CERCLA's stated goal of encouraging prompt and voluntary cleanup without undermining the goal of protecting settling defendants against a contribution claim. Those courts and commentators in favor of limiting PRPs to § 113 contribution claims are concerned about the different statutes of limitations and the amount of protection afforded settling parties.

In 1994 the Supreme Court allowed a PRP to use § 107 to recover certain response costs. *See* Key Tronic Corp. v. United States, 511 U.S. 809 (1994). The Court previously dismissed the § 113(f) contribution claim because a consent decree provided contribution protection. As such, the Court did not specifically address the issue whether a PRP should be limited to bringing a § 113(f) contribution claim, so the opinion may not resolve the issue. The United States Supreme Court was recently asked by a group of PRPs working to remediate a mining site in Arizona to decide whether a PRP may bring a Superfund cost recovery action or whether it is limited to only bringing an action for contribution. Pinal Creek Group v. Newmont Mining Corp., U.S. S. Ct., No. 97-795 (filed 11/10/97).

"covered persons" liable for clean-up costs;

(2) that there has been a release or threatened release[14] of a hazardous substance[15] from a facility;[16]

(3) that the release or threatened release has caused the plaintiff to incur clean-up and response[17] costs;

(4) that the costs expended were necessary; and

(5) that the response actions taken and the costs incurred were consistent with the National Contingency Plan (NCP)[18].[19]

Because CERCLA imposes strict liability[20] as well as joint and several liability[21] on each PRP, most CERCLA actions turn on the issue of who is and who is not a PRP. Pursuant to CERCLA § 107(a)(1)-(4), the following classes of persons[22] are PRPs:

---

[14] CERCLA § 101(22), 42 U.S.C. § 9601(22) (1994) (A "release" is "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.").

[15] The term "hazardous substance" encompasses hazardous substances and toxic pollutants under the Clean Water Act, hazardous wastes under the Resource Conservation and Recovery Act, hazardous air pollutants under the Clean Air Act, imminently hazardous chemical substances under the Toxic Substances Control Act, and any other substance specifically designated as hazardous under CERCLA section 102. CERCLA § 101(14), 42 U.S.C. § 9601(14) (1994).

[16] A "facility" means "(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, and (B) any site or area where a hazardous substance has been deposited, stored, disposed of or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel." CERCLA § 101(9), 42 U.S.C. § 9601(9) (1994).

[17] The terms "respond" or "response" mean "remove, removal, remedy, and remedial action." CERCLA § 101(25), 42 U.S.C.A. § 9601(25) (1994). The terms "remove" and "removal" are defined in CERCLA § 101(23) and the term "remedial action" is defined in CERCLA § 101(24).

[18] The National Contingency Plan (NCP) governs all CERCLA cleanups, whether performed by the government or by a private party. 40 C.F.R. § 300 (1997). The NCP specifies the steps necessary to identify and investigate CERCLA sites, to evaluate possible clean-up strategies, and to choose and implement the actual clean-up plan. *Id.*

[19] CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1994).

[20] *See* United States v. Monsanto Co., 858 F.2d 160, 167 (4th Cir. 1988).

[21] *See* United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1507 (6th Cir. 1989).

[22] The statute defines the term "person" broadly to include individuals, firms, corporations,

> (1) the owner and operator of a vessel or a facility; (2) 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; (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances; and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person . . . .[23]

A party found to be a PRP can assert one of the statutory defenses provided in § 107(b),[24] although they are rarely successful.

In sum, persons who are current or past "owners/operators,"[25] "generators/arrangers,"[26] or "transporters"[27] attain PRP status and are therefore potentially liable under CERCLA.[28] Therefore, a contractor who meets the statutory definition of either an "owner/operator," a "generator/arranger," or a "transporter" faces potential CERCLA liability.

B. Operator Liability [CERCLA § 107(a)(2)]

One way a contractor faces CERCLA liability is through PRP status as an "owner/operator."[29] CERCLA defines "owner/operator" as "any person owning or operating such facility."[30] Several courts have recognized the near uselessness of this circular definition.[31] Nevertheless, the current "owner" or "operator" of

---

associations, and partnerships. CERCLA § 101(21), 42 U.S.C. § 9601(21) (1994).

[23] CERCLA § 107(a)(1)-(4), 42 U.S.C. § 9607(a)(1)-(4) (1994).

[24] CERCLA § 107(b), 42 U.S.C. § 9607(b) (1994) (The defendant must prove that the release or threatened release of the hazardous substance and the resulting damage were caused solely by "(i) an act of God; (ii) an act of war; or (iii) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant . . . .").

[25] CERCLA § 107(a)(1)(2),42 U.S.C. § 9607(a)(1),(2) (1994).

[26] CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3) (1994).

[27] CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4) (1994).

[28] CERCLA § 107(a), 42 U.S.C. § 9607(a) (1994).

[29] CERCLA § 107(a)(1)(2), 42 U.S.C. § 9607(a)(1),(2) (1994)

[30] CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1994).

[31] *See, e.g.*, United States v. A & N Cleaners and Launderers, Inc., 788 F. Supp. 1317, 1331

contaminated property is a PRP.[32] Because most contractors are neither current "owners" nor current "operators" of contaminated property, the term "operator" liability, as applied by courts to a construction contractor, usually refers to liability imposed by CERCLA § 107(a)(2) on a person who "operated" a facility *"at the time of disposal of any hazardous substance."*[33]

Both CERCLA and the Resource Conservation and Recovery Act (RCRA)[34] define "disposal" to include:

> the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.[35]

In response to these two overly-broad definitions, a line of case law has emerged in which courts discussing the imposition of CERCLA § 107(a)(2) liability in the construction context have struggled to formulate working definitions for both "operator" and "disposal."[36]

Edward Hines Lumber Co. v. Vulcan Materials Co.

The first and most important case in this line is *Edward Hines Lumber Co. v. Vulcan Materials Co.* [37] Edward Hines Lumber Company (Hines) owned a wood processing plant. After Hines sold the plant, "the Environmental Protection Agency

---

(S.D.N.Y. 1992).

[32] CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1) (1994).

[33] CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2) (1994)(emphasis added).

[34] Resource Conservation and Recovery Act (RCRA), § 1004(3), 42 U.S.C. § 6903(3) (1994).

[35] *Id.*

[36] *See generally* Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338 (9th Cir. 1992) (holding contractors liable as an "operator" where they had authority to control the cause of the contamination); Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155 (7th Cir. 1988) (recognizing that contractors are not liable under CERCLA as "operators" where they have no day-to-day control of the facility and its operations); United States v. CDMG Realty Co., 875 F. Supp. 1077 (D.N.J. 1995), *vacated on other grounds,* 96 F.3d 706 (3d Cir. 1996) (finding contractor not liable as an "operator" where he did not actively disturb the contaminated soil);; Ganton Tech. Inc. v. Quadion Corp., 834 F. Supp. 1018 (N.D. Ill. 1993)(holding clean-up contractors to be "operators"); City of North Miami v. Berger, 828 F. Supp. 401 (E.D. Va. 1993) (relieving contractor of liability where he did not exercise physical control over the disposed wastes); Brookfield-North Riverside Water Comm'n v. Martin Oil Mktg., Ltd., No. 90-C-5884, 1992 U.S. Dist. LEXIS 2920 (N.D. Ill. Mar. 12, 1992) (finding that a contractor who did not exercise sufficient control over the hazardous substance is not liable as an "operator").

[37] 861 F.2d 155 (7th Cir. 1988).

[(EPA)] concluded that the site had been contaminated by toxic substances."[38] Hines signed a consent decree with EPA, promising to spend close to $5 million to clean up the contaminated site.[39] Hines sought to recover these costs from its suppliers of wood preserving chemicals. [40]

One supplier, Osmose Wood Preserving Inc. (Osmose), "designed and built the portion of the plant that treated wood with chromated copper arsenate,"[41] including a concrete platform, to produce two-by-four beams for the construction industry. Osmose had promised to construct a closed-loop system that prevented toxic preservatives from escaping. In return, Osmose sold Hines its supply of chromated copper arsenate. In addition, Osmose trained the Hines employees to operate the wood treating machinery and allowed Hines to use its trademark in connection with the treated wood. Osmose reserved the right to inspect ongoing operations.[42]

The Seventh Circuit declined to impose "operator" liability on Osmose.[43] The court stated that it might be good policy to hold Osmose liable in order to "induce a firm in Osmose's position to take greater care in design, construction, and training, all of which would be beneficial."[44] In a now often-quoted passage, the court recognized that:

> [t]he statute does not fix liability on slipshod architects, clumsy engineers, poor construction contractors, or negligent suppliers of on-the-job training -- and the fact that Osmose might have been all four rolled into one does not change matters. The liability falls on owners and operators; architects, engineers, construction contractors, and instructors must chip in only to the extent they have agreed to do so by contract.[45]

The Seventh Circuit seemed frustrated with these statutory limitations, particularly because the court assumed that Osmose came up with a defective design, did not build the plant to standard, trained the Hines employees poorly, and hid its activities from the management.[46] Why, then, did the court interpret the statute to shield Osmose from liability? As mentioned above, the court noted that CERCLA does not define "operator."[47] The court suggested, however, that the circularity of

---

[38] *Id.* at 155.
[39] *Id.* at 157.
[40] *Id.*
[41] *Id.*
[42] *Edward Hines Lumber,* 861 F.2d at 157.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Edward Hines Lumber,* 861 F.2d at 157.

the definition strongly implied that the statutory terms have their ordinary meanings, as opposed to some technical or unusual meaning.[48] Therefore, the court turned to common law analogies.[49]

Applying the common law independent contractor theory, the court noted that Osmose had day-to-day control of its own operations.[50] But once it had finished designing and building the turn-key operation on behalf of Hines, Osmose only "hovered in the background" without interfering with operational decisions.[51] Hines, rather, had day-to-day control of the finished facility, including control during the time the release occurred.[52] Osmose, as an independent contractor, had no day-to-day control of the facility and could not, therefore, be liable as an "operator."[53]

The court also analogized to joint venture theories.[54] The court found a joint venture did not exist because there was no willingness to be joint venturers, no shared control, and no division of profits and losses.[55] Pursuant to the contract, Osmose was neither a partner nor a joint venturer, had no control of the work, no right to choose employees, no right to set prices, and only limited veto power.[56] In addition, the contract assigned exclusively to Hines the responsibility for environmental compliance.[57] For example, Hines could have chosen to shut down or revamp the plant to reduce pollution; Osmose could not require Hines to do either.[58] Consequently, Osmose could not be held liable as an "owner" or "operator."[59]

Finally, the court suggested that "owners" and "operators" can contract to reduce their risk if they so choose, by "induc[ing] their contracting partners to take care by insisting on warranties and indemnification."[60] According to the court, Hines must bear the liability because he could have bargained in this manner with Osmose but chose not to.[61]

Courts following the *Hines* logic will not hesitate to impose liability for environmental contamination on contractors where that liability has been expressly

---

[48] *Id.*
[49] *Id.*
[50] *Id.* at 158.
[51] *Id.*
[52] *Edward Hines Lumber,* 861 F.2d at 158.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Edward Hines Lumber,* 861 F.2d at 158.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*

provided for in the contract.[62] The greater lesson from *Hines* is that a court should not impose CERCLA liability on a contractor who did not exercise day-to-day control over the operations.[63]

Brookfield-North Riverside Water Commission v. Martin Oil Marketing, Ltd.

