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## Oil and Gas Issues Involved in CERCLA Reauthorization.

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## OIL AND GAS ISSUES INVOLVED IN CERCLA REAUTHORIZATION

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The opinions expressed herein are solely the authors' and do not necessarily represent those of the agencies, institutions, or employers with which they are affiliated.

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## I. INTRODUCTION

After several decades of environmental legislation, the regulated community faces an extremely complex and costly matrix of obligations and responsibilities.<sup>1</sup> For industry in general, the most expensive environmental statute enacted to date has been the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),<sup>2</sup> which created the Hazardous Substances Superfund (Superfund).<sup>3</sup> CERCLA, which establishes retroactive liability for remediation of hazardous substance con-

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1. See Norman W. Bernstein, *Superfund Needs Drastic Simplification*, 25 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,008, 10,008 (Jan. 1995) (suggesting simplified, more streamlined approach to CERCLA liability in response to legislative reauthorization bills spanning 300-500 pages); E. Donald Elliot et al., *A Practical Guide to Writing Environmental Disclosures*, 25 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,237, 10,237 (May 1995) (stating that taxpayers currently spend \$185 billion per year, or 2.5 percent of gross national product (GNP), on environmental regulations).

2. 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

3. 26 U.S.C. § 9507 (1988). "Superfund" is also the common name for the cleanup program established under CERCLA. See *United States v. Wade*, 577 F. Supp. 1326, 1330 (E.D. Pa. 1983) (referring to CERCLA as "Superfund Act" because CERCLA initially established \$1.6 billion "hazardous substance response trust fund").

tamination, has been described as “a black hole that indiscriminately devours all who come near it.”<sup>4</sup> President Clinton has admitted that CERCLA does not work, and has even labelled the Superfund a “disaster.”<sup>5</sup> Moreover, while there are no solid estimates, studies have indicated that industry expenditures for environmental regulations such as CERCLA significantly reduce economic growth.<sup>6</sup> Even though private and public entities have already spent \$20 billion on the CERCLA program since its inception, only around ten to twenty percent of the sites designated for cleanup under that program have been remediated.<sup>7</sup> Not surprisingly, with the cleanup cost of a CERCLA site averaging between \$20 and \$30 million, and with the time period for remediation averaging ten to thirty years, a CERCLA project can quickly become a quagmire for the entities involved.<sup>8</sup>

Because of the often disastrous effects of falling under the web of CERCLA regulation, most industry interests closely monitor any legislative action that might open the door for CERCLA liability. One such business that has been impacted by CERCLA is the oil and gas industry. During the past two years of reauthorization

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4. Jerry L. Anderson, *The Hazardous Waste Land*, 13 VA. ENVTL. L.J. 1, 6-7 (1993).

5. Bernard J. Reilly, *Stop Superfund Waste*, ISSUES IN SCI. AND TECH., Spring 1993, at 57.

6. See *What to Do About Superfund*, CHIEF EXECUTIVE, July 1993, at 50 (reporting that economists estimate economy has grown 0.2% slower per year than it otherwise would have for last 10 years due to cost of complying with environmental regulations, and noting that in 1993, GNP was 2.6% lower than it would otherwise have been due to these costs), available in LEXIS, News Library, ASAPII File.

7. See John Shanahan, *Superfund Status Quo: Why the Reauthorization Bills Won't Fix Superfund's Fatal Flaws*, HERITAGE FOUND. REP., Oct. 3, 1994 (stating that “only 237 of the 1,292 ‘worst’ hazardous waste sites . . . have been cleaned up”), available in LEXIS, Exec Library, HFRPTS File. The Congressional Budget Office estimates that CERCLA expenditures must double by the year 2003 to remediate existing and newly added high-priority CERCLA sites. Dennis Wamsted, *CBO Study Sees Costly Future for Superfund*, ENV'T WK., Feb. 3, 1994, at 1, 12. Some discrepancy exists in the exact number of sites requiring remediation because some sites considered “remediated” are actually undergoing long-term remediation, and additional sites are continually being added for cleanup. See *id.* (estimating total of 2,300 to 10,100 future CERCLA sites, with remediation costs ranging from \$42 to \$120 billion for both government and private parties).

8. See Sally S. Pipes, *Superfund Drains Economy*, POL. REV., Spring 1994, at 90 (reporting that cleanup of average CERCLA site costs \$30 million and takes 10 years), available in LEXIS, Exec Library, POLICY File; *'Average' Cost Per Site in Rule*, SUPERFUND WK., June 3, 1994 (estimating that average CERCLA site costs around \$22 million to remediate, including 30 years of operation and maintenance), available in LEXIS, News Library, CURNWS File.

debate, Congress proposed many amendments to CERCLA, including the elimination of retroactive liability. Some of these proposals will have a profound effect on the oil and gas industry. Congressional *inaction* also affects oil and gas interests, because many of the basic premises of CERCLA need clarification, including the exclusion of certain oil and gas wastes from CERCLA regulation.

This Article will discuss how CERCLA reauthorization may affect oil and gas interests, and will suggest improvements in CERCLA's regulatory scheme aimed at protecting the oil and gas industry from expansive liability. Part II of this Article summarizes CERCLA's legislative and regulatory scheme. Part III analyzes Congress's proposal to eliminate retroactive liability. Part IV suggests legislative clarification of specific liability issues that directly affect the oil and gas industry. Finally, Part V concludes that Congress should work toward finding an acceptable alternative to the current CERCLA liability scheme that will protect both the environment and the viability of the oil and gas industry.

## II. LEGISLATIVE AND REGULATORY BACKGROUND

CERCLA was enacted in 1980 to supplement the Resource Conservation and Recovery Act of 1976 (RCRA).<sup>9</sup> CERCLA establishes cleanup liability for a defined group of potentially responsible parties (PRPs), which includes past and current facility owners or operators, and those who transport or arrange for the disposal of hazardous substances.<sup>10</sup> Under CERCLA, either PRPs or the government may sue other PRPs to recover cleanup costs expended in the remediation of hazardous substance contamination.<sup>11</sup> A PRP can be held liable only if: (1) there is a "release" or "threatened release" of a "hazardous substance"; (2) the government or plaintiff PRP incurred cleanup costs in response to the re-

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9. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992k (1988 & Supp. V 1993). RCRA established a comprehensive statute to regulate the disposal of solid wastes. *Id.* CERCLA, however, regulates a larger set of substances, referred to as hazardous substances. 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

10. 42 U.S.C. § 9607(a) (1988).

11. *See id.* § 9607(a)(4)(A),(B) (providing for federal or private party cost-recovery actions against PRPs).

lease; and (3) the cleanup was consistent with government regulations.<sup>12</sup>

As a result of CERCLA's broad definitions of "release" and "hazardous substance," PRPs face extensive liability for cleanup costs. CERCLA broadly defines a "release" to include virtually any conceivable contact with the environment, including "spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment."<sup>13</sup> The abandonment of corroded barrels or other receptacles containing hazardous substances also constitutes a release, even if the receptacles have not yet leaked.<sup>14</sup> Additionally, CERCLA broadly defines "hazardous substance" by cross reference to materials regulated by existing environmental statutes, and applies to materials that are: (1) specifically listed under Section 102 of CERCLA; (2) "toxic pollutants" or "hazardous substances" under the Clean Water Act; (3) "hazardous wastes" under RCRA; (4) "hazardous air pollutants" under the Clean Air Act; and (5) "imminently hazardous" chemical substances under the Toxic Substances Control Act.<sup>15</sup>

CERCLA establishes strict liability, as well as joint and several liability, when courts cannot apportion damages among PRPs.<sup>16</sup> PRPs are financially liable for remediation, testing, and other costs, and can include the following parties: (1) current owners and operators of a facility;<sup>17</sup> (2) past owners and operators who were pres-

12. *See id.* (providing that PRPs may be liable to government or other PRPs for their share of cleanup costs, and pointing out prerequisites to liability); *see also* *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1152-53 (9th Cir. 1989) (discussing prima facie elements needed to assert cost-recovery claim under CERCLA).

13. 42 U.S.C. § 9601(22) (1988).

14. *Id.*

15. *Id.* Specifically excluded from the definition are "natural gas, natural gas liquids, liquified natural gas," fuel-quality synthetic gas, and any petroleum derivative not otherwise listed in subsection 14. *Id.*

16. *See, e.g.,* *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1418 (8th Cir. 1990) (acknowledging that CERCLA is strict liability statute and defining statutory defenses to CERCLA claims), *cert. denied*, 499 U.S. 937 (1991); *United States v. Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988) (analyzing § 9607(a) of CERCLA and determining that it establishes strict liability scheme), *cert. denied*, 490 U.S. 1106 (1989); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (rejecting argument that § 9607(a) requires element of causation); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 204 (W.D. Mo. 1985) (noting that "strict liability is the standard to apply in implementing the liability section of CERCLA").

17. 42 U.S.C. § 9607(a)(1) (1988).

ent at the time of disposal or release of hazardous substances;<sup>18</sup> (3) parties who arrange for the treatment or disposal of hazardous substances;<sup>19</sup> and (4) parties who transport hazardous substances to treatment, storage, or disposal facilities.<sup>20</sup>

With regard to the current owners and operators of a facility, liability under CERCLA may arise, subject to statutory defenses, solely from owning previously contaminated property, even if the parties acquired the property without knowledge or without reason to know of the contamination.<sup>21</sup> In addition, parties participating in or influencing the facility's management may be considered op-

18. *Id.* § 9607(a)(2).

19. *Id.* § 9607(a)(3); *see* Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1572–73 (5th Cir. 1988) (holding that party who graded site that contained creosote pools had arranged for disposal of hazardous substance and was liable as PRP).

20. 42 U.S.C. § 9607(a)(4) (1988); Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1309 (N.D. Ohio 1983). The transporter must have some input into the choice of the disposal site to establish liability. *See* United States v. Consolidated Rail Corp., 729 F. Supp. 1461, 1469 (D. Del. 1990) (explaining that “[i]t is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme”).

