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STRICT LIABILITY UNDER THE NEW MEXICO SOLID WASTE ACT: A COMPARISON WITH CERCLA*

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I. AN OVERVIEW OF THE NEW MEXICO SOLID WASTE ACT STRICT LIABILITY PROVISIONS

Effective March 5, 1990, section 34 of the Solid Waste Act[1] ("Act") adopted a strict liability standard with respect to liability for payment of costs of cleaning up contamination resulting from the disposal of solid waste. Virtually all parties associated with a "solid waste facility,"[2] including past and present owners, operators, permittees of the facility, and transporters and generators of contaminated waste, are caught in this strict liability net. In addition, the Act provides the state with the power to require almost all of these parties to conduct the cleanup themselves under threat of substantial penalties. As a result, the Act will have a considerable impact not only on the *past* and *present* parties associated with *present* and *former* solid waste facilities, but also on the ability to transfer, mortgage or use any property that was once used for the disposal of solid waste.

The enactment of the strict liability provision of the Act[3] establishes a strong environmental protection policy in New Mexico and, at the same time, creates numerous legal and practical issues related to implementation of that policy.[4] This article analyzes several major legal and practical

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1. N.M. STAT. ANN. §§ 74-9-1 to -42 (Repl. Pamp. 1990).
2. *Id.* § 74-9-3.
3. N.M. STAT. ANN. § 74-9-34 (Repl. Pamp. 1990) [hereinafter section 34].
4. The Act was introduced as Senate Bill 2 in the 1990 legislative session and was revised twice in the format of committee substitute bills. The first major revisions were embodied in Senate Judiciary Committee Substitute for Senate Bill 2 ("Senate Judiciary Committee Substitute"), which made substantial revisions to section 34. The Senate Conservation Committee Substitute for Senate Judiciary Committee Substitute for Senate Bill 2 ("Senate Conservation Committee Substitute") did not change any of the substantial revisions made by the Senate Judiciary Committee. Several amendments were made to the bill in the House, none of which affected section 34. A prior version of the Act was adopted by the New Mexico legislature in 1989, but was vetoed by the Governor. The 1989 Solid Waste Act did not contain liability provisions such as those found in section 34 of the Act.

issues created by section 34 and proposes methods of addressing those issues.

Section 34 gives the New Mexico Environment Department ("Environment Department") the power to order a "responsible party" to remove and take remedial action with respect to a release or threatened release of "contaminants" from a "solid waste facility." If a responsible party does not provide for removal or remedial action upon order of the Secretary of Environment Department, that person may be liable for punitive damages in an amount up to three times the amount of costs incurred as a result of the failure of the responsible party to take the action ordered.[5] Further, punitive damages are assessed in addition to the costs of removal and remedial action.[6]

The owner or operator of a solid waste facility, any person having a permit issued pursuant to the Solid Waste Act or the Environmental Improvement Act,[7] and any person "otherwise authorized to accept solid waste or disposal or transformation" under regulations adopted by the New Mexico Environmental Improvement Board may be held strictly liable for cleanup costs.[8] In addition, any person who accepted any solid waste for transport to the facility is strictly liable for environmental damage.[9] Finally, section 34 provides that any person who "arranged for" disposal, treatment or transportation for disposal or treatment of solid waste owned or possessed by that person is subject to strict liability.[10]

Courts must apportion responsibility for cleanup costs among multiple parties found liable under the strict liability provisions in accordance with "equitable principles."[11] An owner who can establish that at the time he acquired the property he did not know and had no reason to know that the property had been used for a solid waste facility can employ the "innocent purchaser" defense, the major defense to strict liability.[12]

The strict liability provision contains broad ranging implications for both the public and private sector. Anyone involved in the disposal of solid waste is potentially liable for releases of solid waste that damage the environment. The operators of municipal and county landfill facilities, being the principal operators of solid waste facilities in New Mexico, face the greatest potential liability under the Act.

In contrast to the remainder of the Solid Waste Act, which focuses on the future development of an environmentally safe solid waste management program for the state, section 34 creates liability for contamination related to the disposal of solid waste not only in the future but also in the past. The result is a powerful enforcement tool that allows

5. N.M. STAT. ANN. § 74-9-34(D) (Repl. Pamp. 1990).
6. *Id.*
7. *Id.* §§ 74-1-1 to -10.
8. *Id.* § 74-9-34(B)(4).
9. *Id.* § 74-9-34(B)(6).
10. *Id.* § 74-9-34(B)(5).
11. *Id.* § 74-9-34(E).
12. *Id.* § 74-9-34(C)(2)(a).

the state to require responsible parties to either take remedial action or pay for remedial action taken by the government for any pollution related to any present or prior disposal of solid waste. By applying a strict liability standard to a list of "responsible parties" who are defined by their connection to the source of the contamination, the statute imposes liability on parties regardless of whether their actions actually caused the contamination or whether they acted in compliance with any rules applicable to the disposal of solid waste.

The response and liability provisions of the Act are, in part, analogous to those provided in the federal Comprehensive Environmental Response Compensation and Liability Act ("CERCLA" or "Superfund").[13] In fact, some of the language in section 34 of the Act appears to have been taken directly from the liability and definition provisions of CERCLA.[14] A major focus of this article will be to compare the Act's and CERCLA's liability provisions and to analyze whether the implementation and interpretation of CERCLA by the United States Environmental Protection Agency ("EPA") and the federal courts provide useful examples for implementing and interpreting the Act.

II. IS STRICT LIABILITY RETROACTIVE?

The legislature did not specifically address whether the strict liability provision applies to the costs of removal or remedial action resulting from a release which occurred prior to its effective date. Nothing in section 34 "bars or replaces any cause of action available to any person that existed before its enactment."[15] The causes of action created by section 34 are "supplemental to existing causes of action."[16] Section 73 of the Act, on the other hand, provides that enforcement action taken "shall be valid if based upon an act or failure to act that violated a provision of law in effect at the time of the act or failure to act."[17] Thus, section 73 implies that an enforcement action to recover cleanup costs for damage resulting from a release which occurred prior to the effective date of the Act would be governed by the law in effect on the date of the release and not the effective date of the Act.

In most situations where strict liability under section 34 cannot be imposed, the state will be able to claim causes of action under other laws. If the solid waste facility discharged any significant quantities of water contaminants, the owner or operator of the facility may be subject to liability under the Water Quality Act.[18] A release of hazardous substances or hazardous waste may create liability under CERCLA or the

13. 42 U.S.C. §§ 9601-75 (1980).
14. *Id.* §§ 9601, 9607.
15. N.M. STAT. ANN. § 74-9-34(H) (Repl. Pamp. 1990).
16. *Id.*
17. *Id.* § 74-9-1 note (savings clauses).
18. Water Quality Control Commission Regulation 1-203 (1988).

New Mexico Hazardous Waste Act.[19] The state may also bring a public nuisance cause of action.[20]

A different issue is created by a release which commenced prior to the effective date of the Act but continued to exist beyond the effective date. In such a situation, the Act would clearly apply to costs of removal or remedial action with respect to contamination occurring after the effective date of the Act. As a practical matter, because of the difficulty in establishing that the contamination occurred prior to the effective date of the Act, it may only be necessary to establish that the release was in existence after the effective date of the Act.