The first court to apply the *Hines* control test to a contractor was the Federal District Court for the Northern District of Illinois in *Brookfield-North Riverside Water Commission v. Martin Oil Marketing, Ltd.*[64] The court declined to impose "operator" liability on a contractor under facts slightly different from *Hines*. In *Brookfield-North* the contractor, Abbott Contractors, Inc. (Abbott), contracted with the Brookfield-North Water Commission (Commission) to construct a water main. Hazardous substances allegedly leaked from underground storage tanks at an adjacent petroleum service station, contaminating the soil. Eventually, the water in the main was contaminated with toluene and other hazardous substances. The Illinois EPA (IEPA) issued a Corrective Action Notice to the former owner of the service station, Martin Oil Company (Martin), and identified Martin as a PRP. Martin and the present owner, Brillakis, both undertook corrective action to remediate the site. The water main could not be salvaged.

The Commission sought private cost recovery from Martin under CERCLA as an "owner/operator."[65] Martin filed a third-party complaint against Abbott as the alleged "operator" of the facility at the time it released hazardous substances. Martin based its claim on Abbott's alleged sole possession and control of the water main at the time Abbott installed the water main into the contaminated soil. Abbott raised two defenses: (1) no release occurred at the facility and (2) Abbott was not a PRP.

In addressing Abbott's first defense, the court quickly determined that a construction site (or even a water main) is a facility because a plaintiff must only show that a hazardous substance has otherwise come to be located there.[66] But, the court concluded, there was no release of hazardous substances from the facility because the release came from the underground storage tanks.[67]

---

[62] *See Edward Hines Lumber,* 861 F.2d at 158.

[63] *See id.* at 157

[64] No 90-C-5884, 1992 U.S. Dist. LEXIS 2920 (N.D. Ill. Mar. 12, 1992).

[65] CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1) (1994). The Commission also alleged negligence, ultra-hazardous activity, trespass, and public nuisance against Martin, illustrating the popular common law claims regularly used in environmental contamination cases. *Brookfield-North,* 1992 U.S. Dist. LEXIS 2920, at *8-*9. The court dismissed these claims for lack of jurisdiction. *Brookfield-North,* 1992 U.S. Dist. LEXIS, at *33.

[66] *Brookfield-North,* 1992 U.S. Dist. LEXIS 2920, at *16.

[67] *Id.* at *19.

Assuming that there had been a release from the facility, the court discussed Abbott's PRP status as an "operator." First, the court noted that the statutory definition of "operator" is unclear, and that most courts have read the statutory definition liberally.[68] Second, the court observed that many courts outside the construction context have looked to the degree of control that the party was able to exert over the activity causing the pollution.[69]

The court did not believe Abbott was an "operator" under CERCLA, despite the fact that Abbott exercised a "considerable degree of control over the site when it installed the water main."[70] Relying on reasoning from *Hines*, the court found it significant that although Abbott had control over the construction site and the water main, he had no control over the disposal of hazardous substances and was not hired to operate the site.[71] In short, the *Brookfield-North* court applied the *Hines* control test and concluded that Abbott did not exercise sufficient control over the hazardous substances to be liable as an "operator."[72]

Moreover, even if Abbott were somehow classified as an "operator" under the *Hines* control test, the company did not operate the facility (water main or construction site) *at the time the disposal* of hazardous substances took place.[73] The court found the term "disposal" to embrace "the idea that someone do something with hazardous substances."[74] In *Brookfield-North*, the water main and construction site were contaminated by off-site migration and the evidence did not suggest that the site had been free from contamination prior to Abbott's construction activities. In addition, there was no evidence that Abbott moved contaminated soil around the site. In other words, Abbott did not "do something with hazardous substances." Thus, this court refused to adopt the "continuing disposal" theory suggested by the Fifth Circuit Court of Appeals in *Tanglewood-East Homeowners v. Charles-Thomas, Inc.*[75] Under the continuing or passive disposal theory, a contractor who unknowingly moves or disperses contamination could be held to be an "operator" at the time hazardous substances were disposed of.

The *Brookfield-North* court's rejection of *Tanglewood's* definition of

---

[68] *Id.* at *20 (citing CPC Int'l v. Aerojet-Gen. Corp., 731 F. Supp. 783 (W.D. Mich. 1989)); Idaho v. Bunker Hill Co., 635 F. Supp. 665 (D. Idaho 1986); New York v. Shore Realty, Corp., 759 F.2d 1032 (2d Cir. 1985); United States v. South Carolina Recycling and Disposal Corp. 653 F. Supp. 984 (D.S.C. 1984)).

[69] *Id.* at *21 (citing CPC Int'l v. Aerojet-Gen. Corp., 731 F. Supp. 783 (W.D. Mich. 1989)).

[70] *Id.* at *21.

[71] *Brookfield-North*, 1992 U.S. Dist. LEXIS 2920, at *21-23.

[72] *Id.*

[73] *Id.* at *28.

[74] *Id.* at *25.

[75] 849 F.2d 1568 (5th Cir. 1988).

continuing disposal is shared with commentator Robert Koegel.[76] Koegel believes that the *Tanglewood* court's definition of continuing disposal:

> could lead to harsh results for construction contractors, who routinely move earth and ground water around the job site to do their work, and who may disperse hazardous substances without even knowing it. If, for example, a construction contractor drives steel or wooden foundation piles through buried barrels of toxic waste, releasing their contents to the surrounding soil and ground water, should he be liable for cleanup?[77]

The *Brookfield-North* court answered Koegel's question in the negative, stating:

> [w]hile there may be sound public policy reasons for subjecting construction contractors to CERCLA liability — to encourage contractors to look for and avoid disturbing contaminated sites, and to provide another source of revenue to pay cleanup costs when contractors run into hazardous substances — it is not up to the courts to engage in such policy making.[78]

Furthermore, although CERCLA was intended to tax those persons who profit or benefit from the disposal of hazardous substances, contractors are not such persons.[79] Again quoting from Koegel:

[C]onstruction contractors do not profit from running into hazardous jobs. On the contrary, the wastes are an incident at best, and more likely a costly impediment, to their work . . . . But unlike a landowner that can protect himself from CERCLA liability through due diligence, a construction contractor who carefully inspects a site before starting work nevertheless performs at his peril, for there is [no] "innocent construction contractor" defense.[80]

The court ultimately held: (1) Abbott did not possess sufficient control to face CERCLA liability as an "operator"[81] and (2) the disposal requirement that someone do something with waste was not met by Abbott's moving soil to install a water main.[82]

---

[76] *See Brookfield-North*, 1992 U.S. Dist. LEXIS 2920, at *30.

[77] Robert Koegel, *Construction Contractors Meet Superfund*, N.Y.L.J., Dec. 21, 1989, at 5.

[78] *Brookfield-North*, 1992 U.S. Dist. LEXIS 2920, at *30.

[79] *See id.* at *31.

[80] Koegel, *supra* note 77, at 6.

[81] *Brookfield-North*, 1992 U.S. Dist. LEXIS 2920, at *21.

[82] *Id.* at *29.

Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.

The next court to apply the *Hines* control test did impose CERCLA "operator" liability on the contractor. In the now famous *Kaiser Aluminum*[83] case, Catellus sold land to Richmond, who hired Ferry to excavate and grade a portion of the land for a proposed housing development. While excavating, Ferry spread some of the displaced soil onto other parts of the property. Unknown to Ferry, the displaced soil contained hazardous chemical compounds. After Richmond sued Catellus to recover clean-up costs, Catellus filed a third-party claim for contribution against Ferry, alleging that Ferry exacerbated the contamination. The Ninth Circuit concluded that Catellus' allegations were sufficient to state a claim against Ferry as both an "operator"[84] and a "transporter."[85]

The *Kaiser Aluminum* court applied the *Hines* control test, but distinguished itself from *Hines*.[86] According to the *Kaiser Aluminum* court, the hazardous substances in *Hines* were not released until *after* Hines had completed plant construction. Although Hines designed and built the plant, he was not liable as an "operator" because he had no authority to control the day-to-day operation of the plant *after* if was built.[87] Thus, the *Kaiser Aluminum* court interpreted the *Hines* control test to impose "'operator' liability under section 9607(a)(2) only . . . if the defendant had authority to control the cause of the contamination *at the time* the hazardous substances were released into the environment."[88]

In *Kaiser Aluminum*, the excavation and grading of the development site produced the contamination.[89] This activity occurred during, not after, the construction process.[90] The *Kaiser Aluminum* court, on the basis of the pleadings, determined that Ferry's operations[91] tended to show that Ferry had sufficient control over that phase of the development to be an "operator" under § 9607(a)(2).[92]

---

[83] Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338 (9th Cir. 1992).

[84] *Id.* at 1341.

[85] *Id.* at 1343.

[86] *Id.* at 1341.

[87] *Id.* Although the *Kaiser Aluminum* court did not refer to *Brookfield-North*, a similar argument can be made. In *Brookfield-North*, Abbott did not exercise day-to-day control over operations at the time of disposal of the hazardous substances.

[88] *Kaiser Aluminum*, 976 F.2d at 1341 (emphasis added).

[89] *Id.* at 1342.

[90] *See id.*

[91] Specifically, Ferry's operations included excavating, dredging, filling, grading, other construction and demolition operations, mixing substances with soil and other fill materials, and dispersing the resulting mixture throughout the property.

[92] *Kaiser Aluminum*, 976 F.2d at 1342.

Having determined that Ferry exercised sufficient control to warrant the imposition of "operator" liability, the *Kaiser Aluminum* court concluded that Ferry himself disposed of the hazardous substances.[93] In so doing, this court took a radically different view of disposal than had the *Brookfield-North* court. The *Kaiser Aluminum* court read the statutory definition broadly, to include the subsequent "move[ment], dispers[al], or release [of such substances] . . . during landfill excavations and fillings."[94] The *Kaiser Aluminum* court also found it convincing that some courts have upheld the notion of "passive disposal."[95]

City of North Miami v. Berger

In *City of North Miami v. Berger*,[96] the court imposed "operator" liability on a demolition company, but refused to impose "operator" liability on an engineering firm.[97] Thus, the case provides a clear view of the *Hines* control test in action.

The *Berger* case involved the demolition company, Munisport, Inc. (Munisport), who, in the early 1970's, began developing a municipal recreational complex on

---

[93] *Id.* The statute requires only that the person own or operate the facility at the time of disposal. CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2) (1994).

[94] *Kaiser Aluminum,* 976 F.2d at 1342 (alterations in original) (quoting *Tanglewood*, 849 F.2d at 1573).

[95] "Passive disposal," for purposes of CERCLA, refers to the leaking or migration of hazardous substances into the soil or water following their initial disposal. *See* Reading Co. v. City of Philadelphia, 155 B.R. 890, 898 (E.D. Pa. 1993). Courts finding that passive disposal is covered under CERCLA define disposal to include "not only terms encompassing affirmative human conduct, but also terms indicative of passive conduct; 'leaking' and 'spilling'." Howes v. W.R. Peele, Sr. Trust, 889 F. Supp. 849, 854 (E.D.N.C. 1995). A split of authority exists concerning the issue of liability for passive releases of hazardous substances. Some courts have held that such passive releases constitute a "disposal" for CERCLA purposes. *See, e.g.,* Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 844-46 (4th Cir. 1992), *cert. denied,* 506 U.S. 940 (1992); Stanley Works v. Snydergeneral Corp., 781 F. Supp. 659 (E.D. Cal. 1990) (passive disposal falls under § 9607(a)). Other courts have rejected the idea that passive releases constitute disposal under CERCLA. *See, e.g.,* Redwing Carriers v. Saraland Apts., Ltd., 875 F. Supp. 1545, 1561 (S.D. Ala. 1995) (deciding that in order for a disposal to be under CERCLA, the disposal must result from an affirmative act to introduce hazardous substances into another tract); United States v. CDMG Realty Co., 875 F. Supp. 1077, 1084 (D.N.J. 1995) *vacated on other grounds*, 96 F.3d 706 (3d Cir. 1996) (holding disposal does not encompass a passive element; liability can attach under CERCLA only after "some element of active human participation" in the disposal can be shown); United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346, 1351 (N.D. Ill. 1992) (holding passive disposal does not form the basis for CERCLA liability); Ecodyne Corp. v. Shah, 718 F. Supp. 1454, 1455-57 (N.D. Cal. 1989) (rejecting concept of passive disposal).