21. *See* 42 U.S.C. § 9601(35)(B) (1988) (establishing that purchasers must prove they undertook “all appropriate inquiry into previous ownership and uses of property” to escape liability); FRANK F. SKILLERN, ENVIRONMENTAL PROTECTION DESKBOOK 477 (2d ed. 1995) (discussing heavy burden purchasers must establish to prove lack of knowledge of contamination). In some instances, a foreclosing party may, by acquiring title, also acquire the responsibility for remediation costs. *Compare* United States v. Fleet Factors Corp., 901 F.2d 1550, 1557–58 (11th Cir. 1990) (contending that secured creditor could incur CERCLA liability “if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose”), *cert. denied*, 498 U.S. 1046 (1991) *and* United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 579 (D. Md. 1986) (holding that lender who forecloses on contaminated property and holds title to property during remediation can be liable for cleanup costs under CERCLA) *with* Northeast Doran, Inc. v. Key Bank of Maine, 15 F.3d 1, 3 (1st Cir. 1994) (holding that bank was not liable to subsequent purchaser under CERCLA, even though bank's environmental audit revealed presence of contamination) *and* United States v. McLamb, 5 F.3d 69, 73 (4th Cir. 1993) (holding that bank was exempt from CERCLA liability to subsequent purchasers, even though bank knew of presence of contamination, because bank made diligent attempt to sell property as quickly as possible after acquisition without trying to make profit). The Environmental Protection Agency (EPA) has adopted modifications aimed at protecting lenders and parties that hold security interests. *See* Lender Liability Under CERCLA, 57 Fed. Reg. 18,344–85 (1992) (clarifying activities secured creditors could undertake without incurring CERCLA liability to federal government); *see also* 42 U.S.C. § 9601(20)(A) (1988) (excluding from definition of “owner” or “operator” any “person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility”). The EPA's proposed rule, however, was struck down as beyond the EPA's statutory rulemaking authority. Kelly v. EPA, 15 F.3d 1100, 1107–08 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 900 (1995).

erators and may, therefore, be liable.<sup>22</sup> Furthermore, absentee owners who lease their property may be liable for the lessee's actions in disposing of hazardous substances.<sup>23</sup>

Defenses to CERCLA liability are limited. The defense most often asserted is the innocent purchaser defense, which provides that purchasers are not liable for hazardous substances placed on their property before they acquired title.<sup>24</sup> To assert this defense, purchasers must prove that prior to acquiring the site, they did not know or have reason to know that any hazardous substance was disposed of or released on the property.<sup>25</sup> To meet this burden, purchasers must undertake "all appropriate inquiry" into the previous ownership and use of the property.<sup>26</sup>

### III. ELIMINATION OF RETROACTIVE LIABILITY FROM CERCLA

CERCLA is scheduled for reauthorization by the 104th Congress in 1995.<sup>27</sup> In the second session of the 103rd Congress, legis-

22. See *Guidice v. BFG Electroplating & Mfg. Co.*, 732 F. Supp. 556, 561 (W.D. Pa. 1989) (stating that secured creditors are generally exempt from CERCLA liability provided that they do not "participate in the day-to-day management of the business or facility either before or after the business ceases operation"); *Maryland Bank & Trust Co.*, 632 F. Supp. at 581 (considering whether government had provided enough evidence of bank's participation in facility's operation prior to foreclosure so that court could grant government's motion for summary judgment and preclude bank's third party defense).

23. *Monsanto Co.*, 858 F.2d at 160, 168.

24. See 42 U.S.C. §§ 9601(35)(A), 9607(b)(3) (1988) (providing defense to liability for "act or omission of third party" so long as purchaser inquires into prior use of property). CERCLA also allows a party to assert an "act of God" or "act of war" defense, but these defenses are rarely asserted. See 42 U.S.C. § 9607(b)(1)-(2) (1988) (listing defenses available under CERCLA); see also *Claim for 'Act of War' Exemption Denied as Judge Assigns Responsibility for Cleanup*, 24 Env't Rep. (BNA) No. 23, at 1069, 1069 (Oct. 8, 1993) (reporting federal district court's rejection of "act of war" defense asserted by four major oil companies that dumped wastes from aviation fuel production into unlined pits during World War II).

25. 42 U.S.C. §§ 9601(35)(A), 9607(b)(3) (1988).

26. *Id.* § 9601(35)(B). No specific definition of "all appropriate inquiry" exists, but the purchaser should take into account:

any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect contamination by appropriate inspection.

*Id.*

27. See *Ways-Means Leaders Say Retroactive Liability Under CERCLA Must Be Repealed*, 40 Banking Rep. (BNA) No. 8, at 365, 365 (Feb. 20, 1995) (relating that tax levies



lators proposed CERCLA amendments to reduce the transactional costs involved in remediation efforts.<sup>28</sup> These amendments attempted to establish more efficient cost-allocation procedures, allow de minimis parties to escape involvement in drawn out proceedings, and clarify CERCLA liability for lenders and fiduciaries.<sup>29</sup> While these amendments would assist in streamlining CERCLA, a more fundamental and radical approach was recently proposed by members of both parties of the 104th Congress—elimination of CERCLA's retroactive liability.<sup>30</sup> This proposal would not only streamline transactional costs, but would actually eliminate these costs in most cases.

Some members of Congress, together with industry representatives, have gone even further by threatening to oppose the extension of CERCLA's taxing authority unless Congress enacts substantial reforms.<sup>31</sup> Although such opposition could shut down existing remediation efforts for lack of funding,<sup>32</sup> CERCLA opponents reason that Congress should not support a program that, in addition to not realizing its objectives, is fundamentally unfair.<sup>33</sup>

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supporting CERCLA program are set to expire on December 31, 1995, and contending that tax levies need to be extended or amended to continue program).

28. See George Van Cleve, *Would the Superfund Response Cost Allocation Procedures Considered by the 103d Congress Reduce Transaction Costs?*, 25 *Env't. L. Rep. (Env't. L. Inst.)* 10,134, 10,134 (Mar. 1995) (noting that all parties to congressional CERCLA debate agreed that transaction costs were too high).

29. See S. 1994, 103d Cong., 2d Sess. (1994) (clarifying definition of owner or operator to exclude most security interest holders and all fiduciaries, and creating binding allocation panels to allocate liability); S. 1834, 103d Cong., 2d Sess. (1994) (proposing new cost-allocation procedures, which included staying all pending cost-recovery and contribution litigation, providing avenues for arbitration, allowing payment for cleanup of nonallocated orphan shares from Hazardous Substances Trust Fund, and protecting nonsettling de minimis parties against joint and several liability).

30. See *Exception for Federal Facilities Sought in Call to Eliminate Retroactive Liability*, 25 *Env't Rep. (BNA)* No. 39, at 1870, 1870 (Feb. 3, 1995) (quoting Representative Thomas J. Bliley, Chairman of the House Commerce Committee, as stating that “[t]here’s a strong bipartisan group that would like to remove retroactivity”).

31. See *Browner Urges House Panel to Seek Continued CERCLA Funding Absent Reform*, 26 *Env't Rep. (BNA)* No. 5, at 272, 272 (June 2, 1995) (reporting that some House members feel that withholding funding is only way to spur CERCLA reform).

32. See *id.* (reporting EPA Administrator Carol M. Browner’s concerns that interruption in CERCLA funding could interfere with remediation efforts at existing federal Superfund sites).

33. See *House Committee Leaders Push for Repeal of Retroactive, Joint and Several Liability*, 25 *Env't Rep. (BNA)* No. 41, at 1999, 1999 (Feb. 17, 1995) (quoting Representative Sam Gibbons, who supports conditioning continued CERCLA funding on elimination of retroactive liability because retroactive liability is “fundamentally, basically unfair”).

These threatened sanctions are not unprecedented—CERCLA funding was briefly stayed in 1985 while Congress worked out the details of reauthorization.<sup>34</sup>

Most environmental statutes, unlike CERCLA, have restricted only prospective acts by an owner or operator of a facility because Congress knows that it cannot impose criminal liability for past lawful activities without raising serious constitutional questions.<sup>35</sup> For example, Congress passed RCRA to regulate future solid waste disposal and solid waste management activities occurring after the enactment date.<sup>36</sup> On the other hand, Congress enacted CERCLA in 1980 to address the remediation of contaminated property.<sup>37</sup> Many of the sites targeted by CERCLA were inactive, abandoned, and contaminated prior to 1980.<sup>38</sup> As a result, actions

34. See Ann M. Burkhart, *Lender/Owners and CERCLA: Title and Liability*, 25 HARV. J. ON LEGIS. 317, 320 n.7 (1988) (noting that after funding expired for CERCLA in September 1985, Congress was unable to reach reauthorization agreement until October 1986); David T. Moldenhauer, Note, *The Case Against Waste in Private Liability Actions Under CERCLA*, 60 N.Y.U. L. REV. 888, 904 n.90 (1985) (noting that, although Congress approved temporary funding for CERCLA during reauthorization debate, EPA was forced to delay remediation efforts due to lack of funds).

35. See U.S. CONST. art. I, § 9, cl. 3 (prohibiting federal government from passing laws that retroactively impose criminal penalties). Most of the major federal environmental laws provide criminal penalties for knowing violations that endanger other persons. See 42 U.S.C. § 7413(c) (Supp. V 1993) (imposing criminal penalties of imprisonment or fines under Clean Air Act); 42 U.S.C. § 6928(d) (1988) (imposing criminal penalties for violations under RCRA); 33 U.S.C. § 1319(c) (1988 & Supp. V 1993) (imposing criminal penalties for violations under Clean Water Act). However, for most types of statutes that do not impose criminal penalties, such as CERCLA, courts merely require that there be a rational relation between the retroactive legislation and a legitimate government objective to pass constitutional muster. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976) (finding that retroactive liability may be imposed if rational basis exists to justify such liability).

36. See Elizabeth F. Mason, *Contribution, Contribution Protection, and Nonsettlor Liability Under CERCLA: Following Laskin's Lead*, 19 B.C. ENVTL. AFF. L. REV. 73, 78 (1991) (indicating that Congress passed CERCLA because RCRA did not give EPA authority to clean up already-contaminated sites). Many of the actual administrative regulations promulgated under RCRA were not finalized until well after 1976; nonetheless, courts have stated that parties are subject to RCRA's provisions as of the enactment date. See *United States v. Waste Indus.*, 734 F.2d 159, 167–68 (4th Cir. 1984) (holding that, even though regulations implementing RCRA were not finalized until 1980, statutory provision became operative upon enactment in 1976 without need for promulgation of regulations).

37. See H.R. REP. NO. 96-1016, 96th Cong., 1st Sess. 1 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6119 (stating that CERCLA was proposed to provide authority “to respond to releases of hazardous waste from inactive, hazardous waste sites”).

38. See Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENVTL. AFF. L. REV. 579, 603 (1993) (stating that CERCLA was enacted

that were perfectly legal and in conformity with industry custom when conducted in 1965, for instance, could create liability for the current facility owner.

Due to this peculiarity, many parties have challenged the constitutionality of CERCLA's retroactive liability under the Due Process Clause, the Contract Clause, and the Ex Post Facto Clause.<sup>39</sup> Courts have held, however, that the relationship between the retroactive legislation of CERCLA and the cleanup of hazardous substance sites satisfies the rational legislative purpose necessary to withstand constitutional scrutiny.<sup>40</sup> While lower courts have had no difficulty imposing retroactive liability on responsible parties, the United States Supreme Court has not specifically addressed this issue.<sup>41</sup>

### A. *Retroactivity Problems*

In theory, retroactive liability fairly and efficiently allocates cleanup costs to those private parties who were the beneficiaries of the past conduct at the site.<sup>42</sup> In practice, however, the application of retroactive CERCLA liability has had a number of serious im-

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because congressional concern about past hazardous waste problems was not addressed by RCRA).

39. See *United States v. Kramer*, 757 F. Supp. 397, 430–31 (D.N.J. 1991) (addressing due process and ex post facto challenges to CERCLA); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 213–19 (D.C. Mo. 1985) (addressing and rejecting various constitutional challenges to CERCLA, including those under Due Process, Contract, Ex Post Facto, and Equal Protection Clauses). See generally Amy Blaymore, *Retroactive Application of Superfund*, 12 B.C. ENVTL. AFF. L. REV. 1, 20–48 (1985) (discussing four constitutional bases for attacking retroactive application of CERCLA).

40. See, e.g., *Kramer*, 757 F. Supp. at 429 (rejecting defendant's due process claim because CERCLA's retroactive application is supported by legitimate legislative purpose); *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1073 (D. Colo. 1985) (noting that due process argument, although not frivolous, has been heard and rejected by numerous courts); see also *Ohio ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1308 (N.D. Ohio 1983) (noting congressional intent to apply CERCLA retroactively).

41. The United States Supreme Court has declined to review the constitutionality of CERCLA, which tends to indicate that it agrees with the lower courts' analyses. *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 733, 737 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987). Of course, the Court's refusal to hear challenges to CERCLA does not constitute Supreme Court precedent.