III. SCOPE OF LIABILITY - TO WHAT TYPE OF ACTIVITY DOES STRICT LIABILITY APPLY?

The responsible parties under section 34 can be required to either conduct a cleanup or reimburse a governmental entity for its costs of conducting a cleanup "because of a release or threatened release of contaminants from a solid waste facility."[21] The scope of liability is both broad and vague. Certain terms are capable of broad interpretation while others are undefined.

"Release" is not defined by the Act but is broadly defined by two recently enacted New Mexico environmental laws. Both the New Mexico Hazardous Chemicals Information Act[22] and CERCLA include as a "release" "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing" or the abandonment or discarding of barrels, containers and other closed receptacles.[23] The Ground Water Protection Act[24] only pertains to "releases" from underground storage but includes "spilling, leaking, emitting, discharging, escaping, leaching or disposing."[25] Section 34 also authorizes the Environment Department to recover the costs of remedial action taken with respect to a "threatened release." A "threatened release" is, of course, even broader and more vague than "release."[26]

The term "contaminants" is not defined by the Act or by any other New Mexico environmental statute. The Air Quality Control Act contains a definition of "air contaminants" that refers to specific contaminants (*e.g.*, particulate matter, ash, dust),[27] while the Water Quality Act defines

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19. N.M. STAT. ANN. §§ 74-4-1 to -13 (Repl. Pamp. 1990).
20. *See id.* §§ 30-8-1 to -9 (Repl. Pamp. 1984).
21. *Id.* § 74-9-34(A)(3) (Repl. Pamp. 1990).
22. *Id.* §§ 74-4E-1 to -9.
23. *Id.* § 74-4E-3(G); 42 U.S.C. § 9601(22) (1980).
24. N.M. STAT. ANN. §§ 74-6B-2 to -11 (Repl. Pamp. 1990).
25. *Id.* § 74-6B-3(H).
26. However, while section 34 of the Act refers to costs incurred by the state responding to a release or threatened release, section 36 only gives the Environment Department the power to issue a corrective action order when the Environment Department determines that there has been a release into the environment from a solid waste facility. *Id.* § 74-9-36(D).
27. *Id.* § 74-2-2(A).

"water contaminants" as "any substance which alters the physical, chemical or biological qualities of water."[28]

The broad definition of "solid waste facility" in the Act may extend the liability provisions to hundreds, perhaps thousands, of pieces of property in New Mexico. A solid waste facility means:

> [A]ny public or private system, facility, location, improvements on the land, structures or other appurtenances or methods used for processing, transformation, recycling or disposal of solid waste, including landfill disposal facilities, transfer stations, resource recovery facilities, incinerators and other similar facilities not specified.[29]

"Solid waste" is also broadly defined to include any garbage or refuse, but excludes certain agricultural, mining, hazardous and other wastes.[30]

Simply applying the term "solid waste facility" to landfills creates a large number of potential sources of liability. As of August 1989, 109 municipal solid waste landfills were open and registered, but close to that number had ceased operation in the past few years.[31] Add to this list the number of unregistered landfills or landfills that were closed prior to any registration requirement and the number reaches several hundred. If the definition of "any . . . location . . . used for processing, transformation, recycling or disposal of solid waste" is literally applied, then junk yards, salvage operations, and any arroyo, pit or other location where garbage has been deposited may be included, and the number of such facilities probably reaches into the thousands.

Landfills and dumps are already recognized as one of the most serious causes of soil and groundwater contamination. Nationwide, roughly twenty percent of the CERCLA National Priorities List, or Superfund, sites are municipal landfills.[32] The Lee Acres landfill near Farmington is one of the ten New Mexico Superfund sites.[33] Of the approximately 300 New Mexico properties listed on the Comprehensive Environmental Response, Compensation and Liability Information System ("CERCLIS"), which are the subject of EPA Superfund program investigations, over fifty are readily identifiable as landfills. Therefore, a significant percentage of solid waste facilities as defined by the Act are sources of potential liability for the responsible parties associated with them. Most of the older facilities, particularly the illegal or unregulated ones, contained no barriers to the leaching of contaminants, and even the best constructed landfills may leak at some point.[34]

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28. *Id.* § 74-6-2(A).
29. *Id.* § 74-9-3(P).
30. *Id.* § 74-9-3(N).
31. NEW MEXICO FIRST, NEW MEXICO'S ENVIRONMENT: DANCE OF THE INTERESTS 53 (1990) [hereinafter NEW MEXICO FIRST].
32. Steinzor, *Local Governments and Superfund: Who Will Pay the Tab?*, 22 URB. LAW. 79 (1990).
33. 55 Fed. Reg. 35,502 (1990) (to be codified at 40 C.F.R. § 300) (proposed Aug. 30, 1990).
34. NEW MEXICO FIRST, *supra* note 31, at 53.

IV. IDENTIFYING THE PLAYERS - WHO IS SUBJECT TO STRICT LIABILITY?

Section 34 lists those persons subject to strict liability. In addition to owners, operators and permit holders,[35] section 34 attempts to extend liability to virtually any person who is involved in any way with the process of disposing of waste at a solid waste facility where a release or threatened release occurs.

Subsection B(4) imposes liability on any person, who at the time of the disposal of "any solid waste" in a facility where a release or threatened release occurs, owned, operated, or had a permit or registration certificate to operate the facility. This section extends the spectre of strict liability to a responsible party even where the responsible party can establish that no release or threatened release occurred during the time of its ownership, operation, or holding of a permit or registration certificate.

Subsection B(5) has an even broader reach. That section imposes liability upon any person who "arranged for" the disposal, treatment or transportation of solid waste "owned or possessed by that person" and disposed of in the facility where the release or threatened release occurs.[36] This provision would, theoretically, impose liability on citizens who "arrange for" the transportation and disposal by using a municipal or private solid waste collection and disposal service. All citizens who arranged for the disposal of solid waste at a facility at which a release or threatened release occurs face the threat of liability for costs of removal and remedial action.

Section 34 imposes liability upon "any generator" without imposing any connection to the solid waste facility.[37] The term "generator" is defined as a governmental entity "in which any solid waste disposed of in a solid waste facility in New Mexico originated."[38] Subsection D of section 34 as originally contained in Senate Bill 2 provided that recovery of costs was required to be enforced against responsible parties, not generators.[39] Responsible parties are essentially private entities who own or operate a facility. By removing the priority, the legislature evidenced an intent that governmental entities owning or operating or otherwise possessing a permit for a solid waste facility be subject to sharing with private parties using the facility the responsibility for cleanup. This provision provides a much stronger incentive than the original provision to avoid releases, given the fact that most solid waste facilities in this state are operated by local governments. Thus, all governmental entities,

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35. N.M. STAT. ANN. § 74-9-34(B) (Repl. Pamp. 1990). Permit holders include any person having been issued a permit under the Act or the Environmental Improvement Act, or any person otherwise authorized to accept solid waste for disposal or transformation under regulations adopted by the Environmental Improvement Board under the Environmental Improvement Act. *Id.*

36. *Id.* § 74-9-34(B)(5).

37. *Id.* § 74-9-34(B)(7).