[96] 828 F. Supp. 401 (E.D. Va. 1993).

[97] *Id.* at 412.

city-owned property. In order to raise the level of the terrain and to help defray the construction costs of two eighteen-hole golf courses, the parties agreed that Munisport would operate a landfill on the 281 acres. Munisport retained the engineering firm, Post, Buckley, Schuh & Jernigan (PBS&J), to prepare the engineering plans and drawings, to assist in obtaining permits, and to provide engineering and consulting services. Munisport also contracted with ABC Demolition Company (ABC) to develop the property, to operate the landfill, and to construct the golf courses and other recreational facilities.

Approximately ten years later, EPA listed the landfill on the National Priorities List, due primarily to ammonia leachate that threatened to contaminate neighboring wetlands and preserves. EPA sent letters of potential liability to Munisport's corporate officers, ABC, the City of North Miami, and others.

After discussing the liability of the corporate officers, the court bluntly stated that to hold PBS&J liable as an "operator" would "represent an untenable extension of CERCLA liability."[98] Although the court found PBS&J to be an independent contractor, it cited *Kaiser Aluminum* for the proposition that such status alone does not insulate the independent contractor from CERCLA liability.[99] Therefore, the court went on to apply the *Hines* control test and concluded that PBS&J had "neither actual control nor the authority to control Munisport's landfill operations."[100]

Specifically, PBS&J prepared site plans for the landfill, assisted in procuring necessary permits, prepared solid waste quantity projections, provided consultation and advice, and provided instruction and guidelines concerning the maintenance and operation of the landfill.[101] Nonetheless, PBS&J employees did not "actively participate in the disposal or placement of wastes in the landfill."[102] The court found it significant that PBS&J did "not actually exercise *physical control over any wastes* disposed of" at the landfill.[103]

In addition, PBS&J (like Osmose in *Hines*) did not *possess the authority to direct day-to-day operations* at the site.[104] Although PBS&J could inspect the site and render advice relating to the placement of wastes, it had no authority to make the final operational decisions.[105] Rather, such ultimate authority resided with the corporate officers, who were found potentially liable as "operators."[106] In holding

---

[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Berger*, 828 F. Supp. at 412.
[102] *Id.*
[103] *Id.* at 412-13 (emphasis added).
[104] *See id.* at 413.
[105] *See id.*
[106] *Berger*, 828 F. Supp. at 413.

that PBS&J lacked the requisite control, the court echoed policy sentiments first articulated in *Hines*: "[t]he statute does not fix liability on slipshod architects, clumsy engineers, poor construction contractors . . . [rather] architects, engineers, construction contractors, and instructors must chip in only to the extent they have agreed to do so by contract."[107]

After absolving the engineering firm of "operator" liability, the court applied the *Hines* control test to the demolition company, ABC.[108] Contrary to its treatment of PBS&J, the court did not hesitate in labelling ABC an "operator" because ABC exercised *actual physical control over the wastes.*[109] Although ABC performed under the direction of Munisport's corporate officers, ABC actually performed the construction and waste disposal work at the landfill.[110] Consequently, ABC's "operator" liability, according to the court, was clearly established.[111] Thus, while PBS&J's activities paralleled Osmose's activities in *Hines*, ABC's activities paralleled Ferry's activities in *Kaiser Aluminum.*[112]

Ganton Technologies, Inc. v. Quadion Corp.

The court, in *Ganton Technologies, Inc. v. Quadion Corp.*,[113] applied the *Hines* control test to a remediation contractor rather than a "classical contractor."[114] In *Ganton,* Quadion Corporation, the owner of a contaminated site, sued HDR Engineering, Inc. (HDR) and O.H. Materials Corporation (OHM), claiming that instead of cleaning up the existing contamination, the two contractors exacerbated the problem by contaminating previously uncontaminated areas. OHM and HDR both countered that they could not be liable under CERCLA because (1) neither party was an owner or operator because neither party had control over the cause of the contamination and (2) no disposal of hazardous material took place because the rearranging of pre-existing contaminated material is not "disposal."

The *Ganton* court held that OHM and HDR exercised sufficient control to be held liable as "operators."[115] Relying on *Kaiser Aluminum*, the court found OHM and HDR's control to be "even clearer than in Kaiser," because the *Kaiser Aluminum* excavator controlled grading and excavating and only inadvertently dealt with contaminated material, whereas OHM and HDR were hired specifically to deal

---

[107] *Id.* (citing *Hines,* 861 F.2d at 157).
[108] *Id.*
[109] *Id.*
[110] *Berger,* 828 F. Supp. at 413.
[111] *Id.*
[112] *Id.*
[113] 834 F. Supp. 1018 (N.D. Ill. 1993).
[114] *Id.* at 1018.
[115] *Id.* at 1022.

with hazardous material. The court further held that "disposal" is not limited to the initial introduction of contaminants to a site.[116] Finally, the *Ganton* court stressed that holding clean-up contractors liable under CERCLA is consistent with the policies of CERCLA because Congress intended to include, within the statute, generators, transporters, dump-site owners or operators, and others "who profit or benefit from their disposal [of hazardous waste]."[117] The *Ganton* holding makes it somewhat difficult to envision a scenario where a remediation contractor would not be held liable as a CERCLA "operator." Any remediation contractor will arguably have control over the wastes, so long as a court does not (1) restrict the control test to the time period during which the "initial" disposal occurred and (2) apply a narrow definition of disposal.

United States v. CDMG Realty Co.

United States v. CDMG Realty Co.[118] involved a site known as the Sharkey's Farm Landfill, which became a Superfund site in December 1982. In 1981, Dowel Associates purchased a portion of the site for commercial development, and commissioned a soil sampling investigation which did not reveal contamination. During the course of his ownership, Dowel became aware of the site's contamination and left the site vacant until 1987 when he sold it to HMAT Associates with full disclosure of the site's contaminated condition. Expert testimony revealed that the engineer's soil borings in 1981 caused the contamination of clean soil and spread contaminated soil.

In determining whether Dowel could be held liable under CERCLA as an owner/operator, the district court first noted that "disposal requires some element of active human participation."[119] The district court then turned to determine whether Dowel actively disposed of contaminated materials at the site. The plaintiff argued that Dowel's conduct was similar to the defendant's conduct in *Tanglewood East* and *Kaiser Aluminum* because Dowel "prepared the property for development, including performing compaction studies, digging and drilling soil borings and running drilling rigs across the property."[120] The court was unwilling to interpret Dowel's acts, as performed by the engineering firm, as "disposal."[121] "To do so would be an unjustified expansion of the proper principle enunciated in *Tanglewood* — namely that significant disturbance of already contaminated soil constitutes disposal."[122]

---

[116] *Id.*
[117] *Id.*
[118] 875 F. Supp. 1077 (D.N.J. 1995), *vacated on other grounds*, 96 F.3d 706 (3d Cir. 1996).
[119] *Id.* at 1084.
[120] *Id.*
[121] *Id.* at 1085.
[122] *Id.*

A line of cases has developed in which courts either impose or decline to impose "operator" liability on contractors based on the court's interpretation of two terms: "operator" and "disposal." Liability is usually decided based upon a working definition of "operator" via application of the *Hines* control test. This test has been refined somewhat over the years, such that the factors a court will examine in determining whether a contractor exercised sufficient control to be liable under CERCLA include the following: (1) whether the contractor exercised day-to-day operational control, as in *Hines*; (2) whether the contractor exercised control over the wastes as envisioned in *Brookfield North, Berger, and Ganton*; and (3) whether the contractor exercised control at the time of "disposal" pursuant to *Kaiser Aluminum, Berger, and Ganton.*[123] Divergent holdings can be attributed to factual differences.

Determining whether the contractor exercised control at the time of "disposal" poses its own problems, because the courts have not formulated even a working definition of "disposal." Each court continues to define "disposal" as it sees fit under circumstances particular to each case.

The news for contractors is both good and bad. On the one hand, contractors can at least be aware of what actions a court might construe as warranting the imposition of CERCLA "operator" liability. On the other hand, they, like Ferry, may still face liability in situations where they are not even aware of contamination if their actions fit the test profile and the court is willing to equate "dirt moving" with "disposal." While at least one court has suggested that independent contractor status will shield the contractor from CERCLA "operator" liability,[124] other courts, such as *Ganton* and *CDMG Realty* held that it does not. In *Ganton,* the court found that the contractor could be held liable under CERCLA for its involvement in remediation activities. The *Ganton* court also found that the engineering firm could be held liable as a CERCLA operator for its supervision of the contractor's activities — a vicarious liability of sorts. Similarly, in *CDMG Realty,* the court addressed the owner's, not the contractor's, potential CERCLA liability stemming from the contractor's remediation activities. Such vicarious liability is not limited to CERCLA liability in the construction context, but may be reflective of a more general trend to hold one person liable for the environmentally detrimental acts of another.[125]

---

[123] CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1) (1994).

[124] *See Berger*, 828 F. Supp. at 412.

[125] In the toxic tort context, many courts have held that where a defendant does not own or operate the facility that the plaintiffs claim is responsible for the alleged contamination, the defendant does not owe a duty to the plaintiffs and is therefore not liable under a common law theory. *See, e.g.*, Murray v. Bath Iron Works Corp., 867 F. Supp. 33, 49 (D. Me. 1994) (granting summary judgment on a negligent failure to warn claim in favor of off-site generator who did not own landfill that

C. Arranger Liability [CERCLA § 107(3)]

Contractors not only face potential CERCLA liability as "operators" pursuant to § 107(a)(2), but also face potential CERCLA liability as "arrangers" pursuant to § 107(a)(3). As mentioned above, CERCLA § 107(a)(3) liability is imposed on persons:

> who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.[126]

---

contaminated nearby landowners' property); Hydro-Manufacturing, Inc. v. Kayser-Roth, Corp., 640 A.2d 950 (R.I. 1994) (refusing to extend common law negligence doctrine to create a duty running from a predecessor-in-interest to a remote subsequent purchaser of contaminated property); Barras v. Monsanto, Co., 831 S.W.2d 859, 867 (Tex. Ct. App. 1992) (unwilling to impose liability on an off-site generator who sent materials to be recycled/disposed of where generator did not supervise the waste handling facilities at the site). Nevertheless, courts might be willing to impose tort liability on defendants who did not own or operate contaminating facilities based on the defendants' knowledge or control. *See, e.g.*, Bahrle v. Exxon Corp., 678 A.2d 225 (N.J. 1996) (affirming dismissal of suit against Texaco because the plaintiffs in this groundwater contamination suit failed to prove that Texaco exercised control over station operations); Clark v. Greenville County, 437 S.E.2d 117 (S.C. 1993) (finding that off-site generators could not be held liable under a nuisance theory because they had no control over the property that allegedly created the nuisance); Fortier v. Flambeau Plastics Co., 476 N.W.2d 593 (Wis. Ct. App. 1991) (finding off-site generator negligent for sending wastes to a landfill it knew was unlicensed); City of Bloomington v. Westinghouse Electric Corp., 891 F.2d 611 (7th Cir. 1989) (finding that off-site generator could not be held liable under nuisance theory because it did not control the contaminating substances beyond the point of sale); Ewell v. Petro Processors of Louisiana, Inc., 364 So.2d 604 (La. App. 1978) (finding that off-site generators of waste could not be held liable for contamination from improperly constructed pits unless it was shown that they knew the pits were leaking and continued to send their waste there anyway); Bleeda v. Hickman-Williams & Co., 205 N.W.2d 85 (Mich. Ct. App. 1972) (holding coke producer liable under nuisance theory where coke producer farmed out work to an independent contractor knowing that the contractor would create a nuisance). Therefore, the factors a court is likely to find relevant in a toxic tort case when the plaintiffs seek to impose liability on a party for the acts of another include the following: (1) supervision of waste handling; (2) exercise of control over operations; (3) retention of control over the substances;(4) control of the property or third persons; and (5) knowledge of the potential for contamination.