42. See *Toxic Waste Litigation: Liability Issues in CERCLA Cleanup Actions*, 99 HARV. L. REV. 1511, 1513 (1986) (asserting that retroactive liability is justified because it (1) shifts cleanup burden from victims to responsible parties, (2) creates incentives for safe handling of wastes by internalizing costs, and (3) forces parties to locate and implead other responsible parties).

plications and has created inequities. First, potential CERCLA liability discourages the acquisition and use of abandoned or inactive inner-city properties with already existing infrastructures, while encouraging development of previously nonindustrial areas.<sup>43</sup> The migration of manufacturing and related development to outlying areas erodes a city's tax base and its ability to provide local jobs for its citizens. One critic even argued that "site contamination is a key barrier to the viability and survivability of older cities."<sup>44</sup> Another critic noted that older cities are:

haunted by brownfields—a depressing word for the derelict property that clutters urban landscapes like burned-out clinkers from an earlier industrial age. In their prime, industrial cities—those that developed roughly from 1830 to 1945—had an average of 11 percent of their land devoted to factories, mills, warehouses and rail facilities.

Like festering wounds, many of these properties now rob cities of economic strength, job development and environmental quality simultaneously: A significant number of them are abandoned and off the tax rolls; many harbor underground storage tanks, or have the ground beneath them tainted by chemical wastes or manufacturing byproducts like steel mill slag.

Ironically, the land that once housed the factories that made the Midwest an industrial powerhouse is seen now as an economic liability. The General Accounting office estimates that between 130,000 and 425,000 brownfield sites in the United States may need cleanup action, at a cost of up to \$650 billion.<sup>45</sup>

Because of these effects, CERCLA could be considered a regressive tax on older cities and developed areas.<sup>46</sup>

Second, CERCLA does not define the "all appropriate inquiry" required to prove the "due diligence" needed to assert the innocent purchaser defense. Several industry associations have established guidelines, but the Environmental Protection Agency (EPA)

43. See Robert Simmons, *How Clean is Clean?*, 62 APPRAISAL J. 424, 424 (1994) (noting that stringent enforcement of environmental regulations inhibits redevelopment of inner-city "brownfields," which are former commercial properties with environmental risks attached to them).

44. See Casey Burko, *The Quagmire of Industrial Site Cleanups*, CHI. ENTERPRISE, Sept. 1994, at 24 (reporting comment of EPA brownfield expert Jim Bower), available in LEXIS, News Library, CHIEN File.

45. *Id.*

46. See *id.* (reporting comments of Mr. Bower, who concluded that "[i]f you don't redevelop the cities, the tax base deteriorates").

has neither sanctioned these guidelines nor issued its own.<sup>47</sup> Further, courts have been reluctant to apply the innocent purchaser defense, and when they do apply the defense, it is narrowly construed.<sup>48</sup> Thus, one commentator has noted that the innocent purchaser defense is merely a “safe harbor with no water.”<sup>49</sup>

Third, while environmental audits can assist in determining prior uses of property in, for example, an inner-city industrial area, potential environmental problems can be difficult or impossible to discover, and the potential liabilities are often difficult to quantify.<sup>50</sup> The idea that an audit can provide absolute assurance that a

47. See *Superfund: Standard for Innocent Landowner Will Not Be Clarified*, EPA Says in Memo, Daily Env't Rep. (BNA), Apr. 21, 1994 (reporting that EPA, in policy memo dated April 14, 1994, examined guidelines developed by private organizations for satisfying inquiry standard and decided not to endorse or evaluate adequacy guidelines), available in Westlaw, BNA Database, DEN File. The EPA also decided against developing their own standards of all appropriate inquiry, opting to leave that development to private organizations. *Id.* As such, it appears that the parameters of all appropriate inquiry will continue to be decided by the courts. See *United States v. Pacific Hide & Fur Depot, Inc.*, 716 F. Supp. 1341, 1348–49 (D. Idaho 1989) (reasoning that Congress's failure to define all appropriate inquiry indicates its desire for courts to decide scope of inquiry on case-by-case basis); see also Debra L. Baker & Theodore G. Baroody, *What Price Innocence? A Realistic View of the Innocent Landowner Defense Under CERCLA*, 22 ST. MARY'S L.J. 115, 125 (1990) (noting purchasers' frustrations in attempting to qualify as innocent purchasers when no clear guidelines exist); Michael J. Gergen, *The Failed Promise of the "Polluter Pays" Principle: An Economic Analysis of Landowner Liability for Hazardous Waste*, 69 N.Y.U. L. REV. 625, 652 (1994) (explaining that purchaser must use due diligence in investigating prior ownership and uses of property to assert innocent landowner defense).

48. See *Westwood Pharmaceuticals v. National Fuel Gas Distrib., Inc.*, 964 F.2d 85, 91 (2d Cir. 1992) (stating that landowner must “take precautions against the foreseeable acts or omissions of third parties” for innocent purchaser defense to apply after sale of property); *Acme Printing Ink Co. v. Menard, Inc.*, 870 F. Supp. 1465, 1480 (E.D. Wis. 1994) (holding that landowner who accidentally ruptured waste barrels dumped by unidentified third party could not assert innocent purchaser defense); *United States v. Broderick Inv. Co.*, 862 F. Supp. 272, 275–76 (D. Colo. 1994) (holding that purchaser could not assert innocent purchaser defense because predecessor had knowledge of tenant's hazardous waste disposal activities); see also *Pacific Hide & Fur Depot*, 716 F. Supp. at 1348–49 (applying innocent purchaser defense in situation where landowners obtained property through inheritance when they were “barely out of their teenage years”).

49. Albert R. Wilson, *The Environmental Opinion: Basis for an Impaired Value Opinion*, 62 APPRAISAL J. 410, 411 (1994).

50. See David W. Marczely, Note, *Superfund Liability Alternatives for the Innocent Purchaser*, 39 CLEV. ST. L. REV. 79, 102 (1991) (noting that lenders have refused to invest in many commercially-viable properties because of uncertainty and fear of CERCLA liability).

site is not contaminated is simply a myth.<sup>51</sup> In most cases, purchasers will conduct a "Phase I" audit prior to purchasing property.<sup>52</sup> This audit ordinarily consists of research of real estate records and public data, and a visual inspection of the site.<sup>53</sup> In many cases, however, purchasers experience difficulties in deciding how far the inquiry should proceed. For instance, purchasers are unsure whether the soil should be tested, if ex-owners should be interviewed, if aerial photographs should be analyzed, and whether groundwater test wells should be drilled. Neither the courts nor the EPA have provided clear answers.<sup>54</sup>

Fourth, because CERCLA increases the environmental risks associated with property acquisition, it devalues property.<sup>55</sup> Even though purchasers and sellers can include contractual provisions in

51. See Albert R. Wilson, *The Environmental Opinion: Basis for an Impaired Value Opinion*, 62 APPRAISAL J. 410, 411 (1994) (noting that environmental audits cannot prove or disprove presence of contamination).

52. See Debra L. Baker & Theodore G. Baroody, *What Price Innocence? A Realistic View of the Innocent Landowner Defense Under CERCLA*, 22 ST. MARY'S L.J. 115, 123 (1990) (noting that results from Phase I audit are generally used to determine whether to proceed with further investigation).

53. See David W. Marczyly, Note, *Superfund Liability Alternatives for the Innocent Purchaser*, 39 CLEV. ST. L. REV. 79, 102 (1991) (stating that Phase I site assessment involves gathering of easily attainable information such as government records and interviews with people knowledgeable about past use of site, followed by physical inspection of site).

54. See *id.* at 103-04 (noting that because EPA has only issued very general guidance on what constitutes "all appropriate inquiry," courts must accept and develop standards of review before innocent purchaser can be free from CERCLA liability). Sellers should be sensitive to the fact that potential purchasers' inquiries may uncover violations that could create liability issues. See 42 U.S.C. § 9659(a) (1988) (authorizing citizen suits to enforce CERCLA provisions); 42 U.S.C. § 7413(c)(5)(A) (Supp. V 1993) (imposing penalties of up to 15 years imprisonment or \$1 million in fines for each act of knowingly releasing hazardous air pollutants under Clean Air Act); 33 U.S.C. § 1319(c)(3)(A) (Supp. V 1993) (imposing penalties of up to 15 years in jail or \$250,000 in fines for individuals and \$1 million in fines for organizations that knowingly violate Clean Water Act and endanger other persons); see also Peter A. Gish, *The Self-Critical Analysis Privilege and Environmental Audit Reports*, 25 ENVTL. L. 73, 89 (1995) (stating that environmental audits are usually not protected from discovery in federal courts under scope of privilege).

55. See John W. Bagby et al., *How Green Was My Balance Sheet?: Corporate Liability and Environmental Disclosure*, 14 VA. ENVTL. L.J. 225, 245-46 (1995) (contending that because CERCLA release reporting requirements do not indicate names of PRPs or scope of cleanup, investors encounter difficulties in making rational investment decisions). In some instances, parties structure the transaction so that purchasers acquire a corporation's assets, rather than the corporate entity, seeking to avoid the potential CERCLA liability of acquiring an "owner" or "operator" of a site where hazardous substances have been deposited. See *id.* at 239 (stating that even though acquisition of assets may not lead to CER-

a purchase and sale transaction to address environmental risks, these provisions are awkward because of the uncertain existence, nature, and scope of possible liabilities.<sup>56</sup>

Fifth, retroactive CERCLA liability makes it difficult, if not impossible, for new owners to obtain environmental insurance for developed or environmentally questionable properties.<sup>57</sup> Insurance policies generally do not cover past occurrences of contamination.<sup>58</sup> Likewise, many policies do not cover releases unless they are “sudden and accidental.”<sup>59</sup> The insurance industry’s reluctance to cover environmental risks is understandable because studies indicate that CERCLA liability ranks just behind a “once-in-a-century earthquake in a congested urban area” as the greatest single financial risk for insurers.<sup>60</sup>

Sixth, retroactive liability apportions liability, at least theoretically, to parties who benefitted from the use of the site.<sup>61</sup> In real-

CLA liability, courts may recharacterize acquisition as de facto merger and impose liability).

56. See David E. Pierce, *Structuring Routine Oil and Gas Transactions to Minimize Environmental Liability*, 33 WASHBURN L.J. 76, 134–35 (1993) (explaining that indemnification agreements are difficult to secure due to uncertain nature of potential liability and because environmental liability often exceeds purchase price of property). Recent decisions have made it clear that, while CERCLA will not allow parties to contractually escape liability for cleaning up a site, the parties can allocate that liability by private contract between themselves. See *Commander Oil v. Advance Food Serv. Equip.*, 991 F.2d 49, 52 (2d Cir. 1993) (noting language in contract providing for liability of contracting parties); *United States v. Royal N. Hardage*, 985 F.2d 1427, 1433 (10th Cir. 1993) (explaining that parties have right to be indemnified for CERCLA liability). Of course, these indemnification agreements are only as good as the indemnitor’s ability to meet its obligations.

57. See Debi L. Davis, Comment, *Insureds Versus Insurers: Litigating Comprehensive General Liability Policy Coverage in the CERCLA Arena—A Losing Battle for Both Sides*, 43 Sw. L.J. 969, 994 (1990) (asserting that legal and environmental uncertainty forces insurance companies to either exclude environmental coverage or sell it at cost-prohibitive premiums).