38. *Id.* § 74-9-34. The term "generator" includes the United States, a state or any agency, department, instrumentality, office, institution or political subdivision of the state.

39. Senate Bill 2, 1990 Legislative Session.

including the federal government, the state, the municipalities and counties, in which solid waste was generated may presumably be held strictly liable for cleanup costs with respect to a release or threatened release if the solid waste disposed of at the facility at which the release occurred originated within its territorial limits. Finally, the Act adds an additional category of responsible party—insurers or guarantors of an owner or operator where the owner or operator is in bankruptcy or where jurisdiction over the owner or operator cannot be obtained.[40]

The list of responsible parties in section 34 is essentially the same as provided for in CERCLA,[41] with two major exceptions: subsection B imposes liability on (1) permit holders[42] and (2) generators.[43] Presumably, the amendments which added permit holders were designed to extend liability to persons who originally obtain a permit but contract for the operation of a facility. Municipalities and counties would be the most likely to incur liability under these provisions. These sections may have very little practical impact because regulations promulgated by the New Mexico Environmental Improvement Board require that persons who shall "operate" a new facility must have a permit issued by the Secretary of the Envornment Department ("Secretary").[44] If a permit is transferred, regulations require that the new permittee must demonstrate that it has "ownership or control" of the facility.[45] Few, if any, situations come to mind where a person would be a permit holder subject to liability and would not also be an owner or operator.

The provisions of section 34 create an inextricable entanglement of potentially responsible parties. Section 34 would substantially benefit from more explicit procedures for identifying potentially responsible parties and allocating liability among those parties. Procedures similar to those adopted under CERCLA, discussed below, should be seriously considered with respect to implementation of section 34.

V. ADMINISTRATIVE PROCEDURES FOR APPORTIONMENT OF LIABILITY AND DETERMINATION OF APPROPRIATE REMOVAL AND REMEDIAL ACTION

A. The Provisions of the Act

Section 34 speaks only generally about the procedures for allocating liability among responsible parties and determining the nature and extent of removal and remedial action. Section 34(B) simply provides that responsible parties and generators are strictly liable for "costs."[46] Costs

40. N.M. STAT. ANN. § 74-9-36(F) (Repl. Pamp. 1990).
41. *See* 42 U.S.C § 9607(a) (1980).
42. N.M. STAT. ANN. § 74-9-34(B)(3) (Repl. Pamp. 1990).
43. *Id.* § 74-9-34(B)(7).
44. Solid Waste Management Regulations § 201.
45. *Id.* § 205.
46. N.M. STAT. ANN. § 74-9-34(B) (Repl. Pamp. 1990).

are defined in section 34(A)(3) to mean the "costs of removal or remedial action" incurred by government "because of a release or threatened release of contaminants from a solid waste facility."[47] Subsection D states that any "responsible party" that is "liable for a release or threatened release" is "liable for punitive damages" if it fails to "properly provide removal or remedial action upon order of the director."[48]

Subsections B and D of section 34, when read together, indicate that the Secretary has the power: (1) to make a determination that a responsible party or parties are liable for a release and order a responsible party or parties to take "removal or remedial action"; and (2) to bring an action to recover treble punitive damages measured by the "costs incurred as a result of failure to take proper action." Implicit in the provisions of section 34 is the concept that the state or the appropriate political subdivision may proceed with removal or remedial action to recover: (1) any "costs"; and (2) "punitive damages" not to exceed three times the amount of "costs." However, no specified procedure for the exercise of removal or remedial action by the government or recovery of "costs" incurred by the government for such removal or remedial action is found in section 34. The section simply states that the court has the authority to apportion responsibility for "costs or damages or both among defendants found liable."[49] Thus, the Secretary has no specific authority to issue an administrative order to bring suit to recover costs, but section 34 gives the court authority to apportion both "costs" and "damages."

Section 36 of the Act sheds some light on the procedures for enforcement. That section provides the Secretary with the authority to require "corrective action" or any "other response measures" he deems necessary to protect human health or the environment with respect to releases.[50]

Section 36 provides some key missing links to the enforcement authority set forth in section 34. Subsection D of section 36 provides that the Secretary may, alternatively, commence an action in district court for the district in which the facility is located for "appropriate relief."[51] This provision should be construed to provide authority for the Secretary to initiate an action to recover "costs," filling the void in section 34 which provides only for interaction of a court proceeding to recover "damages." Section 36 requires a corrective action order to specify a time for compliance and to state with "reasonable specificity" the nature of the required corrective action or other response measure.[52] The "corrective action or other response measure" should encompass "removal or remedial action" authorized to be ordered by section 34.[53]

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47. *Id.* § 74-9-34(A)(3).
48. *Id.* § 74-9-34(D).
49. *Id.* § 74-9-34(E).
50. *Id.* § 74-9-36(D). Corrective action is authorized only for present and past releases; whereas section 34 provides for cost recovery for actions taken to prevent "threatened" releases.
51. *Id.* § 74-9-36(D).
52. *Id.* § 74-9-36(E).
53. *Id.* Subsection E also provides for a penalty of $5,000 per day for each day of non-compliance with a corrective action order. Such penalties are in addition to cleanup costs and punitive damages provided for in section 34.

Neither section 34 nor section 36 specifically authorize the government to clean up environmental damage from releases, nor do they provide procedures or requirements related to the determination of responsible parties incurring liability for cleanup costs or the allocation of responsibility for such costs. Such procedures and requirements should be provided for if the Act is to be effectively administered.

The Secretary has an ideal source of guidance in adopting procedures governing enforcement of the Act by looking to the provisions for determination of primarily responsible parties and the allocation of liability among primarily responsible parties provided for in CERCLA and in the National Contingency Plan[54] adopted by the United States Environmental Protection Agency pursuant to CERCLA. Enforcement of CERCLA now benefits from specific requirements related to the administrative process of selection of remedies and allocation of liability, many of which were adopted as part of the Superfund Amendments and Reauthorization Act of 1986 ("SARA")[55] and amendments to the National Contingency Plan mandated by SARA.[56]

B. CERCLA Administrative Procedures

CERCLA and the National Contingency Plan[57] ("Plan") provide administrative procedures for discovery and identification of a release or threatened release of contaminants, preliminary assessment and evaluation of a release or threatened release, determination of an appropriate response, identification of responsible parties, and allocation of liability among the parties.[58] Administration and enforcement of the Act would benefit strongly from adoption of procedures similar to those adopted under CERCLA and the Plan.