[126] CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3) (1994).

In other words, "arranger" liability has three elements.[127] First, the person must arrange for the transport, treatment, or disposal of hazardous substances.[128] Although CERCLA does not define the term "arranged for," courts have broadly interpreted the phrase to effectuate CERCLA's remedial goals.[129] There is little dispute over the definition of "transport." The statute, via cross reference to the Resource Conservation and Recovery Act (RCRA), defines both "treatment"[130] and "disposal."[131] Second, the person must own or possess hazardous substances.[132] Courts addressing this issue have developed a concept of constructive possession based upon the authority to control disposal.[133] Third, another party must conduct the transport, treatment, or disposal at a facility operated by that party.[134]

Cases in the construction context turn on how courts interpret the terms arrange, treatment, and disposal. In essence, courts determining whether to impose "arranger" liability in the construction context apply a test similar to the *Hines* control test.

Jersey City Redevelopment Authority v. PPG Industries

The first court to address "arranger" liability in the construction context was the United States District Court for New Jersey.[135] The issue of "arranger" liability arose when PPG Industries (PPG) produced waste mud at a plant from 1954 to 1964. During that time, Lawrence Construction Co. (Lawrence) removed the mud for use as fill in construction projects. Clif Associates (Clif) later purchased the plant site from PPG. The purchase contract stipulated that Lawrence guaranteed Clif's performance. In 1975, the Jersey City Redevelopment Authority (JCRA) hired A.

---

[127] *Id.*

[128] *Id.*

[129] *See* Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1318 (11th Cir. 1990); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 733 (8th Cir. 1986).

[130] RCRA § 1004(34), 42 U.S.C. § 6903(34) (1994).

[131] RCRA § 1004(3), 42 U.S.C. § 6903(3) (1994).

[132] CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3) (1994).

[133] *See* Howard W. Ashcraft, Jr., *CERCLA Arranger Liability: Emerging Risk for Environmental Consultants*, 14 CONSTR. LAW. 42 (1994). *See generally* United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373, 1382 (8th Cir. 1989) (stating that the critical question under section 107(a)(3) is whether the defendant had authority to control the handling and disposal of hazardous substances); *NEPACCO*, 810 F.2d at 743 (stating that it is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme).

[134] *See* United States v. Fleet Factors Corp., 821 F. Supp. 707, 725-26 (S.D. Ga. 1993).

[135] Jersey City Redevelopment Auth. v. PPG Indus., 655 F. Supp. 1257 (D.N.J. 1987); *see also* Mayor & Council of Borough of Rockaway v. Klockner & Klockner, 811 F. Supp. 1039, 1051 (D.N.J. 1993) (holding attorney's fees not recoverable response costs under CERCLA); City of New York v. Chemical Waste Disposal Corp., 836 F. Supp. 968, 981 (E.D.N.Y. 1993).

Ambrosio & Sons Contracting, Inc. (Ambrosio) to perform excavating work at a development site. Ambrosio allegedly purchased nine truck loads of fill material from the PPG plant. In 1983, the New Jersey Department of Environmental Protection (NJDEP) determined that some of the fill used by Ambrosio had been contaminated with chromium.

The JCRA brought a CERCLA cost recovery action against Lawrence/Clif. The court denied Lawrence/Clif's motion for summary judgment, finding Lawrence/Clif potentially liable as an "arranger" pursuant to CERCLA § 107(a)(3).[136] Apparently, once the court had determined that Lawrence/Clif was an "owner/operator," it was evident to the court that Lawrence/Clif was an "arranger."[137] Thus, this case may have been decided upon "owner/operator" liability rather than "arranger" liability.

Tanglewood E. Homeowners v. Charles-Thomas, Inc.

The next court to address "arranger" liability in the construction context was the Fifth Circuit Court of Appeals in the now famous case *Tanglewood East Homeowners v. Charles-Thomas, Inc.*[138] Like the *Jersey City* court, the *Tanglewood* court found the contractor liable as an "arranger," but unlike *Jersey City*, *Tanglewood* did not focus on the contractor's "owner/operator" status. Rather, *Tanglewood* focused on the meaning of the terms "disposal" and "treatment."[139]

The plaintiffs were homeowners in the Tanglewood East Subdivision in Montgomery County, Texas. The subdivision was built upon a site where United Creosoting Company had previously operated a wood treatment facility from 1946 to 1972. During the wood treatment operations, substantial amounts of highly toxic waste accumulated on the property. In 1973, certain of the defendants acquired the property and, prior to beginning residential development, contracted to have the creosote pools filled and graded. In 1983, EPA placed the site on the National Priorities List for Superfund cleanup. The homeowners sought damages, response and clean-up costs, and injunctive relief.

The Fifth Circuit refused to dismiss the plaintiffs' complaint for failure to state a claim upon which relief under CERCLA could be granted.[140] To begin, the court read the term "disposal" broadly.[141] According to the court, disposal is not limited to "a one-time occurrence — there may be other disposals when hazardous materials

---

[136] *Id.* at 1262.
[137] *Id.* at 1261 n.2.
[138] 849 F.2d 1568 (5th Cir. 1988).
[139] *Id.* at 1573.
[140] *Id.*
[141] *Id.*

are moved, dispersed, or released during landfill excavations and fillings."[142] Likewise, the court read the term "treatment" broadly, as:

> any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. *Such term includes any activity* or processing *designed to change the physical form* or chemical composition *of hazardous waste* so as to render it nonhazardous.[143]

Thus, because filling and grading activities constituted treatment,[144] and because disposal may be merely the placing of any hazardous waste into or on any land,[145] the defendants (residential developers, construction companies, and real estate agents and agencies) may be PRPs as "arrangers" under § 107(a)(3).[146]

Furthermore, the *Tanglewood* court rejected the defendants' argument that CERCLA was not meant to "impose chilling liability" on the banking, real estate, construction, and development businesses.[147] The defendants argued that CERCLA was intended to cover "only persons actually engaged in the chemical/hazardous materials industry" and persons "engaged in businesses which generated such materials."[148] The defendants urged that residential developers, construction companies, and real estate agents do not engage in the industries or businesses Congress intended CERCLA to cover.[149] In any event, the court reasoned, "a determination of the specific businesses and activities covered by CERCLA is beyond the pale of a 12(b)(6) motion."[150]

Brookfield-North Riverside Water Commission v. Martin Oil Marketing, Ltd.

Not all courts have agreed with the Fifth Circuit's analysis. As discussed above, the *Brookfield-North* court declined to follow the *Tanglewood* reasoning and refused to impose "arranger" liability on the contractor, Abbott, for his inadvertent

---

[142] *Id.*
[143] *Tanglewood*, 849 F.2d at 1573 (emphasis added).
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.* at 1573-74.
[148] *Tanglewood*, 849 F.2d at 1573-74.
[149] *Id.*
[150] *Id.* at 1574.

movement of petroleum contaminated soil.[151] The *Brookfield-North* court rejected the *Tanglewood* court's broad interpretation of "disposal," agreeing with commentator Koegel that such a broad definition would be unfair to contractors who must move around earth and groundwater as part of their jobs and who might unknowingly disperse hazardous substances in performing their contracts.[152] Rather, the *Brookfield-North* court limited "disposal" to a one-time occurrence that involved "someone doing something with the waste."[153] Under this restrictive definition, Abbott could not be held liable as an arranger because Abbott did not dispose of hazardous waste at the construction site.[154] Rather, the owner of the adjacent service station "decided the location and method of the disposal or treatment."[155]

City of North Miami v. Berger

The *Berger*[156] case is particularly useful because it imposed "arranger" liability on the demolition contractor, but not on the consulting engineer.[157] The court refused to impose "arranger" liability on the engineering firm, PBS&J, because it had no operational control and could not direct the movement or disposal of the wastes.[158] In contrast, the demolition company, ABC, was liable as an "arranger," because it had "authority to control the handling and disposal of hazardous substances" at the site.[159] Some courts faced with the decision of whether to hold a contractor liable under CERCLA as an "arranger" turn to a *Hines* control test to determine whether the party exercised sufficient control to warrant the imposition of CERCLA liability such as in *Jersey City* or *Berger*. Most courts, however, focus on whether the act of moving previously-contaminated soil around a site constitutes arranging for disposal. Here, as in the "operator" liability cases, the courts have reached no consensus.[160]

Redwing Carriers, Inc. v. Saraland Apartments, Ltd.

---

[151] *Brookfield-North*, 1992 U.S. Dist. LEXIS 2920, at *33.

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] City of North Miami v. Berger, 828 F. Supp. 401 (E.D. Va. 1993).

[157] *Id.* at 414.

[158] *Id.*

[159] *Id.*

[160] *Compare* Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988) (holding that dirt moving is disposal), *with* Redwing Carriers, Inc. v. Saraland Apartments, Ltd., 875 F. Supp. 1545 (S.D. Ala. 1995) (holding that dirt moving is not disposal).

The *Redwing Carriers*[161] court did not consider "dirt shifting" as disposal. One party who was potentially liable under CERCLA in that case was the contractor who built the Saraland Apartments, Meador Contracting Company, Inc. (Meador). Meador contracted to build the apartments and to remove oil, pitch, and soils contaminated by previous waste disposal. In the cost recovery suit, Redwing argued that Meador spread out the hazardous substances and mixed them with the surrounding dirt, thereby increasing the volume of contaminated material to be removed by three to five times. Meador argued that it used heavy equipment to dig to a depth of one foot to excavate all the "goo" it could find before hauling it away. Meador stressed that it was able to excavate the goo without pushing around or otherwise rearranging the surrounding dirt, thereby actually reducing the amount of contaminated material at the site. The court did not directly address this dispute between the parties, but found instead that "no reasonable jury could conclude that Redwing itself did not spread tar-like material laden with hazardous substances on a substantial part of the 2.5 acres."[162] The court somewhat summarily held that no disposal occurred and that the "construction activities impose no § 9607(a)(3) liability upon Meador."[163]

D. Transporter Liability [CERCLA § 107(a)(4)]

We have seen the risk contractors face with respect to both "operator" and "arranger" liability under CERCLA. The risks do not end there. Contractors also face potential CERCLA liability as "transporters."[164] Section 107(a)(4) imposes liability on any person who: "accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . ."[165]

The statute defines "transportation" as "the movement of a hazardous substance by any mode,"[166] but fails to define the critical element of "to . . . sites selected by such person."[167] Thus, one must turn to cases that discuss "transporter" liability in the construction context to discern when courts will impose "transporter" liability on contractors.