58. See John C. Buckley, *Reducing the Environmental Impact of CERCLA*, 41 S.C. L. REV. 765, 809 (1990) (stating that “[p]urchasers of any property will find retroactive environmental impairment liability insurance completely unavailable”).

59. See *id.* at 801–02 (noting that most companies that even offer limited-scope environmental coverage nevertheless exclude gradual environmental degradation by limiting coverage to “sudden and accidental” releases).

60. See *Insurance Industry Report Attacks Superfund’s Costs and Priorities*, TOXIC MATERIALS NEWS, Mar. 3, 1993 (quoting insurance industry report that attributed high cost of CERCLA to retroactive and joint and several liability), available in LEXIS, Envirn Library, ALLNWS File.

61. See Michael J. Gergen, *The Failed Promise of the “Polluter Pays” Principle: An Economic Analysis of Landowner Liability for Hazardous Waste*, 69 N.Y.U. L. REV. 624,

ity, however, parties who often had little or nothing to do with the release of hazardous substances are held responsible through joint and several liability for cleanup costs because the more culpable PRPs no longer exist.<sup>62</sup> Further, retroactive application does not act to change behavior because the activity has already occurred.<sup>63</sup>

Seventh, liability under CERCLA is joint and several when the harm is indivisible and when there is no clear basis for apportioning liability.<sup>64</sup> Since any PRP could be held responsible for the entire cost of a cleanup, joint and several liability encourages individual PRPs to increase the number of other PRPs involved at each site, especially financially solvent PRPs.<sup>65</sup> PRPs may also assert a claim for contribution from other PRPs for portions of the cleanup costs that they paid.<sup>66</sup> Further, PRPs generally attempt to

627 (1994) (explaining that CERCLA liability is modeled after common law tort theory that imposed strict liability on parties whose participation in ultrahazardous activities damaged other persons or their properties).

62. See *O'Neil v. Picillo*, 883 F.2d 176, 178, 183 (1st Cir. 1989) (allocating \$1.4 million in CERCLA liability to PRP who caused minute portion of total contamination), *cert. denied*, 493 U.S. 1071 (1990); see also James K. McBain, Note, *Environmental Impediments to Bankruptcy Reorganizations*, 68 IND. L.J. 233, 233 (1992) (noting that some corporations seek to avoid CERCLA liability by declaring bankruptcy).

63. In many cases, the potential for enormous CERCLA liability actually discourages socially and environmentally responsible behavior. See Michael J. Gergen, *The Failed Promise of the "Polluter Pays" Principle: An Economic Analysis of Landowner Liability for Hazardous Waste*, 69 N.Y.U. L. REV. 624, 669-71 (1994) (stating that landowners may not find it in their best interest to voluntarily discover, report, and cleanup hazardous substances, especially if they do not know to what extent they will be held responsible under CERCLA).

64. See *Bell Petroleum Serv., Inc. v. Sequa Corp.*, 3 F.3d 889, 903 (5th Cir. 1993) (explaining approaches adopted by various courts to determine whether to apply joint and several liability); *Alcan Aluminum Corp.*, 964 F.2d at 269 (holding that party attempting to show that joint and several liability is inappropriate has burden of showing feasibility of apportioning harm).

65. See Ridgway M. Hall et al., *Superfund Response Cost Allocations: The Law, the Science and the Practice*, 49 BUS. LAW 1489, 1491 (1994) (noting that many unlikely parties, including churches, Girl Scouts, and widows of former managers have been sued by PRPs in attempt to lessen liability by spreading cleanup costs as broadly as possible). The joint and several liability scheme is the basis for some of the unusual results under CERCLA. For example, a party who sold a bag of dog food and a bag of grass seed to a PRP who owned a battery plant was also named as a PRP and settled for \$3,500 to avoid further legal costs. John Shanahan, *Why the Reauthorization Bills Won't Fix Superfund's Fatal Flaws*, Heritage Found. Rep., Oct. 3, 1994, available in LEXIS, Exec Library, HFRPTS File.

66. 42 U.S.C. § 9613(f) (1988).



allocate to other PRPs as much of the remediation costs as possible.<sup>67</sup>

In allocating the costs among the PRPs, a court may employ any equitable factor that it considers appropriate,<sup>68</sup> including the relative fault of the PRPs,<sup>69</sup> any contracts between the PRPs bearing on the allocation of cleanup costs,<sup>70</sup> whether a PRP's share of the harm can be distinguished, and any other relevant factors.<sup>71</sup> Retroactive liability results in an extremely time consuming and costly allocation process because a court must consider evidence regard-

67. See *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 (7th Cir. 1994) (upholding suit for cleanup costs by prior owners of land against current owners of land). Under 42 U.S.C. § 9613(f), a party may seek contribution for cleanup costs from another person who is liable or potentially liable under 42 U.S.C. § 9607(a). 42 U.S.C. § 9613(f)(1) (1988). In allocating response costs among the liable parties, a court employs such equitable factors as it determines are appropriate. *Id.*

68. 42 U.S.C. § 9613(f)(1) (1988).

69. See *Environmental Transp. Sys. v. EnSCO, Inc.*, 969 F.2d 503, 508-09 (7th Cir. 1992) (asserting that court has "power to weigh and consider relevant factors, including [relative] fault" of parties).

70. See *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 572-73 (6th Cir. 1991) (noting that court may consider totality of circumstances, including any contracts between parties, in attempting to balance equities).

71. See *id.* at 571-72 (positing that Congress intended to afford courts wide discretion in allocation of response costs). Courts may consider the relevant "Gore factors," including:

- (i) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished;
- (ii) the amount of the hazardous waste involved;
- (iii) the degree of toxicity of the hazardous waste involved;
- (iv) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
- (v) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
- (vi) the degree of cooperation by the parties with Federal, State, or local officials to prevent any harm to the public health or the environment.

*Id.* at 576 (Guy, J., concurring); see *Juniper Dev. Group v. Kahn (In re Hemingway Transp., Inc.)*, 993 F.2d 915, 921-22 n.4 (1st Cir.) (noting that courts often rely on "Gore factors" to equitably allocate response costs among PRPs (citing *Environmental Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 508-09 (7th Cir. 1992))), *cert. denied*, 114 S. Ct. 303 (1993). The "Gore factors" are named after Vice President Al Gore, who, as a member of the House of Representatives, proposed the adoption of these factors as a means of allocating CERCLA liability. See Michael Noone, Recent Decision, *Third Circuit Reexamines Divisibility Under CERCLA—United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1992), 66 TEMP. L. REV. 307, 311-12 (1993) (stating that Gore proposal, which did not pass Congress, was intended to soften harsh consequences of imposition of joint and several liability on PRPs who were responsible for small portion of contamination at CERCLA site).

ing the extent of each PRP's past involvement at the site. Often, the allocation of liability becomes a battle of experts who attempt to document the involvement of each PRP.<sup>72</sup>

In most cases, PRPs must negotiate and litigate with the EPA, their insurance carriers, and among themselves to determine who disposed of what, when, and how much—inquiries which are extremely difficult to answer years or decades after the disposal occurred.<sup>73</sup> As a result, joint and several liability increases legal expenses by creating an incentive to prolong litigation of cost-allocation issues.<sup>74</sup> Recognizing that cost allocation was a major problem with CERCLA, especially when much of the contamination occurred years ago, the 103rd Congress proposed several solutions.<sup>75</sup> While reforming the allocation process can reduce transac-

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72. See Ridgway M. Hall et al., *Superfund Response Cost Allocations: The Law, the Science and the Practice*, 49 BUS. LAW. 1489, 1491 (1994) (commenting that “PRPs arm themselves with lawyers and consultants, and spend a large amount of time, money and energy” litigating allocation of liability); Elizabeth F. Mason, *Contribution, Contribution Protection, and Nonsettlor Liability Under CERCLA: Following Laskin’s Lead*, 19 B.C. ENVTL. AFF. L. REV. 73, 129 (1991) (referring to costly and time-consuming task of allocating liability, and noting that judges and juries generally lack technical expertise to apportion liability based on comparative principles); see also *Nodaway Valley Bank v. Continental Casualty Co.*, 715 F. Supp. 1458, 1459 (W.D. Mo. 1989) (weighing widely differing findings of experts in allocation process), *aff’d*, 916 F.2d 1362 (8th Cir. 1990). According to a General Accounting Office report released January 26, 1995, the lack of adequate data on waste contributions by the various PRPs to support a Gore-factors analysis, and the failure by the EPA to identify and enforce cleanup obligations of all PRPs, were cited by surveyed companies as factors that increased their legal costs. *Lack of Information Cited By Companies As Reason for High Legal Costs, GAO Says*, Nat’l Env’t Daily (BNA), (Jan. 30, 1995), available in LEXIS, Envirm Library, BNANED File.

73. See Bernard J. Reilly, *Stop Superfund Waste*, ISSUES IN SCI. & TECH., Spring 1993, at 57, 62 (noting that litigation over liability allocation may account for 20% of CERCLA expenses).

74. See Rena I. Steiner, *The Reauthorization of Superfund: The Public Works Alternative*, 25 Env’tl. L. Rep. (Env’tl. L. Inst.) 10,078, 10,084 (Feb. 1995) (contending that allocation of costs forces PRPs to offer proof of events that occurred 10, 20, or 30 years ago, which substantially increases litigation).

75. *E.g.*, S. 1994, 103d Cong., 2d Sess. (1994); S. 1834, 103d Cong., 2d Sess. (1994); H.R. 4161, 103d Cong., 2d Sess. (1994). Under one of these legislative proposals, private parties were given authority to recommend the allocation of liability among the parties, and had the power to subpoena information on a site from any party. S. 1834, 103d Cong., 2d Sess. (1994). A party who agreed with the allocation could “cash out” and have no further liability beyond that amount, effectively avoiding joint and several liability for the clean up costs. *Id.* If a party challenged the allocation, joint and several liability would still apply, and the party could be left with “orphan share” costs. *Id.* Allocation would be made on factors similar to the “Gore factors.” *Id.*

tion costs, eliminating joint and several liability would reduce these costs much more effectively.

Finally, in light of hidden liabilities and the uncertain nature of retroactive liability, lenders are reluctant to provide financing for any project that may encompass environmental risk resulting from past use of the site.<sup>76</sup> Needless to say, collateral that is contaminated with a hazardous substance can be worse than an unsecured loan if the lender must pay cleanup costs under CERCLA. CERCLA thus tends to inhibit commercial transactions by restricting financing alternatives.<sup>77</sup>

### B. *Reauthorization Issues If Retroactivity Is Eliminated from CERCLA*

The elimination of retroactive liability from CERCLA would correspondingly eliminate many of the inherent inequities and related transaction costs. However, although eliminating retroactive liability would improve CERCLA, Congress should be aware of problems that may arise once retroactive liability is eliminated, and take measures during the reauthorization process to minimize these problems. Because retroactive liability has been an integral part of the CERCLA liability framework, any major change facilitates a whole new set of issues. Therefore, while the benefits may be attractive to many industrial and commercial entities, the following problems may arise to diminish these benefits.

#### 1. Increased Revenues to Fund the Superfund

With CERCLA, Congress intended to shift the burden of cleaning up hazardous sites from the public to the parties responsible for creating the contamination.<sup>78</sup> If responsible parties cannot be iden-

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76. See *5% of Loans Bring Environmental Cost*, 40 Problem Asset Rep. (Dorset Group, Inc.) No. 6, at 4 (Oct. 17, 1994) (estimating that commercial lenders incur environmental costs on about 5% of loans made, with average cost of remediating contaminated property being around \$130,000), available in LEXIS, News Library, PARPTR File.