1. Preliminary Assessment and Evaluation

Once a release or threatened release has been discovered and the government has been notified, the Plan requires a preliminary assessment of the release or threatened release to determine whether there is an "imminent and substantial danger to the public health or welfare."[59] The preliminary assessment may include identification of the sources and nature of the release or potential release, evaluation of the threat to public health, evaluation of the magnitude of the release and evaluation of whether removal is necessary.[60] During the preliminary assessment an on-site inspection may be conducted.[61] An on-site inspection would include

54. 40 C.F.R. § 300 (1989).
55. Pub. L. No. 99-499, 100 Stat. 1613 (1986).
56. *See* 42 U.S.C. §§ 9604, 9606 (1988).
57. 40 C.F.R. § 300 (1989).
58. *Id.* §§ 300.61-.71.
59. *Id.* § 300.61.
60. *Id.* § 300.64.
61. *Id.*

obtaining samples, determining the contaminants released, and identifiying the potential or actual threats to public health and welfare.[62] If it is determined that a release or threatened release is a threat to public health and welfare, the government must determine what response, if any, is necessary.[63]

2. Determining Appropriate Response

Once it is determined that a response to a release or threatened release is necessary, the Plan requires a determination of whether removal actions are necessary or whether remedial actions are necessary.[64] The government may consider the following in determining the appropriateness of a removal action: (1) actual or potential exposure to pollution by populations, animals, or the food chain; (2) actual or potential exposure of drinking water or sensitive ecosystems to hazardous substances; (3) pollutants which may potentially migrate or are near the surface; (4) the threat of fire or explosions; and (5) pollutants in repositories which may pose a threat.[65] If the preliminary assessment indicates that removal action is not necessary or will not fully address the threat or potential threat imposed by a release, the government may initiate a site evaluation to determine what remedial actions are necessary.[66] The Plan provides for a Remedial Investigation/Feasibility Study to determine the nature and extent of the threat presented by the release and to evaluate the possible remedies.[67] The feasibility study is an in-depth analysis of the various remedial actions which could be used to clean up the site. The feasibility study process involves balancing of the benefits and costs of each potential remedy.[68] Cost, engineering feasibility, and effectiveness of remedy must all be considered in the feasibility study.[69]

3. Participation of Responsible Parties - Special Notice Procedures and Non-Binding Preliminary Allocations of Responsibility

The Plan provides procedures under which potentially responsible parties are notified of the response process and are given an opportunity to participate.[70] Provision should be made under the New Mexico Solid Waste Act for allowing responsible parties to participate in a remedial investigation/feasibility study process. Allowing responsible parties to be involved in the process at an early stage, even before the entry of an order requiring corrective action, will potentially eliminate needless litigation and negotiations concerning the appropriateness of remedies se-

62. *Id.*
63. *Id.*
64. *Id.* § 300.65(e).
65. *Id.* § 300.65(a)(2).
66. *Id.* § 300.66.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* § 300.65.

lected and allocation of liability for the costs. The negotiation of the remedy and a detailed plan for implementation of the remedy is essential to an orderly removal and remediation process.

The Act provides for the allocation of liability among the responsible parties. Section 34 provides that "the court" shall allocate responsibility among the various parties in accordance with "equitable principles";[71] however, as a practical matter the Secretary must initially conduct such an allocation subject to judicial review. Again, use of the techniques provided for in CERCLA would be beneficial to administration and enforcement of the Act.

The Plan provides a special procedure to notify responsible parties.[72] Through use of a special notice procedure, the Environment Department could notify potentially responsible parties of the fact that it is interested in reaching a settlement concerning cleanup. In addition, the Environment Department could simply send an informal request letter that asks each responsible party to take a positive position with respect to its potential liability and initiate a settlement process. The special notice procedure could be used to allow for the initiation of the remedial investigation/feasibility study process or to shortcut that process by proposing a response action where appropriate. Such a procedure would give the parties an appropriate opportunity to begin the remedial investigation/feasibility study process or to take its own appropriate response action. If no response is made to the special notice letter, then the Environment Department could enter its corrective action order. Threat of such an order, and the imposition of punitive damages if corrective action is not taken "without sufficient cause," provide substantial incentives to negotiate a settlement.

Another enforcement tool provided under CERCLA that may be useful in enforcing the Act is the use of non-binding preliminary allocations of responsibility.[73] The allocation could be used by the Environment Department after the conduct of a remedial investigation/feasibility study to allocate responsibility among the parties and, thus, encourage the parties to settle. A non-binding preliminary allocation could be prepared as part of the remedial investigation/feasibility study process, and would be required to be based upon "equitable principles." Issuance of a non-binding preliminary allocation at an early date would have the effect of giving the parties a better idea of their potential liability, including the elimination of liability for parties whose liability is *de minimus*.

4. Use of Records of Decision and Remedial Action Plans

Based upon the remedial investigation and feasibility study and any comments received by interested parties in connection with those efforts, the Environment Department should develop a record of decision in support of the selection of a remedy for cleanup. An orderly process

71. N.M. STAT. ANN. § 74-9-34(D) (Repl. Pamp. 1990).
72. 40 C.F.R. §§ 300.61, 300.65 (1989).
73. 42 U.S.C. § 9622 (1986).

under which the remedial investigation and feasibility study and related documents are incorporated into the record, official comments received by interested parties are incorporated into the record, and a final decision of the Environment Department is made with respect to selection of a remedy should be accomplished. This record would then form the basis for administrative appeal. Because the Act requires a public hearing prior to the taking of an enforcement action, such administrative procedure might also include, as a final step, a hearing at which interested parties would be allowed to present evidence. After the record of decision is completed, the Secretary should propose a remedial action plan. Only after the steps discussed above are followed should the Director enter an order requiring corrective action. If such a procedure is not developed in the form of regulations or administrative policy, the Environment Department will undoubtedly enter orders requiring corrective action which may be found to be unreasonable, arbitrary or capricious by responsible parties, and litigation will ensue. The Act provides that punitive damages apply only if the party "fails without sufficient cause" to properly provide removal or remedial action upon order of the Environment Department.[74] Substantial litigation will undoubtedly ensue as to what constitutes "sufficient cause" to fail to comply with an order of the Secretary unless appropriate administrative procedures are developed.

VI. DEFENSES TO LIABILITY

The limited defenses to liability under the Act mirror, and in many cases copy, the defenses to liability under CERCLA.[75] Certain defenses available under CERCLA, however, such as the third party and secured party defenses, are not available under the Act, while certain defenses applicable to governmental entities are more expansive under the Act than under CERCLA. Where the provisions of the Act mirror those of CERCLA, federal court interpretations provide further insight. New Mexico courts have long held that when construing statutory provisions adopted from other jurisdictions, including federal law, the New Mexico courts will look to the original jurisdiction for construction of the law.[76]

The Act provides all responsible parties with two categories of defenses that the responsible party must prove by a preponderence of evidence. The first category of defenses is available when the responsible party can prove that the contamination was caused solely by certain external forces, *i.e.*, an act of God or act of war.[76] The second category of defenses pertains to certain types of facility owners, including the so-called "innocent purchaser," the governmental entity which obtains the

74. N.M. STAT. ANN. § 74-9-34(D) (Repl. Pamp. 1990).

75. *See* 42 U.S.C. § 9607(b) (1980).

76. Laughlin v. Laughlin, 49 N.M. 20, 155 P.2d 1010 (1944); Wellborn Paint Mfg. Co. v. New Mexico Employment Sec. Dept., 101 N.M. 534, 685 P.2d 384 (Ct. App. 1984); Featherstone v. Bureau of Revenue, 58 N.M. 557, 273 P.2d 752 (1954) (follow construction of similar provision in federal revenue act); Benavidez v. Benavidez, 99 N.M. 535, 660 P.2d 1017 (1983) (follow construction of identical federal rule of civil procedure).