---

[161] Redwing Carriers, Inc. v. Saraland Apartments, Ltd., 875 F. Supp. at 1545 (S.D. Ala. 1995).
[162] *Id.* at 1564.
[163] *Id.*
[164] CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4)(1994).
[165] *Id.*
[166] CERCLA § 101(26), 42 U.S.C. § 9601(26) (1994).
[167] CERCLA § 107(a)(4), 42 U.S.C. § 9607(a)(4)(1994).

Tanglewood East Homeowners v. Charles Thomas, Inc.

The earliest case to address the issue was *Tanglewood East Homeowners v. Charles-Thomas, Inc*, where the Fifth Circuit imposed "arranger" liability on contractors and developers who filled and graded creosote pools.[168] Based on its broad interpretation of the terms "disposal" and "treatment," the *Tanglewood* court apparently assumed that the dispersal of contaminated soil over the site satisfied the requirements of "transporter" liability as well as the requirements of "arranger" liability.[169] The court, however, did not explain its reasoning.[170]

Danella Southwest, Inc. v. Southwestern Bell Telephone Co.

The next court to address the issue provided scant guidance. In *Danella Southwest, Inc. v. Southwestern Bell Telephone Co.*,[171] the court imposed "transporter" liability on the contractor, but, after an analysis of equitable factors, determined the contractor was not responsible for contribution for any of the clean-up costs.[172]

Danella Southwest, Inc. (Danella) contracted with Southwestern Bell Telephone Company (Southwestern Bell) to excavate and remove dirt that, unknown to either party, was contaminated with dioxin. Specifically, Southwestern Bell asked Danella to dig a trench and place buried cable along a street. Prior to 1984, an asphalt contractor had sprayed the street with dioxin-contaminated waste oils.

Danella did not learn of the dioxin contamination until after it completed excavation of the trench, laid the pipe and cable, and hauled the last pile of dioxin-contaminated soil to a ranch site. Danella ceased operations once it learned of the contamination. On October 22, 1987, both Danella and Southwestern Bell entered into an agreement with EPA to contain the contamination.[173] Southwestern Bell spent $223,610.75 in accordance with the plan. Southwestern Bell then sought contribution from Danella. Danella sought a declaratory judgment that it was not liable for contribution for the clean-up costs.

The court quickly determined that Danella was liable as a "transporter" under CERCLA

§ 107(a)(4).[174] Because it was undisputed that Danella transported the

---

[168] *Tanglewood*, 849 F.2d at 1573.

[169] *See id.*

[170] *See id.*

[171] 775 F. Supp. 1227 (E.D. Mo. 1991).

[172] *Id.* at 1234.

[173] *Id.* at 1232.

[174] *Id.* at 1234.

contaminated dirt to a site selected by it, the court, without further explanation, concluded "[i]t is clear that plaintiff [Danella] is a 'responsible party' under § 107(A)(4)."[175] All the court required was that the contractor transport contaminated materials to a site selected by the contractor.[176]

Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.

The next court to impose "transporter" liability in the construction context outlined its reasoning with more detail. The *Kaiser Aluminum* [177] court first noted that CERCLA defined "transportation" as "the movement of a hazardous substance by any mode."[178] Ferry's conduct fell within this definition because Ferry moved the contaminated soil during excavation and grading.[179] But, to be liable under § 107(a)(4), Ferry must also have selected the site.[180] The court ultimately concluded that Ferry did "select the site," although it recognized this was the more difficult issue because neither the statute nor case law has defined the phrase "to . . . sites selected by such person."[181]

The *Kaiser Aluminum* court echoed the proposition that CERCLA "is to be given a broad interpretation to accomplish its remedial goals."[182] The court relied on legislative history for the position that Congress intended to impose liability on those parties who caused or contributed to a release or threatened release of hazardous waste.[183] Thus, the court stated:

> [w]hether a transporter moves hazardous material from one parcel of land to another, or whether he simply takes the material from a contaminated area on one parcel and disposes of it on an uncontaminated area of the same parcel, he has spread contamination. There is no longer a logical basis for a defendant's liability as a "transporter" under section 9607(a)(4) to hinge solely on whether he moves hazardous substances across a recognized property

---

[175] *Id.*

[176] *Danella Southwest*, 775 F. Supp at 1234.

[177] *Kaiser Aluminum*, 976 F.2d at 1343.

[178] *Id.* (quoting CERCLA § 101(26), 42 U.S.C. § 9601(26) (1994)).

[179] *Kaiser Aluminum*, 976 F.2d at 1343.

[180] *Id.*

[181] *Id.*

[182] *Id.* (citing 3550 Stevens Creek Ass'n v. Barclays Bank of Cal., 915 F.2d 1355, 1363 (9th Cir. 1990).

[183] *Id.* (citing H.R. Rep. No. 1016, 96th Cong., 2d Sess. 33 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6136).

boundary.[184]

The *Kaiser Aluminum* court apparently concluded that a contractor who moves material around a site both falls within the scope of "to . . . sites selected by such person" as well as engaging in the transportation of hazardous substances. Such a contractor is liable as a transporter under § 107(a)(4).

Remarkably, the *Kaiser Aluminum* court never addressed whether the contractor must have knowledge that the material it is transporting (via moving it around the site) to a site selected by it (any area of the same construction site) is in fact hazardous.[185] As long as the contractor (1) moves the material around and (2) selects where to move it, the contractor is liable as a "transporter" under a *Kaiser Aluminum* analysis.[186] The *Kaiser Aluminum* court effectively read out any requirement that the selector, in selecting the site, have knowledge that it is selecting the site for disposal or treatment of hazardous substances.[187] The "transporter" construction cases offer bad news for contractors. Not only are courts willing to view dirt shifting as the transportation of hazardous materials,[188] courts are also apparently willing to view dirt shifting as incorporating the second element of transporter liability — the act of selecting the disposal site.[189]

The holding in *Danella Southwest*[190] suggests limited hope for contractors. In this case, the contractor was clearly liable as a CERCLA "transporter" because it transported the hazardous materials to a site it selected; however, the court, for equitable reasons, did not require Danella to contribute to clean-up costs.

A number of courts have examined the imposition of CERCLA liability on contractors, with varying results. For the most part, the courts have applied a "control test" to determine whether the imposition of "operator" or "arranger" liability is warranted. In short, the more control a contractor exercises over waste and/or operations, the more likely the contractor will be subject to CERCLA liability as an "operator" or "arranger."

To add to the uncertainty, courts have not reached a consensus on what constitutes a "disposal" of hazardous substances sufficient to trigger CERCLA "operator" or "arranger" liability. For example, as discussed above, some courts are willing to hold a contractor liable where that contractor simply moves previously contaminated dirt around a site by grading, excavating, or otherwise developing the

---

[184] *Kaiser Aluminum*, 976 F.2d at 1343.

[185] *Id.*

[186] *See id.*

[187] *Id.*

[188] *See Tanglewood*, 849 F.2d at 1573; *Kaiser Aluminum*, 976 F.2d. at 1343.

[189] *See Kaiser Aluminum*, 976 F.2d. at 1343.

[190] *Danella Southwest*, 775 F. Supp. at 1234.

property. On the other hand, some courts are unwilling to equate such "dirt moving" with "disposal." Nevertheless, dirt moving activities may also trigger "transporter" liability as well as "operator" and "arranger" liability. Contractors must recognize that they could be held liable under CERCLA, through no fault of their own, if they simply come into contact with hazardous substances while performing earth moving activities at a job site.

That said, what can a contractor do to avoid falling into the CERCLA trap? First, a contractor might seek to contractually transfer CERCLA liability risks to clients through indemnification. But, as noted by Howard W. Ashcraft, Jr., the contractor can obtain only limited protection.[191] First, many states have anti-indemnity statutes that prohibit indemnification for sole negligence or defects in design.[192] Second, indemnification only works if the indemnitor remains solvent. Due to the staggering costs and lengthy time involved in CERCLA cleanups, the possibility of a solvent indemnitor is questionable at best. Third, Ashcraft notes that many parties are unwilling to agree to indemnification in the construction context.[193]

Nonetheless, CERCLA does contain an indemnity provision.[194] Section 107(e)(1) expressly preserves agreements to insure, to hold harmless, or to indemnify a party held liable under

§ 107(a).[195] As such, parties to a contract are free to shift CERCLA liability by means of assumption or indemnity agreement.[196] In other words, CERCLA does not prohibit private indemnity agreements; parties may lawfully allocate CERCLA response costs among themselves while remaining jointly and severally liable to the

---

[191] Howard W. Ashcraft, Jr., *CERCLA Arranger Liability: Emerging Risk for Environmental Consultants*, 14 CONSTR. LAW. 42, (Jan. 1994).

[192] *See, e.g.*, CAL. CIV. CODE § 2782 (Deering 1994).

[193] Ashcraft, *supra* note 191, at 43.

[194] CERCLA § 107(e)(1) provides:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

CERCLA § 107(e)(1), 42 U.S.C. § 9607(e)(1)(1994).

[195] *See* Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1458 (9th Cir. 1986).

[196] *See* 42 U.S.C. § 9607(e); MacGlashing v. Dunlop Equip. Co., 89 F.3d 932, 941 (1st Cir. 1996); LaSalle Nat'l Trust, N.A., v. ECM Motor Co., 76 F.3d 140 (7th Cir. 1996); City of Toledo v. Beazer East, Inc., 103 F.3d 128 (6th Cir. 1996); PMC, Inc. v. Sherwin-Williams Co., No. 93-C-1379, 1996 WL 598961 (N.D. Ill. Oct. 17, 1996). City Mgt. Corp. v. United States Chem. Co., 43 F.3d 244, 255 (6th Cir. 1994); AM Int'l v. International Forging Equip. Corp., 982 F.2d 989, 994 (6th Cir. 1993).

government for the entire cleanup.[197]

State law determines whether a particular assumption of liabilities provision covers CERCLA costs.[198] For example, "in New York indemnification agreements are strictly construed; a court cannot find a duty to indemnify absent manifestation of a 'clear and unmistakable intent' to indemnify."[199] It follows that some commentators have interpreted the case law to require that a contractual allocation of CERCLA costs, through such methods as indemnification, specifically mention the statute.

These indemnification agreements are common in real estate transactions where buyers and sellers negotiate the scope of the agreement. Although a court has not determined whether a contractor could use such an indemnification agreement to recoup clean-up costs imposed on the contractor, the uncertainties associated with interpretation, and the practical limitations discussed by Ashcraft[200] render such use of § 107(e) by a contractor problematic.

Second, a contractor might seek protection from CERCLA liability through insurance. But a commercial general liability (CGL) policy, the principal policy used by contractors, does not cover environmental impairment losses.[201] One gap-filler to the pollution exclusion is Contractor's Pollution Liability (CPL) insurance, which covers potential pollution liability arising out of the performance of construction work.[202] Such policies provide both indemnity and legal fees for property damage, bodily injury, and environmental clean-up costs for certain contractor's operations.[203] Significantly, CPL insurance covers pollution liability that is imposed upon a contractor from subcontracted operations.[204] The growing popularity of such coverage has meant lower cost and increased availability so that CPL coverage may be a cost-effective way for contractors to manage the

---

[197] Apparently, the law has not always been so settled. In 1992, the United States Court of Appeals for the Ninth Circuit referred to section 107(e) as "truly murky," noting that courts around the country have reached different interpretations of its language. *See* Jones-Hamilton Co. v. Beazer Materials & Servs. Inc., 973 F.2d 688, 692 (9th Cir. 1992).