77. See Peter J. Patchin, *Contaminated Properties—Stigma Revisited*, 59 APPRAISAL J. 167, 169 (1991) (noting that “[t]he inability to obtain financing, either for the sale of a [contaminated or previously contaminated] property or its future development, is one of the most frequent causes of stigma-related value loss”).

78. See Michael J. Gergen, *The Failed Promise of the “Polluter Pays” Principle: An Economic Analysis of Landowner Liability for Hazardous Waste*, 69 N.Y.U. L. REV. 624, 641–44 (1994) (explaining that Congress intended CERCLA to encourage voluntary pri-

tified, remediation costs are paid out of the public Superfund, which is primarily supported by an environmental tax on corporations, petroleum, and certain chemical products.<sup>79</sup>

Thus far, the monies spent on Superfund projects constitute only a fraction of the total cost of the Superfund program. The Congressional Budget Office (CBO) has estimated that total public and private costs of the Superfund program approach \$75 billion.<sup>80</sup> Through 1992, however, federal and state governments and private parties had obligated only \$20 billion for cleanup costs of Superfund sites.<sup>81</sup> The total cost of the Superfund program will ultimately depend on the number of sites added to the program, and the CBO has estimated that only nineteen to forty percent of CERCLA costs have been paid to date.<sup>82</sup>

If Congress eliminates retroactive liability for pre-1980 releases, the federal and state governments will bear an increased burden for the cost of remediation.<sup>83</sup> Thus far, states have contributed less

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vate cleanups and provide mechanism for federal government to recover cleanup costs from PRPs).

79. See 26 U.S.C. § 9507 (1988) (providing for creation of Hazardous Substance Superfund, which is supported in part by appropriations received in Treasury under §§ 59A, 4611, and 4661 of Internal Revenue Code); see also 26 U.S.C. § 4661 (1988) (imposing tax on certain listed chemical products, with tax rate varying depending on type of chemical); 26 U.S.C. § 4611 (1988 & Supp. V 1993) (imposing tax on crude oil received at refineries and petroleum products); 26 U.S.C. § 59A (1988) (imposing environmental tax on corporations); John Shanahan, *Superfund Status Quo: Why the Reauthorization Bills Won't Fix Superfund's Fatal Flaws*, Heritage Found. Rep., Oct. 3, 1994 (stating that Congress created Superfund to clean up "orphan" sites and funded program primarily through taxes on petroleum industry prior to 1990 and appropriations from general revenue after 1990), available in LEXIS, Exec Library, HFRPTS File. In 1993, the Superfund tax structure raised \$1.46 billion; approximately \$560 million of this amount derived from a tax on crude oil, \$260 million from taxes on chemical feedstocks and derivatives, and \$630 million from broad-based corporate taxes. Rena I. Steinor, *The Reauthorization of Superfund: The Public Works Alternative*, 25 *Env't. L. Rep.* (Env't. L. Inst.) 10,078, 10,086 (Feb. 1995).

80. See Dennis Wamstead, *CBO Study Sees Costly Future for Superfund*, *ENV'T Wk.*, Feb. 3, 1994, at 1 (reporting conclusions of CBO review of Superfund program).

81. *Id.*

82. *Id.* at 12. The CBO estimated that around 66% of expenditures would go for site investigation and cleanup, 24% for litigation and negotiation, and 12% for federal management, support, and research. *Id.*

83. See *Republican Funding, Reform Proposals Draw Fire from Administration Officials*, 26 *Env't Rep.* (BNA) No. 12, at 589, 589-90 (July 21, 1995) (reporting EPA official's warning that elimination of retroactive liability would increase costs for taxpayers and states). In general, publicly financed cleanups have cost more than closely managed private cleanups. Dennis Wamstead, *CBO Study Sees Costly Future for Superfund*, *ENV'T*

than one percent of the total CERCLA cleanup costs.<sup>84</sup> With reauthorization, the states' share of cleanup costs will rise dramatically.<sup>85</sup> Elimination of retroactive liability would probably increase the states' involvement even further.

The CBO study of the Superfund program also found that the "EPA will need large increases in funding to avoid a growing backlog of sites awaiting study and cleanup."<sup>86</sup> The CBO reported that Congress enacted CERCLA with little available information to determine the ultimate costs to the taxpayers and the economy.<sup>87</sup> The CBO concluded, however, that with more information now available, the program's balance of benefits and costs warrants a second look.<sup>88</sup>

Elimination of the retroactive liability provisions, with no other changes, would increase the already escalating burden on the Superfund.<sup>89</sup> Congress may need to levy additional taxes on the public or on certain businesses or industrial entities to finance this

Wk., Feb. 3, 1994, at 1, 12. As a result, shifting the responsibility for cleanups to the public may increase costs and further burden the Superfund. *Id.*

84. Dennis Wamstead, *CBO Study Sees Costly Future for Superfund*, ENV'T WK., Feb. 3, 1994, at 1, 12. The Superfund is structured so that states pay around 10% of remediation costs and 100% of operation and maintenance costs for Superfund sites within the state. See 'Brownfield' Redevelopment May Be Spurred by Liability Changes, *Assessment Office Says*, 26 Env't Rep. (BNA) No. 8, at 448, 448-49 (June 23, 1995) (reporting that EPA supports increasing state financial participation in cleanup expenses to 15%). Because of the chances of increasing obligations, states have a major interest in any reauthorization proposals. See *id.* (discussing congressional testimony of state officials concerning CERCLA reauthorization).

85. See Dennis Wamstead, *CBO Study Sees Costly Future for Superfund*, ENV'T WK., Feb. 3, 1994, at 1, 12 (reporting CBO prediction that, although state contributions to Superfund costs will remain low, actual costs will rise dramatically).

86. *Id.* The CBO noted that if certain sites now being studied were added to the National Priorities List requiring a cleanup, Superfund spending could double by the year 2003. *Id.*

87. *Id.*

88. *Id.* In 1993, the federal government spent more than twice as much on hazardous waste cleanup as it did on cancer, heart disease, and AIDS combined. See *Capitol Hill Hearing Testimony*, Fed. Document Clearing House Cong. Press Releases, Feb. 2, 1995, (reporting congressional testimony of Jerry J. Jasinowski, President, National Association of Manufacturers, to House Commerce, Trade and Hazardous Material Risk Assessment Committee), available in LEXIS, Legis Library, CNGTST File.

89. See Rena I. Steinor, *The Reauthorization of Superfund: The Public Works Alternative*, 25 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,078, 10,079 (Feb. 1995) (noting that study of proposed elimination of retroactive liability concluded that funding levels for CERCLA would have to be increased two to three times above current levels).

public expenditure.<sup>90</sup> With the increasing public demand for a balanced budget, any potential increase in public expenditures to fund Superfund cleanups could create serious political concerns.<sup>91</sup>

## 2. Expansion in the Number of CERCLA “Hazardous Substances” Since 1980

Congress enacted CERCLA in 1980 to regulate “hazardous substances,” a broadly defined term incorporating many different materials.<sup>92</sup> In 1990, the number of materials classified as CER-

90. See *Costs Similar for Five Funding Schemes Proposed for Program, Joint Study Finds*, 25 Env't Rep. (BNA) No. 39, at 1872, 1872 (Feb. 3, 1995) (describing results of recently released study of various funding schemes for Superfund, which concluded that “[a]s long as the cleanup standards are the same . . . any release from liability [by eliminating retroactive liability] means you need more trust fund revenues”). Some executives have supported a repeal of the current Superfund funding mechanism, and have suggested a very broad-based surcharge to fund the program. See *What to Do About Superfund*, CHIEF EXECUTIVE, July 1993, at 50 (reporting conversation between two executives, one who supports broad-based 2% to 3% surcharge on companies to replace current funding structure, and other who does not support surcharge on grounds that it would be inadequate), available in LEXIS, News Library, ASAPII File.

However, both Senator Robert C. Smith, Chair of the Senate Environment and Public Works Subcommittee on Superfund, Waste Control, and Risk Assessment, and Representative Michael B. Oxley, Chair of the House Commerce Subcommittee on Commerce, Trade, and Hazardous Materials, have stated that it is unlikely that Congress would have to increase taxes if retroactive liability is eliminated. *Exception for Federal Facilities Sought in Call to Eliminate Retroactive Liability*, 25 Env't Rep. (BNA) No. 39, at 1870, 1870 (Feb. 3, 1995). The Chairs suggested that tax breaks might be incorporated for voluntary cleanups and that certain elements of the program could be revised to make it more efficient. *Id.*

Likewise, Representatives Bill Archer and Sam Gibbons of the House Ways and Means Committee have both indicated that they would like to see retroactive liability eliminated with no increase in taxes to fund the Superfund. *Ways-Means Leaders Say Retroactive Liability Under CERCLA Must Be Repealed*, 40 Banking Rep. (BNA) No. 8, at 365, 365 (Feb. 20, 1995). Representative Archer, while opposing new taxes, noted that if a particular segment of industry proposed a tax to relieve themselves of liability—such as was considered for the insurance industry in legislation introduced in the 103rd Congress—he would consider approving those taxes. *Id.*

91. Representative Sherwood Boehlert has proposed one plan that would repeal retroactive liability only for CERCLA actions at municipal solid waste landfills. *Plan Would Repeal Retroactive Liability at Municipal Landfills with Multiple PRPs*, 26 Env't Rep. (BNA) No. 13, at 627, 627-28 (July 28, 1995). Although this plan would only eliminate retroactive liability for about 20% of all contaminated sites on the National Priorities List, it would allow Congress to avoid major tax increases to fund a total elimination of retroactive liability. *Boehlert Plan Contains Partial Repeal of Retroactive Liability; EPA Lukewarm*, HAZARDOUS WASTE NEWS, July 31, 1995, available in LEXIS, Envirn Library, ZEV1 File.

92. See 42 U.S.C. § 9601(14) (1988) (defining “hazardous substance” by cross reference to other environmental statutes).

CLA “hazardous substances” increased significantly due to the Clean Air Act amendments and new RCRA regulations. The Clean Air Act amendments increased the number of “hazardous air pollutants” from 7 to 189,<sup>93</sup> and RCRA regulations increased the number of compounds considered “toxic” in hazardous wastes from 15 to 40.<sup>94</sup> All RCRA hazardous wastes and Clean Air Act hazardous air pollutants are, by definition, hazardous substances under CERCLA.<sup>95</sup>

From a legislative and legal standpoint, an interesting question arises: If a material was released during the “gap” between 1980 and the date the material was designated as a CERCLA hazardous substance, is the owner or operator responsible for CERCLA remediation costs? If the answer is yes, the tremendous increase in the number of materials defined as hazardous substances since 1980 means that elimination of pre-1980 liability would only be a partial shield to CERCLA liability. For example, if formerly exempt oil and gas wastes are later designated as hazardous substances, current owners or operators who are now generating RCRA-exempt wastes could be liable for cleanup costs even if Congress eliminates pre-1980 CERCLA liability.

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93. See Clean Air Act Amendments of 1990, 42 U.S.C. § 7412(b)(1) (Supp. V 1993) (listing hazardous air pollutants).