77. N.M. STAT. ANN. § 74-9-34(C)(1) (Repl. Pamp. 1990).

facility involuntarily or by condemnation, and the inheritor of the facility.[78] The external forces defenses are also found in CERCLA.[79]

The Act does not, however, include the third, and most significant, CERCLA external forces defense: the third party defense.[80] Under CERCLA, a potentially responsible party is not liable for the damages caused solely by the act or omission of a third party who is not an employee, agent or a party to a contractual relationship with the potentially responsible party. The third party defense is intended to cover the "midnight dumpers" who release hazardous substances onto another's land without permission or knowledge of the landowner. To claim the defense, the landowner must show that they took precautions against "foreseeable acts" of third parties.[81]

In New Mexico, where solid waste is continuously disposed on vacant land without the landowner's permission or knowledge, the third party defense could have great application. Instead, by failing to include a third party defense, the Act may impose significant liability on the victims of midnight dumpers. When the definition of "solid waste facility" includes any "location . . . used for . . . disposal of solid waste,"[82] the hundreds, maybe thousands, of arroyos filled with trash certainly qualify as solid waste facilities. The owners of large tracts of vacant land, particularly those adjacent to, or within, urban areas, may face huge liabilities as contamination from these locations begins to migrate.

What remains in the Act then are the practically useless act of God and act of war defenses. While certain acts of God, such as a flash flood or tornado, may contribute to a release of contaminants, the burden is on the responsible party to prove that the release and the resulting damages were caused *solely* by the act of God. The responsible party would presumably need to demonstrate that it had taken all required and reasonable precautions.

The second category of defenses available under the Act are the "innocent landowner" defenses. These include any owner who:

> (a) at the time he acquired the property, did not know and had no reason to know that the property had been used for a solid waste facility;
> (b) is a governmental entity that acquired the property by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority; or
> (c) acquired the property by inheritance or devise.[83]

This language is taken almost verbatim from the "innocent landowner" defenses added to CERCLA by the Superfund Amendments and Reau-

78. N.M. STAT. ANN. § 74-9-34(C)(2) (Repl. Pamp. 1990).
79. 42 U.S.C. § 9607(b) (1980).
80. *Id.* § 9607(b)(3).
81. *Id.*
82. N.M. STAT. ANN. § 74-9-3(P) (Repl. Pamp. 1990).
83. *Id.* § 74-9-34(C)(2).

thorization Act of 1986.[84] In CERCLA, however, these defenses were included as part of the third party defense instead of being listed as separate defenses as they are in the Act.[85] A party claiming a CERCLA third party defense is also under a burden to prove by a preponderance of the evidence that it exercised due care once the contamination was revealed and also took precautions against the foreseeable acts of third parties.[86] A party would also lose the right to claim a CERCLA third party defense if it obtained knowledge of the contamination during its ownership and then failed to disclose the knowledge to a subsequent purchaser.[87] No such requirements are necessary for anyone asserting the innocent landowner defenses under the Act.

At first glance, the most significant landowner defense under the Act is available to the purchaser who had no reason to know the property had been used as a solid waste facility. The availability of this defense will hinge on the definition of when a land purchaser "had no reason to know" at the time they purchased the property. Under CERCLA, specific guidelines are provided for establishing the "no reason to know" qualification. The purchaser must have made, at the time of acquisition, "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability."[88] Whether the inquiry was sufficient will depend on the knowledge and experience of the purchaser, the obviousness of the contamination, commonly known information on the property and the relationship of the purchase price to market value.[89] Congress clearly intended that the level of inquiry would be more substantial for commercial, as opposed to residential, transactions.[90]

The requirement under CERCLA for "all appropriate inquiry," combined with the reluctance of the EPA to acknowledge innocence, has led some to assert that the innocent purchaser defense is nearly impossible to prove.[91] The EPA has used the requirements of the innocent purchaser defense primarily as a means of determining eligibility for *de minimus* settlements under section 122 of CERCLA.[92] The courts, however, have refused to reject the possibility of a CERCLA innocent purchaser defense in several situations involving older purchases and individual defendants.[93]

Because the Act lacks a statutory definition of "had no reason to know," a New Mexico court will have greater leeway in applying the

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84. *See* Pub. L. No. 99-499, 100 Stat. 1613, 1616 (1986).
85. 42 U.S.C. §§ 9607(b)(3), 9601(35) (1986).
86. *Id.* § 9607(b)(3)(a), (b)(3)(b).
87. *Id.* § 9601(35)(C).
88. *Id.* § 9601(35)(B).
89. *Id.*
90. H.R. CONF. REP. No. 962, 99th Cong., 2d Sess. 187, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3276, 3280 [hereinafter H.R. CONF. REP. No. 99-962].
91. *See, e.g.*, Mays, *The Blessed State of Innocence - The Innocent Landowner Defense Under Superfund*, 18 CHEM. WASTE LIT. REP. 864 (Oct. 1989).
92. 54 Fed. Reg. 34,235 (1989); 42 U.S.C. § 9622(g) (1986).
93. United States v. Pacific Hide & Fur, Inc. Depot, 30 Env't Rep. Cas. (BNA) 1082 (D. Idaho 1989); United States v. Serafini, 706 F. Supp. 346 (M.D. Pa. 1989).

innocent purchaser defense. New Mexico courts would also have the option of applying the "all appropriate inquiry" standard found in CERCLA. The failure of the New Mexico legislature to include the standard in the Act cannot be viewed as an attempt to either broaden or limit the defense.

With environmental assessments becoming more common in commercial real estate transactions, the Environment Department will have a strong argument that a significant amount of inquiry should be required before the innocent purchaser defense can be successfully asserted in a recent purchase of real property. If, however, the contaminated property was purchased twenty, ten or even five years ago, when little attention was paid to examining the environmental liabilities of real property, the purchaser may stand a better chance of proving that no special inquiry was required at the time of purchase. New Mexico courts may agree with Congress that the duty to investigate increases with the growing public awareness of environmental contamination.[94] Still, the presence of a landfill is generally obvious, and the purchaser may be hard pressed to deny knowledge. The difficult situations include expanding urban areas where old landfills were covered and the property was filled and levelled so as to preclude easy identification of the landfill.

The other two landowner defenses may allow escapes for parties that are not very "innocent." Unlike the "innocent purchaser" who cannot know of the presence of a landfill on the property, the governmental authority that condemns the property or the party that inherits the property can be fully aware of the landfill without jeopardizing their liability defense. The Act, unlike CERCLA, does not require these owners to prove that they exercised due care with respect to the solid waste on their property in order to assert the defense. If a closed, privately owned and operated landfill is sold to a purchaser who should have known about the landfill, then liability will pass to the purchaser; but if that landfill is inherited by the next generation who knows of its existence (but were not operators), then liability will not pass.

The position of the state or local governmental authority is somewhat ambiguous. A county, for instance, that condemns land on which a closed landfill is located will not become liable as an "owner" but will probably remain liable as a "generator."[95] Being liable only as a generator even though it owns the facility, however, allows the county to avoid the treble punitive damages that the state can assess against "responsible parties" which fail to provide remedial action when so ordered by the Environment Department.[96] "Responsible party" is defined in the liability section of the Act to mean any liable party *except* generators.[97] The

94. "The duty to inquire under this provision shall be judged as of the time of acquisition. Defendants shall be held to a higher standard as public awareness of the hazards associated with hazardous substances releases has grown . . . ." H.R. CONF. REP. No. 99-962, *supra* note 90, at 3280.