[198] *See* LaSalle Nat'l Trust v. ECM Motor Co., 76 F.3d 140, 144 (7th Cir. 1996); Hatco Corp. v. W.R. Grace & Co., 59 F.3d 400, 405 (3d Cir. 1995); Beazer East, Inc. v. Mead Corp., 34 F.3d 206, 212 n.2 (3d Cir. 1994); Olin Corp. v. Consolidated Aluminum Corp., 5 F.3d 10, 14-15 (2d Cir. 1993).

[199] *Olin Corp.*, 5 F.3d at 15 (quoting Commander Oil Corp. v. Advance Food Serv. Equip., 991 F.2d 49, 51 (2d Cir. 1993)).

[200] *See* Ashcraft, *supra* note 191, at 43.

[201] *See* Daniel E. Toomey, et al., *Surety, Insurance, Construction and Hazardous Waste: A Toxic Mix?*, CONSTRUCTION LAW, Jan. 1994, at 31, 32-33.

[202] *See* Ashcraft, *supra* note 191, at 35.

[203] *See id.*

[204] *See id.*

environmental risks of general contracting operations.[205]

Nonetheless, contractors, particularly nonremediation contractors, should not rely too heavily on CPL policies because CPL policies cover only claims arising out of "specifically scheduled operations."[206] It is unclear whether Ferry's excavation activities, for example, would fall into this classification because Ferry did not even know the site was contaminated. Ashcraft suggests that "[c]ontractors who *elect* to work on environmentally sensitive projects must seriously consider obtaining CPL coverage."[207] Such advice and such coverage would likely be of little use to a contractor in Ferry's situation.

Finally, the contractor should bear in mind that just because a court labels the contractor a potentially responsible party under CERCLA as an "operator," "arranger," or "transporter," such a determination does not mean that the contractor is liable, only that the contractor could be held jointly and severally liable for the entire cost of cleanup. After the courts determine liability, the courts assess damages, often relying on equitable factors such as the so-called "Gore factors." The Gore factors include: (1) the amount of hazardous substances involved; (2) the degree of toxicity of the substances; (3) the degree of involvement by parties in the generation, transportation, treatment, storage, or disposal of the substances; (4) the degree of care exercised by the parties with respect to the substances; and (5) the degree of cooperation of the parties with government officials to prevent any harm to public health or the environment.[208] In fact, CERCLA § 113(f)(1) specifically provides that "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."[209]

III. Trendy Statutory/Regulatory Traps for Contractors

In addition to the threat of CERCLA liability, several other environmental statutory and regulatory frameworks have recently become active snares for unwary contractors. These "trendy traps" include, among others, property transfer legislation, storm water regulations, and wetlands regulations.

---

[205] *See id.*

[206] *See id.*

[207] Ashcraft, *supra* note 191, at 35 (emphasis added).

[208] *See, e.g.*, Steven A. Herman, *Interim Guidance on Orphan Share Compensation for Settlors of Remedial Design/Remedial Action and Non-Time-Critical Removals*, SB18 ALI-ABA 621 (1996).

[209] CERCLA § 113(f)(1), 42 U.S.C.A. § 9613(f)(1) (1994).

A. Duty to Disclose

In her recent article,[210] Professor Serena Williams outlines a new potential liability that builders and developers now face under common law. Professor Williams notes that under the traditional doctrine of *caveat emptor*, neither a builder nor a developer would have a duty to disclose to a prospective homeowner that a home may be threatened by an off-site environmental condition, such as a nearby landfill.[211] Professor Williams further notes that while a seller's duty to disclose material defects in property being sold has recently been greatly expanded, courts have not been eager to impose a similar duty on builders/developers to disclose potentially harmful off-site conditions.[212]

Homeowners threatened by off-site conditions have always been able to bring a common law tort action, such as negligence or nuisance, against the builder/developer. As Professor Williams notes, these suits rarely succeed because it is difficult for the homeowners to prove that the builder/developer owed a duty to disclose the off-site condition to the homeowner.[213] New Jersey homeowners may now have an easier case because the Supreme Court of New Jersey established this duty to disclose in *Strawn v. Canuso*.[214] Specifically, the court established a duty on the part of residential builder/developers and their brokers to disclose off-site physical conditions both known and unknown "and not readily observable by the buyer if the existence of those conditions is of sufficient materiality to affect the habitability, use, or enjoyment of the property and therefore, render the property substantially less desirable or valuable to the objectively reasonable buyer."[215]

In *Strawn*, approximately 150 to 200 families who had purchased homes in a development near a closed landfill that contained toxic wastes filed a class action lawsuit, alleging that the market value of the homes was diminished due to their close proximity to the landfill, as well as common law fraud, negligent misrepresentation and concealment, and violations of the New Jersey Consumer Fraud Act. Apparently, the builder/developer company knew of the landfill's existence and had been warned of the possible hazards regarding leachate.[216] When marketing the subdivision, however, the builder/developer advertised only the

---

[210] Serena Williams, *When Daylight Reveals Neighborhood Nightmares: The Duty of Builders and Developers to Disclose Off-Site Environmental Contamination*, 12 J. NAT. RESOURCES & ENVTL. L. 1 (1996-97).

[211] *Id.* at 2.

[212] *Id.* at 2-3.

[213] *Id.* at 3.

[214] 657 A.2d 420 (N.J. 1995).

[215] *Id.* at 431.

[216] *Id.* at 423.

desirable off-site conditions, such as the surrounding wooded area,[217] and completely failed to mention the landfill located only a half-mile from some of the homes.[218] Tests performed by the New Jersey Department of Environmental Protection indicated groundwater contamination and EPA confirmed that the homeowners' complaints about odors and physical symptoms were consistent with expected reactions to exposure to gases from a landfill.[219]

Five months after the *Strawn* decision, the New Jersey "New Residential Construction Off-Site Conditions Act"[220] became effective. The statute first requires owners of newly constructed real estate to file lists of certain off-site conditions with the municipality.[221] The statute further requires a seller of newly constructed residential real estate to provide the purchaser, at the time of entering into a contract for sale, with notice of availability of these lists of nine off-site conditions for the subject property and all property within a one-half mile radius.[222] A potential purchaser can request the lists from the municipality[223] and can cancel the contract by sending the seller written notice within five days.[224]

The statute does not, however, require that the seller actually warn the buyer about the existence of any of the nine off-site conditions (such as listing on the National Priorities List, sites known to the New Jersey Department of Environmental Protection, certain overhead electric utility transmission lines, electrical transformer substations, underground gas transmission lines, sewer pump stations, sanitary landfill facilities, public wastewater treatment facilities, and airport safety zones). Professor Williams concludes that the New Jersey legislature limited the duty of disclosure by narrowly defining off-site conditions and not requiring any affirmative disclosure by the seller.[225] Several other states, including Wisconsin, Illinois, Indiana, California, and Texas have enacted somewhat similar property transfer statutes that impose a range of duties on the seller. In Wisconsin, for example, a seller has ten days after accepting a sales contract to deliver to the buyer a real estate condition report.[226] The Wisconsin report provides information about the property, and the seller must disclose certain defects — conditions that would have a significant adverse effect on the value of the property or that would significantly

---

[217] *Id.* at 429.
[218] *Id.* at 424.
[219] *Strawn*, 657 A.2d at 423.
[220] N.J. STAT. ANN. § 46:3C-1 to 3C-12 (West 1997).
[221] § 46:3C-5.
[222] § 46:3C-8.
[223] § 46:3C-8.
[224] § 46:3C-9.
[225] Williams, *supra* note 210, at 21.
[226] WIS. STAT. ANN. § 709.02 (West Supp. 1996).

impair the health or safety of occupants — of which he or she is aware. For instance, a seller must disclose any awareness of "a defect caused by unsafe concentrations of, unsafe conditions relating to, or the storage of hazardous or toxic substances on, neighboring properties."[227] A Wisconsin seller also must disclose any awareness of "unsafe conditions relating to radon, radium in water supplies, lead in paint, lead in soil, . . . or other potentially hazardous or toxic substances on the premises."[228]

The Illinois Responsible Property Transfer Act of 1988[229] and the Indiana Responsible Property Transfer Law[230] both impose a comprehensive duty to disclose environmental conditions on the seller. Both acts require the seller of real property to provide the buyer with a completed disclosure document that thoroughly describes the environmental health of the property.[231] The seller must provide the disclosure document at least thirty days prior to transfer.[232] If the buyer, via the disclosure document, learns of any previously unknown environmental defect, the buyer may cancel the contract for sale.[233]

In California, an owner of nonresidential real property must give written notice to the buyer of any known releases of hazardous substances on or under the property.[234] The owner can be liable for a civil penalty of $5,000 for knowing nondisclosure.[235]

The Texas duty to disclose relates only tangentially to environmental issues. In Texas, a seller of residential real property must provide the buyer with a written disclosure notice.[236] The written disclosure notice runs the gamut from microwave ovens to garage door openers to radon gas to hazardous or toxic waste.[237] If the seller fails to provide the written notice, the buyer may terminate the contract within seven days.[238] The duty to disclose and the potential liability associated with any such duty vary from state to state. Despite such variations, it is clear that a person wishing to sell real property should become familiar with any applicable disclosure requirements.

---

[227] § 709.03.

[228] § 709.03.

[229] 765 ILL. COMP. STAT. §§ 90/1-/2 (West 1997).

[230] IND. CODE ANN. § 13-25-3 (West 1997).

[231] 765 ILL. COMP. STAT. §§ 90/4-/5 (West 1997); IND. CODE ANN. §§ 13-25-3-2 to -7 (West 1998).

[232] 765 ILL. COMP. STAT. § 90/4(a) (West 1997); IND. CODE ANN. § 13-25-3-2(a) (West 1998).

[233] 765 ILL. COMP. STAT. § 90/4(c) (West 1997); IND. CODE ANN. § 13-25-3-3 (West 1998).

[234] CAL. HEALTH & SAFETY CODE § 25359.7(a) (West 1997).

[235] § 25359.7(a).

[236] TEX. PROP. CODE ANN. § 5.008(a) (West 1997).

[237] § 5.008(b).

[238] § 5.008(f).

B. Storm Water Regulations

Storm water includes storm water runoff, snow melt runoff, surface runoff, and drainage.[239] In its 1987 amendments to the Federal Water Pollution Control Act (or Clean Water Act), Congress required EPA to establish a permitting program for nonpoint source discharges of storm water entering the waters of the United States.[240] The Clean Water Act (CWA) outlined a two-phased approach for controlling discharges of storm water.[241]

1. Phase I

On November 16, 1990, EPA published final regulations defining "storm water discharge associated with industrial activities."[242] These new regulations applied to a broad range of industrial activities defined by their Standard Industrial Classification Codes.[243] EPA has applied these regulations to construction activities that disturbed more than five surface acres.

EPA issued nationwide general permits covering storm water discharges associated with such industrial activity in 1992.[244] Any party desiring coverage under the general permit must file a notice of intent (NOI) with the permitting authority — usually the state.[245] To meet the terms of the general permit, which includes general effluent guidelines and conditions, the permittee must prepare a storm water pollution prevention plan that, among other things, identifies potential sources of pollution "which may reasonably be expected to affect the quality of storm water discharges associated with industrial activity from the facility."[246] Once the sources of potential storm water contamination at a facility have been identified, the permittee must adopt appropriate management controls to reduce pollutants in storm water run-off.[247] Any party that exercises day-to-day control over construction site operations must apply for a permit; therefore, the developer, the general contractor, and the subcontractors could all be co-permittees.[248]

---

[239] 40 C.F.R. § 122.26 (1997).