94. See 40 C.F.R. § 261.24 tbl. 1 (1992) (listing maximum contaminant levels for each contaminant that materials can exhibit before being classified as hazardous). In response to a legislative mandate, the EPA in 1990 replaced RCRA’s “extraction procedure” (EP) toxicity test with the more stringent “toxicity characteristic leaching procedure” (TCLP) test. 55 Fed. Reg. 11,798, 11,800 (1990) (codified at 40 C.F.R. § 261.24 (1992)). The legislative history of the Hazardous and Solid Waste Amendments of 1984 indicates that Congress believed the EP test was deficient because it was underinclusive in identifying hazardous wastes. H.R. Rep. No. 198, 98th Cong., 2d Sess. 52-53 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5615-16. Many wastes that were not considered toxic under the pre-1990 EP test are considered toxic under the post-1990 TCLP test. See Kenneth H. Kastner, *Complying with the New RCRA Toxicity Characteristic & TCLP*, 20 Env’t Rep. (BNA) No. 47, at 1899, 1899 (Mar. 23, 1990) (predicting that new TCLP test will nearly triple amount of wastes considered hazardous under RCRA, and directly affect 15,000 generators of these newly classified wastes). Both the EP and TCLP tests measure whether designated toxic elements will leach out of wastes placed in a hypothetical unlined, decomposing landfill situated over a groundwater aquifer. *Edison Elec. Inst. v. EPA*, 2 F.3d 438, 441-42 (D.C. Cir. 1993). This contamination scenario is referred to as the “waste mismanagement scenario,” and may bear very little resemblance to the manner in which oil field wastes are actually disposed. See *id.* at 444-45 (considering argument that oil field wastes are not likely to be disposed of in landfills because of regulatory barriers).

95. 42 U.S.C. § 9601(14)(C), (E) (1988).

### 3. Broad Definitions of “Release” and “Disposal” Under CERCLA

As previously discussed, CERCLA defines the term “release” to include virtually any contact of a hazardous substance, or receptacle containing a hazardous substance, with the environment.<sup>96</sup> CERCLA defines the term “disposal” to include discharging, depositing, injecting, dumping, spilling, leaking, or placing into the environment.<sup>97</sup> Some courts have held that disposal does not require active participation by a PRP—all that is required by these courts is a leak of a hazardous substance.<sup>98</sup> Under this line of cases, any passive migration of a hazardous substance into the environment could create liability. As a result, even with pre-1980 retroactive liability eliminated, owners or operators might still be liable for any current leaking or plume expansion, even if the release was instigated by a past owner prior to 1980.

Further, courts have not uniformly quantified the concentration level or amount of discharge required to establish liability under CERCLA.<sup>99</sup> For example, the United States Court of Appeals for the Fifth Circuit has held that owners and operators incur liability

96. *Id.* § 9601(22).

97. *See id.* § 9607(a)(2) (holding liable under CERCLA “any person who at time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of”); *id.* § 9601(22) (defining “disposal” according to definition of term under RCRA).

98. *See Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 844–45 (4th Cir.) (construing term “disposal” to not require active conduct), *cert. denied*, 113 S. Ct. 377 (1992); *see also* *United States v. Waste Indus., Inc.*, 734 F.2d 159, 165 (4th Cir. 1984) (concluding that Congress intended to close loopholes in environmental protection and deciding that limiting enforcement to cases of active human conduct does not comport with congressional intent). Other courts have refused to extend the definition of disposal to this extent, noting that such an extension would make every party in the chain of title liable. *See Snediker Developers Ltd. Partnership v. Evans*, 773 F. Supp. 984, 989 (E.D. Mich. 1991) (holding that “disposal” does not include “the mere migration of hazardous waste, without more”); *Ecodyne Corp. v. Shah*, 718 F. Supp. 1454, 1457 (N.D. Cal. 1989) (applying narrow construction of “disposal” because interpretation that is too broad would create liability for all property owners from time site became polluted forward).

99. *See United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 260 (3d Cir. 1992) (stating that “the statute does not, on its face, impose any quantitative requirement or concentration level on the definition of ‘hazardous substance’ ”); *United States v. Metate Asbestos Corp.*, 584 F. Supp. 1143, 1147–49 (D. Ariz. 1984) (discussing CERCLA liability established by showing release or threat of release of hazardous materials, but declining to comment on amount of release necessary to trigger liability); *United States v. Wade*, 577 F. Supp. 1326, 1339–40 (E.D. Pa. 1983) (debating whether CERCLA imposes liability for releases of hazardous substances when statute fails to designate reportable quantity).



for any release of radionuclides, a CERCLA-listed hazardous substance, no matter how small.<sup>100</sup> Because of the broad definition of release and the lack of release standards to establish liability, owners and operators could incur CERCLA liability for post-1980 releases at otherwise inactive sites.<sup>101</sup>

#### 4. Historical and Ongoing CERCLA Projects

The typical federal Superfund project takes ten years to resolve and costs around \$30 million because of the required consultant studies, testing, determination of the remediation methodology, alternative evaluation, cost allocation, and the actual remediation.<sup>102</sup> The way in which the removal of retroactive liability would affect ongoing projects and litigation or already completed projects is unclear. Any legislation removing retroactive liability should clarify the legislation's impact on current and completed Superfund projects. Otherwise, such legislation will precipitate lawsuits requesting judicial resolution of these issues.

#### 5. Date of Retroactive Liability Cutoff

If CERCLA retroactive liability is eliminated, Congress must devise a cutoff date. Legislators have suggested two cutoff dates: (1) December 11, 1980, the date CERCLA was enacted; and (2) December 31, 1986.<sup>103</sup> Insurance companies are particularly interested in the second cutoff date because most did not begin to include pollution exclusion clauses in their standard insurance policies until after 1987.<sup>104</sup> If Congress chooses the earlier cutoff date,

100. See *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 669 (5th Cir. 1989) (explaining that radionuclides meet CERCLA definition of hazardous substance and no threshold amount of discharge is required by plain language of statute).

101. For example, naturally occurring radioactive material (NORM), such as radionuclides, is a concern for operators of processing plants and wells in certain producing areas. Although most oil field contamination emits radionuclides at very low levels that are not injurious to health, under *Amoco Oil Co.* and related cases, any release of radiation creates potential CERCLA liability for the oil field owner or operator. See *supra* note 100 and accompanying text.

102. See Sally C. Pipes, *Superfund Drains Economy*, POLICY REV., Spring 1994, at 90 (concluding that CERCLA is enormous drain on economy, resulting in cleanup of only 10% of sites at cost of \$112 billion), available in LEXIS, News Library, CURNWS File.

103. *Plan Would Repeal Retroactive Liability at Municipal Landfills with Multiple PRPs*, 26 Env't Rep. (BNA) No. 13, at 627, 628 (July 28, 1995).

104. *Republican Funding, Reform Proposals Draw Fire from Administration Officials*, 26 Env't Rep. (BNA) No. 12, at 589, 589 (July 21, 1995).

most insurance companies will probably face continued litigation and losses due to policies that were in effect between 1981 and 1987. However, it appears more likely that Congress will adopt the 1980 cutoff date,<sup>105</sup> which coincides with the date of CERCLA enactment and the date the RCRA waste manifest system was put in place.<sup>106</sup> Regardless of which cutoff date Congress chooses, oil and gas interest holders might still face “retroactive” liability if formerly exempt or excluded oil and gas wastes are reclassified as hazardous substances under CERCLA.

#### IV. REAUTHORIZATION ISSUES

In addition to the retroactive liability issue, other CERCLA-related reauthorization issues may affect the oil and gas industry. These issues include: (1) clarification of the RCRA exemption for oil and gas wastes as it relates to CERCLA; (2) retention of the liability scheme for the remediation of CERCLA pollutants and contaminants in addition to hazardous substances; (3) revisions to, or clarifications of, the CERCLA petroleum exclusion; (4) clarification of whether the oil and gas lessee or easement holder is a CERCLA “owner” for liability purposes; and (5) clarification of the degree of inquiry required to assert the innocent purchaser defense. The remainder of this Article will analyze these issues in detail.

##### A. *Clarification of the RCRA Exemption As It Relates to CERCLA*

“Hazardous wastes” under RCRA are, by definition, “hazardous substances” under CERCLA.<sup>107</sup> Congress amended RCRA in 1980 to exclude several major categories of waste materials from regulation until the EPA could conduct special studies of the wastes to determine whether a stringent hazardous waste manage-

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105. See *More Support Probable in Senate for 1981 as Liability Cutoff Date*, *Smith Tells Group*, 26 *Env't Rep.* (BNA) No. 12, at 590, 590 (July 21, 1995) (quoting legislator as stating that, although “the insurance guys want ‘87,” the 1981 cutoff date “is the most salable”).

106. *Superfund Shutdown Is Looming, CMA Warns Congress*, 247 *Chemical Market- ing Rep.* (ASAP) No. 26, at 3 (June 26, 1995), available in LEXIS, News Library, ASAPII File.

107. 42 U.S.C. § 9601(14) (1988).

ment program under RCRA was needed.<sup>108</sup> This amendment, referred to as the Bevill Amendment, required a study of high-volume, low-toxicity wastes generated in the oil and gas and mining industries.<sup>109</sup>

After conducting studies, the EPA determined that certain oil and gas and mining wastes should be exempted from the hazardous waste management provisions of RCRA.<sup>110</sup> Cases dealing with exempt mining wastes were the first to raise the issue of whether an exempt RCRA waste could still be subject to CERCLA. In many of these cases, courts stated that a hazardous waste can be exempt under RCRA and still be regulated under CERCLA as a hazardous substance.<sup>111</sup> The United States Supreme court has not yet directly addressed this issue.

### 1. Mining Cases

The leading case on the relationship of the RCRA exemption to CERCLA is *Eagle-Picher Industries, Inc. v. EPA*,<sup>112</sup> in which the

108. See David M. Flannery & Robert E. Lannan, *Hazardous Waste—The Oil and Gas Exception*, 89 W. VA. L. REV. 1089, 1092–93 (1987) (discussing legislative history surrounding 1980 amendment, which effectively ended prior EPA proposals to regulate oil and gas wastes).

109. See 42 U.S.C. § 6982(m) (1988) (specifying considerations EPA should take into account when conducting study of oil and gas wastes); *id.* § 6921(b)(2) (suspending RCRA regulation of “drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil or natural gas” until completion of EPA study); see also David M. Flannery & Robert E. Lannan, *Hazardous Waste—The Oil and Gas Exception*, 89 W. VA. L. REV. 1089, 1089 (1987) (noting that exempt wastes under RCRA are generally high-volume, low-toxicity oil and gas wastes); Robert L. Glicksman, *Pollution of the Federal Lands III: Regulation of Solid and Hazardous Waste Management*, 13 STAN. ENVTL. L.J. 3, 43–44 (1994) (explaining that Bevill Amendment’s purpose was to limit RCRA’s impact on energy industry out of concern for achieving energy self-sufficiency).

110. See 53 Fed. Reg. 25,446, 25,447 (1988) (exempting oil and gas wastes from RCRA regulation); 51 Fed. Reg. 24,496, 24,496 (1986) (exempting mining wastes from RCRA regulation). The scope of the RCRA oil and gas waste exemption has been clarified several times, and extends through primary field operations. As such, a waste that is generated at the wellhead may be RCRA exempt, while that identical waste generated by a transmission pipeline would not be exempt. See 59 Fed. Reg. 38,536, 38,538 (1994) (broadening exemption to include recovered oil from wastewater treatment operations at actual refinery point, but continuing to regulate wastewater from refinery operations upstream of recovered oil systems that produce exempt wastewater); 58 Fed. Reg. 15,284, 15,286 (1993) (stating that crude oil production occurs at wellhead and, therefore, all wastes produced in transporting crude oil down pipelines are not exempt).

111. See *infra* notes 112-30 & accompanying text.

112. 759 F.2d 922 (D.C. Cir. 1985).