95. N.M. STAT. ANN. § 74-9-34(A)(1) (Repl. Pamp. 1990).

96. *See id.* § 74-9-34(D).

97. *Id.* § 74-9-34(A)(2).

result is that the state or the local government can condemn solid waste facilities for little cost, based on the potential liability reducing the market value of the property, and not increase their overall liability under the Act.

Further protection from liability is provided to the governmental authorities for emergency responses. The authorities will not be liable for any costs or damages that result from any "actions taken in response to an emergency created by the release or threatened release by or from a solid waste facility owned by another person."[98] While this sentence is taken almost verbatim from CERCLA, CERCLA limits this protection and does not preclude liability for harms resulting from the gross negligence or intentional misconduct of the governmental entities.[99] No such limit is found in the Act.

Another important difference between liability defenses offered by the Act and by CERCLA is the absence of a secured party exemption under the Act. In the definition of "owner or operator," CERCLA provides that the term "does not include a person, who, without participating in the management of vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility."[100] While recent federal court decisions have construed this exemption narrowly,[101] some protection from liability is offered to secured parties under CERCLA. A party which holds title to contaminated property purely to protect its security interest without any involvement in the management of the property is subject to liability under the Act as an "owner,"[102] but is potentially exempt from liability under CERCLA.[103]

VII. STANDARDS FOR APPORTIONMENT OF LIABILITY AMONG RESPONSIBLE PARTIES

Section 34 imposes liability for response costs on a large field of potentially responsible parties. The question then becomes how will the liability be allocated among the responsible parties. A responsible party under the Act can become liable for response costs under two different scenarios. First, the state or local authority can incur costs responding to a release from a solid waste facility and then sue some or all of the responsible parties for reimbursement of the response costs. Second, the Environment Department can direct a responsible party to respond to a release directly. In the first scenario, the issues include whether the liability of the responsible parties is joint and several and whether the sued responsible parties have a right of contribution against the unnamed responsible parties. In the second scenario, the issues include whether

98. *Id.* § 74-9-34(F).
99. 42 U.S.C. § 9607(d)(2) (1986).
100. *Id.* § 9601(20)(A).
101. *See, e.g.*, United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990).
102. *See* N.M. STAT. ANN. § 74-9-34(B)(1) (Repl. Pamp. 1990).
103. *See In re* Bergsoe Metal Corp., 910 F.2d 668 (9th Cir. 1990).

the Act grants to the responsible parties who incur response costs a right of action against the other responsible parties.

The Act is silent as to the imposition of joint and several liability and the right of responsible parties to seek contribution. The Act does not explicitly provide a private right of action. Instead, the Act only directs a court to apportion costs and damages among the liable defendants in "accordance with equitable principles."[104] A number of issues will remain for the courts to address.

A. Joint and Several Liability

Congress originally was silent in CERCLA on the issues of joint and several liability and a right of contribution. The goal of Congress was to allow the courts to apply federal common law on a case-by-case basis.[105] The federal courts generally found joint and several liability and a right to contribution. Congress later expressed its agreement with the application of joint and several liability[106] and added a specific right of contribution to CERCLA.[107]

The federal courts found joint and several liability under CERCLA by applying a traditional test of whether the multiple defendants caused a single, indivisible harm. If multiple defendants did cause a single, indivisible harm, then each potentially responsible party is subject to liability for the entire harm.[108] The harm generally flowed from the commingling of different wastes that were generated, transported and handled by a number of parties and therefore the harm was indivisible. The burden is on the individual defendant to provide a rational basis for apportioning the harm.[109]

A similar argument can be made for finding joint and several liability under the Act. The list of responsible parties under the Act covers the same categories as CERCLA and even adds a few (*e.g.*, permit holders). In a cost recovery situation, each responsible party would have made contributions to a solid waste facility as a generator or transporter of the waste or as an owner, operator or permit holder for the facility. From the facility would have flowed a single, indivisible harm, *i.e.*, the release of contaminants into the environment.

But does the Act, which requires apportionment of damages by the court, allow for joint and several liability? Reading the provision literally, the apportionment applies only to costs and damages and not to liability. If the liability is found to be joint and several, then the court will play

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104. N.M. STAT. ANN. § 74-9-34(E) (Repl. Pamp. 1990). Senate Bill 2 originally provided that any costs or damages recovered under the strict liability provisions would be allocated based upon the "proportional share of the total amount of solid waste treated, transported, or disposed of in the solid waste facility." The final version of section 34 provides that liability is to be apportioned by the court based upon "equitable principles."

105. H.R. REP. No. 253, 99th Cong., 2d Sess., pt.1 at 74 (1985), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2856 [hereinafter H.R. REP. No. 99-253].

106. H.R. REP. No. 99-253, *supra* note 105, at 74.

107. 42 U.S.C. § 9613(f) (1986).

108. *E.g.*, United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983).

109. *E.g.*, United States v. Bliss, 667 F. Supp. 1298, 1313 (E.D. Mo. 1987).

its statutory role by apportioning the full amount of costs and damages among the joint tortfeasors. The issue then is whether a New Mexico court will find joint and several liability in this situation.

Joint and several liability in New Mexico was dealt a severe blow when the courts adopted the theory of comparative negligence.[110] The court of appeals explicitly rejected the theory that a single, indivisible harm must result in joint and several liability.[111] Because the theory of several liability is premised on comparative fault, however, joint and several liability appears to continue for strictly liable defendants except where the negligence of other parties (*e.g.*, plaintiffs) contributed to the harm.[112]

The New Mexico legislature acted in 1987 to both preserve the newly implemented theory of several liability and retain some area for the theory of joint and several liability.[113] The statute carves out several situations where joint and several liability can be applied.[114] Two situations provide support for a New Mexico court to adopt joint and several liability under the Act. First, joint and several liability is applied by law to persons strictly liable for defective products.[115] Second, the court can apply joint and several liability to other situations not listed in the statute where joint and several liability would have "a sound basis in public policy."[116]

A reasonable argument can be made that New Mexico courts should impose joint and several liability under the Act because the responsible parties are strictly liable and the imposition would serve the public policy goals of the Act. The responsible parties are liable under the Act not because they were negligent in their actions relating to the disposal of solid waste, but merely because their actions were connected to a solid waste disposal system which later caused contamination. The Act seeks to hold responsible a large number of parties associated with the contaminated facility.

If joint and several liability is imposed, the state only needs to identify a few responsible parties in a cost recovery or enforcement proceeding; the named responsible parties, who face having to pay for the entire cleanup, will be motivated to identify and join the unnamed responsible parties in order to spread the costs. If several liability is imposed, the state would be forced to litigate the apportionment of liability for each liable party and would need to track down all liable parties in order to

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110. Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981) (adopting comparative negligence); Bartlett v. New Mexico Welding Supply, Inc., 98 N.M. 152, 646 P.2d 579 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982) (rejecting joint and several liability when comparative negligence is used).

111. *Bartlett*, 98 N.M. at 158, 646 P.2d at 585.

112. *See* Jaramillo v. Fisher Controls Co., Inc., 102 N.M. 614, 698 P.2d 887 (Ct. App. 1985); Marchese v. Warner Communications, Inc., 100 N.M. 313, 670 P.2d 735 (1983) (apportioning fault between negligent parties and strictly liable defendant).