[240] 33 U.S.C. §§ 1251-1387 (1994 & Supp. I 1995 & Supp. II 1996).

[241] *Id.*

[242] 40 C.F.R. § 122 (1997).

[243] *Id.*

[244] *See* Final NPDES General Permits for Storm Water Discharges Associated with Industrial Activity, 57 Fed. Reg. 41,236, 41,297 (1992).

[245] *Id.* at 41,241.

[246] *Id.* at 41,307.

[247] *Id.* at 41,309.

[248] 63 Fed. Reg. 1585 (1998).

In some cases the general permit is not applicable. In the construction context, for example, when the construction activity will affect sensitive streams or waterways, construction operators may be required to submit detailed applications for an individual, rather than a general, storm water permit.[249] The individual permit will contain the following: (1) specific construction plans; (2) a prohibition on discharging non-storm water; (3) requirements for handling hazardous substance releases that exceed reporting quantities; (4) a storm water pollution prevention plan; and (5) site inspection requirements.[250]

2. Storm Water General Permit For Construction Activities

On June 2, 1997, EPA proposed a new general permit for storm water discharges from construction sites that disturb five or more acres of land.[251] On February 6, 1998, EPA announced that a general permit authorizing the discharge of storm water from construction sites on five or more acres had been signed and was available on the Internet.[252] The new general permit would replace general permits issued in September 1992 that expired in September 1997 and would affect construction sites in EPA Region I in Boston, EPA Region II in New York, EPA Region III in Philadelphia, EPA Region VI in Dallas, EPA Region VIII in Denver, EPA Region IX in San Francisco, and EPA Region X in Seattle.[253]

The most significant changes to the general permit for storm water discharges from construction sites include: (1) expanded conditions to protect endangered and threatened species; (2) new conditions to protect historic properties; (3) a new requirement to post a copy of the permit coverage confirmation and a brief description of the project; (4) a new requirement to provide public access to copies of the pollution prevention plan at the site (or nearby); (5) a requirement to submit a notice of permit termination when construction is completed; and (6) the inclusion of pollution prevention performance objectives.[254] Significantly, under the old

---

[249] 57 Fed. Reg. 41,317.

[250] *Id.* at 41,259-41,320.

[251] Proposed Reissuance of NPDES General Permits for Storm Water Discharges From Construction Activities, 62 Fed. Reg. 29,786, 29,787 (1997).

[252] *Water Pollution: Storm Water General Permit for Some Construction Sites Signed*, Daily Env't Rep. (BNA) 30, at A-7 (Feb. 13, 1998).

[253] *Permits for Storm Water Runoff from Construction Sites Proposed*, Daily Env't Rep. (BNA) 105, at A-7 (June 2, 1997).

[254] Proposed Reissuance of NPDES General Permits for Storm Water Discharges From Construction Activities. *See also id.* (The required components of "a storm water pollution prevention plan include: a description of the type of construction activity; a description of the activities that will disturb the soil over major portions of the site; estimates of the total area to be disturbed by excavation, grading, or other activities; estimates of the site's run-off coefficient used

permit, owners (those persons having control over site design, plans, and specifications) and operators (those persons having control over day-to-day implementation of pollution prevention plans) were required to obtain the general permit only if their construction activities impacted five or more acres of land. Under the new general permit for construction activities, owners and operators of projects that are less than five acres but that are part of a "larger common plan of development or sale" may be required to obtain the general permit.[255] EPA uses the example of a residential development where several builders are working in a master planned subdivision. If there is no common plan of development or sale that ties the individual sites together, or if the total area disturbed by the individual sites does not add up to five or more acres, the general permit is not needed. If, however, the total of the sites adds up to five or more acres and the sites are tied by a common plan of development or sale, the general permit is required.

On July 10, 1997, prior to EPA's release of the new general permit, a public meeting and public hearing were held in Dallas, Texas, at the offices of EPA Region VI to discuss the proposed general permit for construction activities. Of particular concern to the construction representatives in attendance were the new Endangered Species Act (ESA)[256] and National Historic Preservation Act (NHPA)[257] self-screening requirements. In essence, these portions of the proposed general permit would require the site owner/operator to screen for adverse effects of construction

---

to calculate the amount of runoff during and after construction; a map showing anticipated drainage patterns and slopes after grading, areas of soil disturbance, locations of structural and nonstructural controls, location of surface waters and discharge points, and off-site locations of equipment storage; and information on endangered and threatened species.").

[255] *Water Pollution: Storm Water General Permit for Some Construction Sites Signed*, *supra* note 252, at A-7.

[256] The Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1534, provides a program for the conservation of threatened and endangered plants and animals and the habitats in which they are found. The law prohibits any action that results in a "taking" of a listed species or adversely affects habitat. The United States Fish and Wildlife Service (FWS) of the Department of the Interior maintains the list of approximately 632 endangered species (326 are plants) and 190 threatened species (78 are plants). Species include birds, insects, fish, reptiles, mammals, crustaceans, flowers, grasses, and trees. Anyone can petition FWS to include a species on this list or to prevent an activity such as logging, mining, construction, or dam building that might threaten a listed species. Import, export, interstate, and foreign commerce of listed species are all prohibited.

[257] Pursuant to the National Historic Preservation Act (NHPA), 16 U.S.C. § 470, the federal government recognizes a policy to provide leadership and assistance to state and local governments, Indian tribes, and native Hawaiians to preserve prehistoric and historic resources. To this end, the Secretary of the Interior is authorized to expand and maintain a National Register of Historic Places. The NHPA requires federal agencies to both conduct a preliminary evaluation and prepare an impact report prior to taking action on property eligible for inclusion on the National Register.

on endangered or threatened species (both plant and animal) and on historic sites.[258] After self-screening for impact, the owner/operator must certify in good faith that the construction activity will have no negative impact.[259]

Construction representatives were equally concerned about enforcement. According to Region VI EPA, citizen complaints primarily will drive enforcement; therefore, enforcement should not "be a problem" so long as the construction company continues to exercise good management practices (such as retaining sediment on site, using silt fences, cleaning out sediment traps when 50% full, and ensuring final stabilization that provides for 70% native background vegetative cover).[260]

On July 6, 1998, EPA Region VI issued its final NPDES general permit for storm water discharges associated with construction activity.[261] The EPA Region VI general permit for construction activity includes new conditions to protect listed endangered and threatened species *and critical habitats*. The certification required for the Region VI general permit for construction activity is more onerous than the certification required for the Multi-Sector General Permit. Addendum A to the Region VI general permit for construction activity outlines the procedures that should be followed when developing a storm water pollution prevention plan with respect to protecting listed species and critical habitat. Applicants seeking coverage under the Region VI general permit for construction activity must follow the six steps outlined in Addendum A.

3. Phase II

On January 9, 1998, EPA issued a final proposed rule for Phase II of the storm water program.[262] Phase II will regulate smaller dischargers of storm water by

---

[258] EPA representative, Remarks at Public Meeting in Dallas (July 10, 1997).

[259] *Id.*

[260] In Georgia, several home development firms were cited for violating the CWA by discharging storm water containing significant amounts of sediment due to inadequate use or failure to use sediment and erosion control devices such as silt fences. According to the August 26, 1997 publication of *BNA Daily Environment Report*, federal and state regulators gave several construction companies in two Georgia counties thirty days to control storm water runoff at their sites, or else pay fines of up to $25,000 per day. Reportedly, the crackdown was the result of citizen complaints and lax county enforcement efforts. To come into compliance and to avoid the fines, the developer must erect silt fences, plant grass, and install hay bales along site perimeters to control the flow of sediment offsite. No follow-up information is available.

[261] 63 Fed. Reg. 36,489 (July 6, 1998).

[262] National Pollutant Discharge Elimination System — Proposed Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 63 Fed. Reg. 1536 (1998) (to be codified at 40 C.F.R. §§ 122 and 123) (proposed Jan. 9, 1998).

requiring, for the first time, that municipalities with populations under 100,000, various commercial operations, and notably, construction sites that disturb between one and five acres all obtain CWA National Pollutant Discharge Elimination System (NPDES) permits.[263] In broad terms, the proposed rule requires designated states and tribes to implement the second phase of the storm water permitting program by issuing NPDES permits (most likely general permits) by May 31, 2002.[264] In those states that lack authority over their waste water permitting programs, EPA will issue the Phase II permits.[265] According to the proposal, a final Phase II storm water rule should be finalized by March 1, 1999.[266]

In the proposal, EPA relies on "safety valves" to both exclude certain sources based on their lack of impact on water quality and to pull in, based on localized adverse impact on water quality, other sources not previously regulated on a national basis.[267] EPA also proposes a "no exposure" exemption to those owners and operators of regulated activities who can show that their industrial materials, materials handling operations, and industrial processes are not exposed to storm water.[268] With respect to municipalities, EPA proposes six best management practices (BMPs) aimed to reduce pollutants in urban runoff in a cost effective manner.[269] If, however, after implementation of the BMPs, there is still a water quality problem, the municipality would have to take stronger measures.[270]

With respect to construction activities, EPA believes that the proposed use "of BMP controls at small construction sites will also result in a significant reduction is [sic] pollutant discharges and an improvement in surface water quality."[271] According to EPA, storm water discharges generated during construction can cause

---

[263] *Id.* at 1536. According to the proposal, small municipalities must implement "minimum measures" that focus on best management practices. For example, an EPA fact sheet on the proposal suggests that the municipality could implement a public education program on limiting the use and runoff of garden chemicals, issue a soils and erosion control ordinance, and ensure good housekeeping of municipal operations. A regulated municipality could be required both to develop and implement a storm water management program designed to reduce pollutants to the maximum extent practicable in a cost effective manner and to submit to the permitting authority a list of best management practices and measurable goals.

[264] *Id.* at 1563.

[265] *Id.*

[266] *Id.*

[267] National Pollutant Discharge Elimination System — Proposed Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 63 Fed. Reg. 1536 at 1563 (1998) (to be codified at 40 C.F.R. §§ 122, 123) (proposed Jan. 9, 1998).

[268] *Id.* at 1536.

[269] *Id.*

[270] *Id.*

[271] *Id.*

an array of water quality impacts because the biological, chemical, and physical integrity of the waters may become severely compromised.[272]

Water quality impairment results, in part, because a number of pollutants are preferentially absorbed onto mineral or organic particles found in fine sediment. The interconnected process of erosion (detachment of the soil particles), sediment transport and delivery is the primary pathway for introducing key pollutants, such as nutrients (particularly phosphorus), metals, and organic compounds into aquatic systems.[273]

In the final proposed rule, EPA notes that its decision to regulate certain storm water discharges from construction sites disturbing less than five acres is consistent with the Ninth Circuit's decision in *NRDC v. EPA*.[274] The existing regulations define storm water "discharges associated with industrial activity" to include only those storm water discharges from construction sites where the discharge disturbs more than five acres of land.[275] As such, storm water discharges from construction sites disturbing less than five acres have not been regulated. EPA's final proposal would solve this dilemma by designating discharges from construction activities that disturb between one and five acres as "discharges associated with *other* activity" as opposed to "discharges associated with industrial activity."[276]

According to the EPA proposal, the new definition of storm water "discharges associated with other activity" would include construction activities (including clearing, grading, and excavating activities) that result in the disturbance of equal to or greater than one acre and less than five acres. Such activities might include road building; construction of residential houses, office buildings, or industrial buildings, or demolition activity.[277]

Sites disturbing less than 1 acre would be included if they were part of a "larger common plan of development or sale" with a planned disturbance of equal to or greater than 1 and 5 acres. A "larger common plan of development or sale" would mean a contiguous area where multiple separate and distinct construction activities

---

[272] National Pollutant Discharge Elimination System — Proposed Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 63 Fed. Reg. 1536 at 1540 (1998) (to be codified at 40 C.F.R. §§ 122, 123) (proposed Jan. 9, 1998).