United States Court of Appeals for the District of Columbia Circuit considered exempt mining wastes.<sup>113</sup> The mining companies argued that the RCRA-exempt wastes were also exempt under CERCLA because the hazardous substance definition excludes RCRA wastes if their regulation has been suspended by Congress.<sup>114</sup> The EPA countered by asserting that mining wastes, although excluded by RCRA from the hazardous wastes definition, could still be classified as CERCLA hazardous substances if the wastes fell under any of the other subparts of the CERCLA definition, including: (1) hazardous substances listed under CERCLA; (2) hazardous substances or toxic pollutants under the Clean Water Act; (3) hazardous air pollutants under the Clean Air Act; or (4) imminently hazardous chemical substances under the Toxic Substances Control Act.<sup>115</sup> The court found that the mining wastes in question contained lead, copper, zinc, and arsenic,<sup>116</sup> and determined that these materials were hazardous substances under the plain meaning of CERCLA because they released listed CERCLA substances into the environment.<sup>117</sup>

Most courts follow *Eagle-Picher Industries, Inc.*,<sup>118</sup> which suggests that these courts would apply similar reasoning to oil and gas wastes because oil and gas wastes are similarly exempted under

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113. *Eagle-Picher Indus., Inc.*, 759 F.2d at 926.

114. *Id.* at 926–27. Section 9601(14)(C) of Title 42 of the United States Code provides in pertinent part:

The term “hazardous substance” means . . .

. . . .

(C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of [RCRA] . . . (but not including any waste the regulation of which under [RCRA] has been suspended by Act of Congress).

42 U.S.C. § 9601(14)(C) (1988).

115. *Eagle-Picher Indus., Inc.*, 759 F.2d at 927.

116. *Id.*

117. *See id.* at 928–30 (reviewing legislative history of hazardous substance definition to determine that mining wastes can be hazardous substances).

118. *E.g.*, *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 24 F.3d 1565, 1573 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 780 (1995); *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 673 (D. Idaho 1986); *see Idaho v. Hanna Mining Co.*, 699 F. Supp. 827, 833–34 (D. Idaho 1987) (relying on *Bunker Hill Co.*, which adopted *Eagle-Picher Industries, Inc.*’s analysis and conclusions), *aff’d*, 882 F.2d 392 (9th Cir. 1989); *United States v. Metate Asbestos Corp.*, 584 F. Supp. 1143, 1146–47 (D. Ariz. 1984) (using analysis similar to that used in *Eagle-Picher Industries, Inc.* in concluding that RCRA exemptions were not intended by Congress to apply to CERCLA’s definition of hazardous substance).

RCRA. However, in *United States v. Iron Mountain Mines, Inc.*,<sup>119</sup> the United States District Court for the Eastern District of California reviewed the legislative history and express language of CERCLA and concluded that if a waste is exempt under RCRA, it must also be exempt under CERCLA.<sup>120</sup> The *Iron Mountain Mines, Inc.* court dismissed the earlier *Eagle-Picher Industries, Inc.* decision as a misinterpretation of the statute.<sup>121</sup>

## 2. Oil and Gas Cases

There are fewer cases dealing with oil and gas wastes, but the analysis should be identical to that employed in cases dealing with mining wastes. In *Jastram v. Phillips Petroleum Co.*,<sup>122</sup> the United States District Court for the Eastern District of Louisiana considered the issue of whether the disposal of produced water<sup>123</sup> from oil and gas production can trigger CERCLA liability.<sup>124</sup> The court first determined that produced water was an exempt waste under RCRA.<sup>125</sup> Even so, the court noted that produced water could still trigger liability if it fell under CERCLA's definition of a hazardous substance.<sup>126</sup> The court found that produced water did not contain materials either specifically listed under CERCLA or regulated under other environmental statutes that cross-reference to CERCLA.<sup>127</sup> Therefore, the court decided that produced water was not a CERCLA hazardous substance.<sup>128</sup> In contrast, in *United States v. Royal N. Hardage*,<sup>129</sup> the United States District Court for the Western District of Oklahoma concluded that RCRA-exempt spent oil

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119. 812 F. Supp. 1528 (E.D. Cal. 1992).

120. *Iron Mountain Mines, Inc.*, 812 F. Supp. at 1540. The court made its decision based on CERCLA's legislative history and express statutory language. *Id.* at 1537-40.

121. *Id.* at 1539.

122. 844 F. Supp. 1139 (E.D. La. 1994).

123. Produced water, also known as "formation water" or "oil field brine," is water trapped in geological formations that is brought to the surface along with the oil and gas during drilling. PRODUCED WATER IN SENSITIVE COASTAL HABITATS 7 (U.S. Dep't of Interior ed., 1989). After removal of produced water from the oil or gas, the produced water is disposed of as waste. *Id.*

124. *Jastram*, 844 F. Supp. at 1140-41.

125. *Id.* at 1141.

126. *Id.* at 1142.

127. *Id.* at 1141.

128. See *Jastram*, 844 F. Supp. at 1141 (holding that defendants were not liable under CERCLA hazardous substance definition for cleanup of produced water).

129. No. CIV.A.86-1401-W, slip op. (W.D. Okla. Apr. 15, 1991).

and gas drilling mud that contained asbestos, sodium hydroxide, and lead residue was not excluded from CERCLA because it contained separately “listed” CERCLA hazardous substances or otherwise fell under the CERCLA definition of hazardous substance.<sup>130</sup>

### 3. RCRA Exemption Reauthorization Issues

CERCLA hazardous substances also include those materials defined in the Clean Air Act as “hazardous air pollutants.”<sup>131</sup> In 1990, Congress amended the Clean Air Act to increase the number of hazardous air pollutants from 7 to 189, thereby increasing the number of CERCLA hazardous substances.<sup>132</sup> One of the new hazardous air pollutants is benzene,<sup>133</sup> a relatively common element in oil and gas wastes.<sup>134</sup>

Further, as previously discussed, the CERCLA definition of a “release” is very broad, and no quantitative limits exist to establish when a release of a hazardous substance has occurred. The broad definition of release, along with the increase in the number of hazardous substances, makes it more likely that the EPA or the courts might classify oil and gas wastes as hazardous substances if RCRA-exempt wastes become subject to CERCLA regulation.

Unfortunately, CERCLA regulation would circumvent the EPA’s purpose in exempting these high-volume, low-toxicity wastes from RCRA regulation. For example, it is not uncommon for RCRA-exempt materials, such as basic sediment from oil production, to be disposed of at the well site or a site other than a reclamation plant as nonhazardous wastes in accordance with state regulations.<sup>135</sup> Under decisions like *Eagle-Picher Industries, Inc.*, such RCRA-exempt wastes would be regulated under CERCLA.

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130. *Royal N. Hardage*, No. CIV.A.86-1401-W, slip op. at 12.

131. 42 U.S.C. § 9601(14)(E) (1988).

132. Clean Air Act Amendments of 1990, 42 U.S.C. § 7412(b)(1) (Supp. V 1993).

133. *See id.* (listing benzene as hazardous air pollutant).

134. *See* Michael M. Gibson & David P. Young, *Oil and Gas Exemptions Under RCRA and CERCLA: Are They Still “Safe Harbors” Eleven Years Later?*, 32 S. TEX. L. REV. 361, 391 (1991) (noting that benzene is “naturally occurring component of petroleum”).

135. *See* 16 TEX. ADMIN. CODE § 3.57 (West 1995) (Tex. R.R. Comm’n, tank bottoms) (permitting tank bottoms, which are “mixture of crude oil or lease condensate, water and other substances” concentrated at bottom of storage tanks and pipeline storage tanks, to be disposed of at lease site or at other facilities).

Accordingly, these high volume, low toxicity wastes would have to be managed as RCRA hazardous wastes to avoid liability, even though the RCRA waste management regulations clearly treat these wastes as nonhazardous. This type of regulation contravenes the EPA's determination that existing state and federal regulatory programs for nonhazardous wastes are generally adequate for controlling oil, gas, and geothermal wastes.<sup>136</sup> For the oil and gas industry, a legislative clarification that RCRA-exempt oil and gas wastes are also exempt from CERCLA is extremely important.<sup>137</sup>

*B. Retention of the Liability Scheme for Remediation of CERCLA-Defined "Pollutants and Contaminants"*

Under CERCLA, PRPs can be held responsible for the cost of cleaning up a facility at which a release or threatened release of a hazardous substance has occurred.<sup>138</sup> The government and PRPs can initiate cost recovery only for the cleanup of CERCLA-defined hazardous substances—no recovery is allowed for the cleanup of CERCLA pollutants or contaminants.<sup>139</sup> CERCLA defines a "pollutant or contaminant" as any substance that, if released, "may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions or physical deformations."<sup>140</sup> However, CERCLA does not in-

136. 53 Fed. Reg. 25,446, 25,447 (1988).

137. Texas Representative Jack Fields expressed an interest in ensuring that this problem is addressed in any CERCLA reauthorization proposal. *See* Letter from Representative Jack Fields, Chair, Subcommittee on Telecommunications and Finance, to Representative Michael Oxley, Chair, Subcommittee on Commerce, Trade, and Hazardous Materials (June 27, 1995) (stating that scope of RCRA oil and gas exemption "may be easily clarified in the upcoming reauthorization process") (on file with the *St. Mary's Law Journal*).

138. 42 U.S.C. § 9607(a)(4) (1988).

139. *See Apache Powder Co. v. United States*, 968 F.2d 66, 76 (D.C. Cir. 1992) (finding that EPA could not recover removal costs because nitrates are, at most, CERCLA pollutants or contaminants, not CERCLA hazardous substances).

140. Section 9601(33) of Title 42 of the United States Code provides:

The term "pollutant or contaminant" shall include, but not be limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring; except that the term "pollutant or contaminant" shall not include pe-

clude petroleum and natural gas, liquefied natural gas, or synthetic gas of pipeline quality in the definition of a "pollutant or contaminant."<sup>141</sup> The 103rd Congress proposed legislation to amend CERCLA by inserting the phrase "pollutant or contaminant" after the term "hazardous substance" throughout the statute.<sup>142</sup> This proposed amendment would allow the government or private parties to bring actions against PRPs to recover costs expended for the cleanup of CERCLA pollutants or contaminants.

Importantly, petroleum products and crude oil are not CERCLA pollutants or contaminants; however, produced water is a significant oil and gas waste that would be classified as a CERCLA pollutant or contaminant if not specially exempted. Produced water is waste water generated from drilling operations that can be heavily mineralized.<sup>143</sup> On the average, the oil and gas industry generates two to three barrels of produced water for every barrel of oil.<sup>144</sup>

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troleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of paragraph (14) and shall not include natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas).

42 U.S.C. § 9601(33) (1988).

141. *Id.*

142. H.R. 3800, 103d Cong., 2d Sess. (1994).

143. *Coastal Oil, Gas Operations Would Cut Discharges of Pollutants Under Proposal*, 25 Env't Rep. (BNA) No. 40, at 1904, 1904-05 (Feb. 10, 1995).