113. 1987 N.M. Laws ch. 141 (codified at N.M. STAT. ANN. §§ 41-3A-1, -2, 41-3-2, 52-1-10.1). *See generally* Schultz & Occhialino, *Statutory Adoption of Several Liability in New Mexico: A Commentary and Quasi-Legislative History*, 18 N.M.L. REV. 483 (1988).

114. N.M. STAT. ANN. § 41-3A-1(C) (Repl. Pamp. 1989).

115. *Id.* § 41-3A-1(C)(3).

116. *Id.* § 41-3A-1(C)(4).

receive full reimbursement for response costs.[117] Joint and several liability would, therefore, promote the expeditious and cost effective cleanup of contamination by reducing the cost and burden on the state and shifting the incentive to the responsible parties.

B. Contribution and Apportionment

The right of contribution among joint tortfeasors exists when two or more persons are liable to the same party for the same harm and one joint tortfeasor has paid more than its equitable share of the common liability.[118] Under CERCLA, the combination of joint and several liability and the right of contribution allows the federal government to pursue a few responsible parties, who then have a strong incentive to discover and seek contribution from the remaining responsible parties. Despite a traditional common law rule against contribution, most American jurisdictions, including New Mexico, have recognized a right of contribution by statute or judicial decision.[119]

The argument for a right of contribution under CERCLA[120] followed two United States Supreme Court decisions that established the possibility of contribution among parties jointly liable under a federal law if either the statute expressly or clearly implies a right of action for contribution, or if the courts establish a right of contribution through federal common law based on the power to fashion appropriate remedies.[121] The courts found authority for a CERCLA right of contribution in either the language of the statute[122] or federal common law.[123] The federal common law argument is justified by the "unique federal interests" which are furthered by a CERCLA right of contribution, which include the encouragement of expeditious settlements and the preservation of Superfund monies.[124]

While the Act does not explicitly create a right of contribution, New Mexico is one of the many states that have adopted by statute a right of contribution among joint tortfeasors.[125] The adoption of several liability and comparative fault in New Mexico threw the usefulness of contribution

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117. In fact, full reimbursement would often be impossible due to the death, dissolution or financial inability of parties associated with old facilities where much of the contamination will be released.

118. *See* RESTATEMENT (SECOND) TORTS § 886A (1979); PROSSER AND KEETON ON THE LAW OF TORTS 336-41 (W. Keeton 5th ed. 1984).

119. PROSSER AND KEETON, *supra* note 118, at 338.

120. The original CERCLA passed in 1980 without any reference to contribution. In the 1986 SARA amendments, a right of contribution was specifically authorized. *See* 42 U.S.C. § 9613(f) (1986).

121. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 638 (1981); Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 90-91 (1981).

122. *E.g.*, United States v. Conservation Chem. Co., 619 F. Supp. 162 (W.D. Mo. 1985).

123. *E.g.*, State v. ASARCO, Inc., 608 F. Supp. 1484 (D. Colo. 1985).

124. United States v. New Castle County, 642 F. Supp. 1258, 1268-69 (D. Del. 1986).

125. N.M. STAT. ANN. §§ 41-3-1 to -8 (Repl. Pamp. 1989) (Uniform Contribution Among Tortfeasors Act).

into question.[126] The statute which reaffirmed the limited application of joint and several liability, however, also reaffirmed the concomitant right of contribution and amended the statutory contribution apportionment provision to coincide with the principles of comparative fault.[127]

If a New Mexico court applies joint and several liability to the Act, the statutory right of contribution should follow. As previously discussed, section 34 provides that "[n]othing in this section bars or replaces any cause of action available to any person that existed before its enactment. The causes of action of this section are supplemental to existing causes of action."[128] Therefore, the jointly and severally liable responsible parties should have the right to seek contribution under the existing statute.

Does the contribution statute conflict with the Act's requirement that a court apportion costs or damages "in accordance with equitable principles"?[129] No such conflict should be inferred. Contribution is generally viewed as an equitable concept,[130] and New Mexico courts have viewed the contribution statute as seeking equitable results.[131] Under the contribution statute, a joint tortfeasor has a right of contribution against other liable parties if they have discharged the common liability or paid more than their pro rata share of the liability.[132] Presumably, a responsible party who has conducted a cleanup under an Environment Department enforcement order will have discharged the common liability. "Pro rata share" has been changed from a per capita standard[133] to a "percentage of fault" standard.[134]

In a strict liability situation such as under the Act, a percentage of fault standard will be difficult to apply. The New Mexico courts will apportion liability on a case-by-case basis applying relevant equitable principles. Congress, when it codified the right of contribution, assumed that courts would consider any relevant criteria, including:

> the amount of hazardous substances involved; the degree of toxicity or hazard of the materials involved; the degree of involvement by parties in the generation, transportation, treatment, storage or disposal of the substances; the degree of care exercised by the parties with respect to the substances involved; and the degree of cooperation of the parties with government officials to prevent any harm to public health or the environment.[135]

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126. *See* Wilson v. Galt, 100 N.M. 227, 668 P.2d 1104 (Ct. App.), *cert. denied*, 100 N.M. 192, 668 P.2d 308 (1983).

127. *See* N.M. STAT. ANN. § 41-3-2(D) (Repl. Pamp. 1989); Schultz & Occhialino, *supra* note 113, at 499-502.

128. N.M. STAT. ANN. § 74-9-34(H) (Repl. Pamp. 1989).

129. *Id.* § 74-9-34(E).

130. *See* RESTATEMENT (SECOND) OF TORTS § 886A comment c (1979).

131. *See* Aalco Mfg. Co. v. City of Espanola, 95 N.M. 66, 618 P.2d 1230 (1980); Dessauer v. Memorial Gen. Hosp., 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981).

132. N.M. STAT. ANN. § 41-3-2(B) (Repl. Pamp. 1989).

133. *See* Commercial Union Assurance Co. v. Western Farm Bureau Ins. Co., 93 N.M. 507, 601 P.2d 1203 (1979).

134. N.M. STAT. ANN. § 41-3-2(D) (Repl. Pamp. 1989).

135. H.R. REP. NO. 253, 99th Cong., 2d Sess., pt. 3 at 19, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3042.

Other issues that may be considered when apportioning liability among successive owners of a facility include the conditions of the sale, the price paid and any discounts given for the condition of the property.[136] Similar criteria can be considered by a New Mexico court apportioning liability in a contribution action.

C. *Private Right of Action*

Another method of encouraging contamination cleanups is to allow private parties that clean up sites without governmental enforcement to later sue responsible parties for recovery of the cleanup costs. CERCLA specifically creates a private right of action for the recovery of response costs. The responsible parties named by CERCLA are liable for the response costs incurred by the government, for natural resource damages and for "any other necessary costs of response incurred by any other person consistent with the national contingency plan."[137] The courts have held that this provision creates a private right of action.[138]

Private parties can respond to the contamination and seek reimbursement of their costs even without prior involvement or approval of the government.[139] While this right of action clearly applies to "innocent" parties (*i.e.*, non-responsible parties), most courts have also allowed responsible parties to use this action to recover costs they incurred voluntarily.[140] Congress intended CERCLA to induce responsible parties to voluntarily pursue cleanup actions.[141]

No such incentive for voluntary cleanups exists under the Act. The Act imposes liability on the responsible parties for costs incurred only by "this state or any of its counties or municipalities."[142] Without a right to pursue other responsible parties for response costs that are voluntarily incurred, a responsible party has little incentive to expend funds in a cleanup prior to any response or enforcement activity by the state or local authority. A private right of action would also encourage landowners who have defenses to government enforcement to pursue cleanups.