[273] *Id.*

[274] *Id.* at 1582 (citing NRDC v. EPA, 966 F.2d 1292, 1582 (9th Cir. 1992) (remanding portions of storm water regulations related to discharges from construction sites); *see* V. Novonty & G. Chesters, *Delivery of Sediment and Pollutants from Nonpoint Sources: A Water Quality Perspective,* 44 J. SOIL & WATER CONSERVATION 568 n.6 (1989).

[275] *Id; see* 40 C.F.R. § 122.26 (b)(14) (1997).

[276] *Id.* (emphasis added).

[277] National Pollutant Discharge Elimination System — Proposed Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 63 Fed. Reg. 1536 (1998) (to be codified at 40 C.F.R. §§ 122, 123) (proposed Jan. 9, 1998).

might be occurring at different times on different schedules under one plan (*e.g.*, a housing development of five 1/4 acre lots). Such sites would be required to seek coverage under an NPDES permit regardless of the number of lots in the larger plan because designation for permit coverage would be based on the total amount of disturbed land area.[278]

In short, a construction activity that disturbs less than one acre would be designated for storm water regulation only where there is reason to believe that impacts to water quality are likely to occur from activity on these sites.[279]

Construction activity equal to or greater than 1 acre but less than 5 acres would be automatically designated [for storm water regulation] except in those circumstances where an owner or operator certifies that any of three specific waiver circumstances would apply .... Under the proposal, NPDES permitting authorities would have the option of providing a permit waiver to construction site owners or operators in three circumstances. The first waiver would be based on "low predicted rainfall potential .... The second waiver would be based on "low predicated soil loss." .... The third waiver would be based on a consideration of ambient water quality.[280]

In addition to the waivers, the EPA is also considering possible approaches for providing incentives for local decision-making that would limit the adverse water quality impact associated with uncontrolled growth in a watershed. In situations where there are special controls or incentives that direct development away from wetlands, open space, or other protected land, (such as transferable development rights or traditional neighborhood development ordinances) it may be possible to provide relief to small construction sites in areas of less dense development, provided that the average development densities are very low.[281] Also, EPA notes that "relief may also be appropriate where redevelopment construction replaces existing development and the new development results in a net water quality benefit."[282] Activities in compliance with a local sediment and erosion control program could apparently be deemed in compliance with the NPDES program.[283]

The final proposal may not adequately address certain concerns previously expressed by the National Association of Home Builders (NAHB) at an October

---

[278] *Id.* (citations omitted).

[279] *Id.*

[280] *Id.*

[281] *Id.*

[282] National Pollutant Discharge Elimination System — Proposed Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 63 Fed. Reg. 1536 (1998) (to be codified at 40 C.F.R. §§ 122, 123) (proposed Jan. 9, 1998).

[283] *Id.*

1997 meeting of the Storm Water Phase II Federal Advisory Subcommittee.[284] For example, Don Moe of NAHB expressed concern with respect to then-existing EPA guidelines for post-construction storm water management in development and redevelopment on parcels of one acre or more. An earlier EPA draft proposal included a recommendation for BMPs that attempt to mimic pre-development runoff conditions, including water quality and quantity. EPA guidelines to achieve such conditions include multiple detention pond systems, sediment forebays, and the use of wetland vegetation. According to Moe, if EPA interprets the guidelines as a requirement — as opposed to a "toolbox" — some development projects would become economically infeasible.

C. Wetlands

Section 404 of the CWA limits the discharge of dredged or fill material into wetlands.[285] Wetlands are defined as areas "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."[286] Wetlands may be in coastal areas, near streams, lakes, reservoirs, or even in dry creek beds and generally include swamps, marshes, bogs, and similar areas.[287] Earth-moving activities that discharge or place any amount of soil, rocks, or other fill material into or on a wetlands may be a violation of § 404. As such, wetlands regulations exert an obvious impact on construction and development.

The U.S. Army Corps of Engineers (Corps) is charged with implementing and enforcing

§ 404 with EPA oversight. Through the Chief of Engineers, the Secretary of the Army issues permits for the discharge of dredged or fill material into navigable waters and prohibits such discharges under certain circumstances.[288] In addition to

---

[284] *Storm Water Advisory Committee Airs Concerns on Phase II Draft Proposal*, Daily Env't Rep. (BNA) 194, at A-9 (Oct. 7, 1997).

[285] Federal Water Pollution Control Act (Clean Water Act) § 404, 33 U.S.C. § 1344 (1994). The discharge of dredged or fill material is the addition of these materials into United States waters. Discharge of fill material does not include plowing, cultivating, seeding, and harvesting for the production of food, fiber, and forest products. Discharge of dredged material includes, but is not limited to, runoff from a contained land or water disposal area and any addition (including redeposits) of dredged material into waters of the United States. 33 C.F.R. §§ 323.2(d) & (f) (1998).

[286] 40 C.F.R. § 110.1 (1997).

[287] *Id.*

[288] 33 U.S.C. § 1344(a) (1994). Permit may be restricted or denied for a defined area if it is determined "that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding

other federal requirements, a § 404 permit applicant must receive certification from the state that the discharge will comply with applicable state water quality standards. Failure to obtain a permit is a violation of the CWA.[289] To streamline the permitting process, the Corps issued approximately three dozen nationally applicable permits, known as nationwide permits (NWPs), in addition to individual permits.[290]

On July 15, 1996, seventeen environmental groups filed a challenge to NWP 29, the permit that allows for the construction or expansion of single-family homes.[291] In addition to injunctive relief, the suit seeks a declaratory judgment to direct the Corps to rescind the permit. Environmentalists warn that NWP 29, in its existing format, eliminates most of the environmental safeguards normally afforded by § 404 and could potentially authorize many one-half acre fills. According to the Corps, NWP 29 may apply to more than 95% of all single-family housing in the country.

The Corps unveiled a package of new and revised NWPs authorizing various types of projects in wetlands.[292] The Corps reissued all the existing NWPs and issued two new NWPs, effective February 11, 1996. The changes were primarily the result of a modification to the definition of "discharge of dredged material."[293] The definition was revised to include more activities within the scope of § 404.

Amid much controversy, the package scales back and eventually eliminates (by the end of 1998) NWP 26, which originally allowed for the filling of up to ten acres of land in isolated and headwaters wetlands.[294] In the first scale-back on February 11, 1997, the Corps had revised NWP 26 to allow the discharge of dredged or fill material in up to three acres of isolated or headwater wetlands with minimal regulatory oversight. Thirty-five states and territories had certified this general permit.[295] Twenty-nine of the thirty-five states have modified the permit slightly and

---

areas), wildlife, or recreational areas." 33 U.S.C.A. § 1344(c) (1994).

[289] 33 U.S.C. § 1311 (1994).

[290] Before the Corps can issue an individual permit, it must conduct a public review and analysis to evaluate the benefits and detriment of the activity. 33 C.F.R. § 320.4 (1998).

[291] *Environmental Groups Expected to Pursue Challenge to General Permit*, Daily Env't Rep. (BNA) 3, at A-8 (Jan. 6, 1997).

[292] Final Notice of Issuance, Reissuance, and Modification of Nationwide Permits, 61 Fed. Reg. 65,874 (Dec. 13, 1996).

[293] 33 C.F.R. § 323.2(d) (1998).

[294] The National Wetlands Coalition reports that approximately 50,000 projects receive wetlands permits annually. Of that 50,000, approximately 43,000 are general or nationwide permits. Of those general or nationwide permits, approximately 30,000 fall under NWP 26. *Wetlands: Draft Permits Impose Limits on Activities on One-Third to Three Acres*, [Jan. 1998] National Env't Daily (BNA) Vol. 28 No. 37, at D-2 (Jan. 23, 1998).

[295] *See Corps Says 35 States, Territories Certified Permit Affecting Discharges* Daily Env't Rep.(BNA) 134, at A-1 (July 14, 1997).

applied certain restrictions to its use.[296] Eleven states have denied use of the permit.[297] The National Association of Home Builders (NAHB) filed suit against the Corps for its decision to phase out NWP 26. The suit, filed March 6, 1997, in the United States District Court for the District of Columbia, charges that the Corps made critical changes to the permit without a public notice or comment period, in violation of the Administrative Procedures Act. Apparently, NAHB argues that the changes will both slow the permitting process and contribute to an increase in housing costs.[298]

On January 16, 1998, the Corps began circulating among federal agencies a draft activity-based permit to be used instead of NWP 26. The draft lists sixteen activities which, if they result in the loss of between one-third and three acres of wetlands, would be regulated and require a wetlands mitigation plan.[299] Residential development activities, commercial development activities, and master planned activities (that do not cause a loss of more than three to ten acres) are among the sixteen activities listed for regulation.[300] The requirement of a mitigation plan is a new requirement.

IV. Conclusion

The regulatory schemes aimed at protecting wetlands, limiting storm water discharges, and imposing disclosure obligations on the transfer of contaminated property may pose some of the biggest hurdles for contractors and developers in the coming years. These hurdles should not prove insurmountable, although compliance will almost certainly increase the costs of doing business. Construction industry professionals who wish to transfer property they reasonably suspect is impacted by off-site environmental conditions should determine whether they have a duty to disclose under state or local law. Those involved in construction in a potential wetlands area should determine at the outset what type of permit is required. Similarly, construction professionals conducting an operation subject to storm water regulation should file a Notice of Intent to use the general permit available for construction activities, bearing in mind the new permit requirements and EPA's coming release of the new Phase II storm water rule. With respect to both storm water and wetlands regulations, industry involvement in the administrative process is also essential, and contractors are encouraged to attend public meetings whenever

---

[296] 19 NAT'L WETLANDS NEWSL. (Envtl. L. Inst.) 6, Nov.-Dec. 1997, at 18.

[297] *Id.*

[298] *See Wetlands: Home Builders Claim Modifications to Corps Nationwide Permit 26 Were Illegal,* Daily Env't Rep.(BNA) 46, at A-4 (Mar. 10, 1997).

[299] *Draft Army Corps of Engineers Wetlands Permit to Replace Nationwide Permit No. 26* DAILY ENV'T REP. (BNA) 17, at E-1 (Jan. 27, 1998).

[300] *Id.*

possible. In short, these ever more frequently invoked regulatory snares are costly and burdensome, but not deadly for contractors.

CERCLA, on the other hand, remains a deadly trap for contractors, primarily because education does little to protect the contractor. For example, had Ferry known the soil he had been asked to excavate was contaminated by previous owners/operators, it is questionable whether he would have declined the job for fear of being held liable under CERCLA as an "operator," "arranger" and "transporter" of hazardous waste. Today, even the contractor familiar with the *Hines* control test, which a court will likely apply to determine whether the imposition of CERCLA liability is warranted, cannot accurately predict whether any one court will view dirt shifting as "disposal" of a hazardous substance. In short, knowledge of the application of CERCLA to the construction context provides little protection from liability. Moreover, as discussed above, contractual provisions that seek to limit liability and insurance policies offer only limited safety from the CERCLA trap. The only fail-safe method of protection for a contractor is to avoid any area that might have been impacted by hazardous substances.