D. *Indemnification*

The Act allows indemnification agreements, but it does not allow a responsible party to use the agreement to transfer liability under the

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136. Amoco Oil Co. v. Borden, Inc., 889 F.2d 664 (5th Cir. 1989).

137. 42 U.S.C. § 9607(a)(4)(B) (1986).

138. *E.g.*, Walls v. Waste Resource Corp., 761 F.2d 311 (6th Cir. 1985); Tanglewood East Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988).

139. *E.g.*, Wickland Oil Terminals v. ASARCO, Inc., 792 F.2d 887 (9th Cir. 1986).

140. *E.g.*, Pinole Point Properties v. Bethlehem Steel Corp., 596 F. Supp. 283 (N.D. Cal. 1984). *But see* Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049 (D. Ariz. 1984) (doctrine of unclean hands precludes potentially responsible party from using right of action).

141. H.R. REP. No. 1016, 96th Cong., 2d Sess. 17, *reprinted in* 1980 U.S. CODE. CONG. & ADMIN. NEWS 6119-20.

142. N.M. STAT. ANN. § 74-9-34(A)(3) (Repl. Pamp. 1990).

Act.[143] This provision in the Act is almost identical to language in CERCLA.[144] The courts have found that the indemnification provision prevents a responsible party from denying statutory liability for response costs, but it does not prevent the responsible party from seeking indemnification from another private party.[145] However, a court may require that the contractual language expressly refer to the statute or to future environmental liabilities before recognizing a contractual allocation of liability.[146]

VIII. CONCLUSION

In the midst of a statute that establishes a framework for the future management of solid waste in New Mexico, section 34 of the Act creates a far reaching liability scheme for those who were associated with the past failures to adequately manage solid waste disposal in New Mexico. As the Act seeks to narrow the solid waste disposal facilities to a small number of heavily regulated sites run by a closely watched permit holder, section 34 casts a wide net over the hundreds, perhaps thousands of locations where solid waste was disposed in the past.

Section 34 will become an important, additional weapon in the state's fight against the causes of ground and water pollution. The broad definition of "solid waste facility" may allow the application of section 34 to thousands of potential sources of contamination. Once section 34 is available, the state has recourse against a wide variety of parties associated with the facility, both in the past and the present, without any need to show fault or negligence. Even though it is impossible to predict how vigorously the state will attempt to enforce the Act, a few issues concerning enforcement and other impacts of section 34 are worth noting.

While potential liability under the Act is enormous, the actual enforcement of cleanups may prove less effective unless the Act is modified or regulations are promulgated. CERCLA, from which much of the language of section 34 is adopted, provides three options for achieving cleanups with little ultimate cost to the government. First, the government can use Superfund monies to conduct the cleanup and then pursue responsible parties for reimbursement. Second, the government can order responsible parties to conduct the cleanups. Finally, CERCLA allows a potentially resonsible party or other private party to conduct the cleanup without government intervention and then obtain reimbursement from other responsible parties.

At this point, only one of these options is effectively available under the Act. While the Act names the parties liable for reimbursement of governmental cleanup costs, no fund is created to allow the state to

143. *Id.* § 74-9-34(G).

144. *Compare id. with* 42 U.S.C. § 9607(e)(1) (1986).

145. *See, e.g.*, Channel Master Satellite Sys., Inc. v. JFD Elec. Corp., 702 F. Supp. 1229 (E.D.N.C. 1988); United States v. Moore, 703 F. Supp. 455 (E.D. Va. 1988).

146. Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994 (D.N.J. 1988).

conduct the cleanups. If the courts fail to find the responsible parties jointly and severally liable, a possibility which we have suggested in this article may occur, the government will be forced to track down and sue all of the responsible parties associated with a facility in order to be fully reimbursed.

Section 34 also fails to provide a private right of action which would create an incentive for a responsible party to conduct a cleanup and seek reimbursement from other responsible parties before any governmental involvement. Lacking that carrot, the state is left with the heavy stick of ordering responsible parties to conduct the cleanup or face treble damages in addition to the reimbursement of actual cleanup costs.

If the state relies on ordering responsible parties to provide removal or remedial actions, the state will be under pressure to develop uniform procedures and regulations covering the remedial actions. Without adequate uniform guidelines and with high cleanup costs, some responsible parties may decide to challenge the enforcement actions of the state.

As news of this broad liability scheme spreads and the state begins to initiate a few enforcement actions, section 34 may begin to have impacts far beyond the cleanup of contaminated landfills. Like CERCLA, from which the Act borrows many of its liability concepts, the Act may have a significant impact on real estate and financing transactions in New Mexico. Parties that are purchasing, foreclosing or lending on real estate will need to increase their due diligence. Lenders, who receive no protection under the Act, will be under great pressure to avoid liability traps that may be associated with property once used for solid waste disposal. Environmental assessments may become more common, and pressure will be placed on the state and local governments to maintain information on the location and extent of closed solid waste facilities.

The pressures on the market may, in the end, help achieve some of the goals of the Act. Property which contains old landfills or simply accumulations of trash will decrease in value or become more difficult to transfer or use as collateral. Some property may be abandoned as owners default on loans or go into bankruptcy, bankruptcy trustees abandon the property, and lenders refuse to foreclose on the property. For some larger landfill sites, the cost of removing and redepositing the trash into an approved landfill will far exceed the value of the property. On the other hand, smaller trash accumulations may be removed to legal facilities or properly closed as lenders and purchasers require such actions to complete transactions. Information about facilities across the state will increase as they are discovered and investigated during transactions. Lenders and purchasers who discover illegal open facilities may require their registration or closure.

In the end, who will pay for the contamination that results from our past mismanagement of solid waste disposal? Most of the parties associated with old landfills, including property owners, dump operators, and trash haulers, have "shallow pockets" and will be unable to absorb all of the costs associated with cleanups. For many of the older landfills, many responsible parties will be difficult to track down, and the parties that

presently own the property may decide to abandon it or seek protection under the Bankruptcy Code. As the government and other responsible parties search for deep pockets, attention may turn to banks and other lenders who foreclosed on or simply hold security interests in the property where the contaminated facility is located. Without the statutory exemption provided by CERCLA for secured parties, lenders may be vulnerable to enforcement and contribution claims for section 34 liability. If a trend toward lender liability develops, the lenders may in turn put pressure on the state legislature to amend the Act.

When the courts are called upon to apportion costs among the solvent responsible parties, one category of responsible parties will be found at most every site: the county or municipality. Local governments will generally be liable for costs not only as a generator, but also as an owner or operator of the facility. These governmental entities, which face a heavy burden to implement the strict landfill procedures contemplated by the Act, may be forced to absorb much of the costs of paying for past mistakes.