Produced water may contain the following contaminant levels:

*CONCENTRATIONS IN PARTS PER MILLION ("ppm")*

CONTAMINANT	SEAWATER	DRINKING WATER	PRODUCED WATER
Sodium	10,600	-	12,000 to 150,000
Potassium	400	-	0 to 4,000
Calcium	400	-	1,000 to 120,000
Magnesium	1,300	-	500 to 25,000
Chlorides	19,000	-	20,000 to 150,000
Bromides	65	-	50 to 5,000
Iodine	0.05	-	1 to 300
Sulfate	2,700	250	0 to 3,600
Carbonate	0	-	0 to 1,200
Total Dissolved Solids	34,500	500	50,000

See 40 C.F.R. § 143.3 (1994) (establishing minimum allowable levels of contaminants in drinking water); GEORGE W. REID ET AL., U.S. ENVTL. PROTECTION AGENCY, BRINE DISPOSAL TREATMENT PRACTICES RELATING TO THE OIL AND GAS INDUSTRY 1 (1974) (detailing contaminant levels of seawater and produced water).

144. GEORGE W. REID ET AL., U.S. ENVTL. PROTECTION AGENCY, BRINE DISPOSAL TREATMENT PRACTICES RELATING TO THE OIL AND GAS INDUSTRY 1 (1974). The amount



Concentrations of minerals vary widely depending on the field and formation,<sup>145</sup> but it is not unusual for produced water to contain many contaminants, especially salt.<sup>146</sup> Because its salinity can make it toxic to plant and aquatic life,<sup>147</sup> produced water could be classified as a CERCLA pollutant or contaminant.<sup>148</sup> Lands or groundwater damaged by salt water disposed of in a legal manner during the early years of the industry are still commonly encountered.<sup>149</sup> Additionally, owners or operators periodically clean out

of produced water generated by the oil and gas industry varies, with new production from some reservoirs generating very little produced water, and older fields with declining reservoirs generating a lot of produced water. PRODUCED WATER IN SENSITIVE COASTAL HABITATS 7 (U.S. Dep't of Interior ed., 1989).

145. See PRODUCED WATER IN SENSITIVE COASTAL HABITATS 38, 41 (U.S. Dep't of Interior ed., 1989) (discussing factors that may affect composition of produced water from various fields, including efficiency and consistency of operation of oil-water separators, addition of oil and gas waste to produced water during production, and production age of field).

146. See GEORGE W. REID ET AL., U.S. ENVTL. PROTECTION AGENCY, BRINE DISPOSAL TREATMENT PRACTICES RELATING TO THE OIL AND GAS INDUSTRY 1 (1974) (stating that, although some produced water is potable, most produced water is highly saline). Produced water is water trapped in permeable sedimentary rock that is brought to surface during oil and gas drilling. PRODUCED WATER IN SENSITIVE COASTAL HABITATS 7 (U.S. Dep't of Interior ed., 1989). Produced water is usually very salty because the trapped water may be partially evaporated seawater or because salt diapirs may have leached into the trapped water. *Id.* Produced water also contains other contaminants. See GEORGE W. REID ET AL., U.S. ENVTL. PROTECTION AGENCY, BRINE DISPOSAL TREATMENT PRACTICES RELATING TO THE OIL AND GAS INDUSTRY 6 (1974) (noting that produced water may contain oil, dissolved organics, and dissolved gases); PRODUCED WATER IN SENSITIVE COASTAL HABITATS 7 (U.S. Dep't of Interior ed., 1989) (explaining that produced water may contain trace metals, sulfide, elemental sulfur, petrochemical hydrocarbons, and partially oxidized organics).

147. See GEORGE W. REID ET AL., U.S. ENVTL. PROTECTION AGENCY, BRINE DISPOSAL TREATMENT PRACTICES RELATING TO THE OIL AND GAS INDUSTRY 5 (1974) (noting adverse effects of produced water on plants and animals). Some produced water is so salty that 1 barrel could contaminate 700 barrels of fresh water, causing the fresh water to exceed government standards for salt content in drinking water. *Id.* at 6. Obviously, this water is highly toxic to livestock and wildlife, especially when released into surface waters or surface salt water disposal pits, which was the practice before regulatory restrictions. *Id.*

148. See 42 U.S.C. § 9601(33) (1988) (defining "pollutant or contaminant" as any substance that if released into environment will cause "death, disease, behavioral abnormalities, cancer, genetic mutation physiological malfunctions . . . or physical deformations").

149. See *W.H. Avitts v. Amoco Prod. Co.*, [1994] 24 *Envtl. L. Rep.* (Envtl. L. Inst.) 20,712, 20,712-13 (S.D. Tex. Jan. 4, 1994) (allowing plaintiffs to recover in tort for damage to property used as oil field since 1934 when some of damage was caused by disposal of salt water into open pits in earlier days); GEORGE W. REID ET AL., U.S. ENVTL. PROTECTION AGENCY, BRINE DISPOSAL TREATMENT PRACTICES RELATING TO THE OIL AND GAS INDUSTRY 5 (1974) (noting that before 1935, oil and gas producers could dispose of produced water unencumbered by regulation); *cf.* Michael M. Gibson & David P. Young, *Oil and*

basic sediment, sludge, sand and scale from production tanks. Historically, most owners or operators, in accordance with existing regulations, buried these materials in on-site pits or spread the materials on the sites.<sup>150</sup> In these instances, if produced water is defined as a CERCLA pollutant or contaminant, any damage caused by its legal disposal could create liability for the current owner or operator under Congress's proposal to expand CERCLA liability to pollutants or contaminants.

### 1. Case Law Pertaining to Liability for CERCLA Pollutants and Contaminants

In *Jastram v. Phillips Petroleum Co.*,<sup>151</sup> the United States District Court for the Eastern District of Louisiana addressed the issue of whether the disposal of produced water from oil and gas production can trigger CERCLA liability.<sup>152</sup> The court first considered whether produced water was a CERCLA hazardous substance.<sup>153</sup> As previously noted, a CERCLA hazardous substance is either listed under CERCLA or defined according to other environmental statutes, such as RCRA.<sup>154</sup> The *Jastram* court found that produced water was not a hazardous substance under CERCLA because it contained neither a substance listed by CERCLA as hazardous nor a substance that, by cross reference to other statutes, is defined as a hazardous substance.<sup>155</sup> As such, a private cost-recovery action under CERCLA was not appropriate.<sup>156</sup> Importantly, the *Jastram* court refused to extend liability to private

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*Gas Exemptions Under RCRA and CERCLA: Are They Still "Safe Harbors" Eleven Years Later?*, 32 S. TEX. L. REV. 361, 384 (1991) (noting that state and federal regulators just recently began to recognize widespread radium contamination of land caused by oil and gas drilling).

150. See Christopher G. Arth, Comment, *Crude Oil Storage Tank Bottoms—Friend or Foe?: Tightening the Petroleum Exclusion of CERCLA to Exclude Crude Oil Tank Bottoms from Exemption as Hazardous Waste*: *Cose v. Getty Oil Co.*, 4 F.3d 700 (9th Cir. 1993), 33 WASHBURN L.J. 897, 899 (1994) (describing past disposal practice at CERCLA site, which involved spreading crude oil collected in pipeline sump onto on-site gravel pit).

151. 844 F. Supp. 1139 (E.D. La. 1994).

152. *Jastram*, 844 F. Supp. at 1140–41.

153. *Id.*

154. *Id.* at 1140–41 n.2 (citing 42 U.S.C.A. § 9601(14)).

155. *Id.* at 1140. The court noted that although produced water contains high levels of chloride, this substance is not a hazardous substance by CERCLA definition. *Id.* at 1140–41 & n.3.

156. *Jastram*, 844 F. Supp. at 1141.

parties for the cleanup of a pollutant or contaminant.<sup>157</sup> The court stated:

[I]n light of the clear statutory language of CERCLA, the court refrains from legislating new liability provisions for private parties. CERCLA § 9607(a) imposes liability on private parties only when 'hazardous substances' are involved. 'Hazardous substances,' as defined by § 9601(14), do not include brine or salt water. If Congress wanted to include 'pollutants or contaminants' in § 9607(a), it very well could have. . . .<sup>158</sup>

## 2. Liability Scheme Reauthorization Issues

The definition of a CERCLA pollutant or contaminant can potentially encompass many substances, including produced water. The produced water disposal practices that were common in the past leave many regular landowners, in addition to oil and gas interests, in possession of sites damaged by produced water. Because of this potential for widespread liability, Congress should strongly oppose any change in the liability scheme for the remediation of CERCLA pollutants or contaminants.

### C. Retention of the CERCLA Petroleum Exclusion

As previously stated, petroleum and natural gas are excluded from the definition of a CERCLA hazardous substance.<sup>159</sup> Early EPA opinions suggested that the petroleum exclusion should apply to a petroleum product even if that product contained hazardous substances, provided that the hazardous substances were an inherent part of the product.<sup>160</sup> For example, the EPA took the position

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157. *Id.*

158. *Id.*

159. 42 U.S.C. § 9601(14)(F) (1988).

160. In 1981, the EPA issued a policy memo which stated that the following substances fall under CERCLA's petroleum exclusion:

- (1) crude oil and crude oil fractions;
- (2) hazardous substances indigenous to petroleum such as benzene;
- (3) indigenous, refinery-added hazardous substances which are normally mixed with or added to crude oil or crude oil fractions during the refining process.

Michael M. Gibson & David P. Young, *Oil and Gas Exemptions Under RCRA and CERCLA: Are They Still "Safe Harbors" Eleven Years Later?*, 32 S. TEX. L. REV. 361, 388 (1991).

that diesel fuel was exempt from CERCLA even though it contained hazardous substances such as benzene.<sup>161</sup>

The courts are split on the scope of the petroleum exclusion. For instance, in *Wilshire Westwood Associates v. Atlantic Richfield Corp.*,<sup>162</sup> the United States Court of Appeals for the Ninth Circuit held that the petroleum exclusion applied to leaking underground storage sites, even though the released gasoline contained listed hazardous substances such as benzene, toluene, xylene, ethyl benzene, and lead.<sup>163</sup> Although some of the hazardous substance components were added during the refining process, the court held that the exemption applied.<sup>164</sup> Conversely, many courts have found that various oil and gas products are not covered by CERCLA's petroleum exclusion and are subject to CERCLA.<sup>165</sup> For example, in *United States v. Royal N. Hardage*,<sup>166</sup> the United States District Court for the Western District of Oklahoma found that spent drilling mud containing asbestos, sodium hydroxide, and lead residue from pipe dope in a reserve pit was not included in the CERCLA petroleum exclusion.<sup>167</sup>

161. See *Equitable Life Assurance Soc'y v. Greyhound Corp.*, No. CIV.A.88-9857, 1990 WL 6143, at \*1 (E.D. Pa. Jan. 26, 1990) (following EPA's interpretation that diesel is excluded from CERCLA regulation under petroleum exclusion); *City of Philadelphia v. Stepan Chem. Co.*, Nos. CIV.A.81-0851, CIV.A.83-5493, 1988 WL 136530, at \*1-2 (E.D. Pa. Dec. 19, 1988) (discussing EPA memorandum that excluded from CERCLA regulation diesel and its inherent hazardous substance constituents, such as benzene and toluene).

162. 881 F.2d 801 (9th Cir. 1989).

163. *Wilshire Westwood Assocs.*, 881 F.2d at 803-04 (finding that "[a]ny construction ignores the plain language of the statute and renders the petroleum exclusion a nullity").

164. *Id.* at 804.

165. See, e.g., *Cose v. Getty Oil Co.*, 4 F.3d 700, 704 (9th Cir. 1993) (holding that crude oil tank bottoms that were taken from oil storage tanks and disposed of on lands near pumping station were subject to CERCLA because they were not "petroleum," but rather suspended solids in crude oil en route to refinery); *United States v. Western Processing Co., Inc.*, 761 F. Supp. 713, 724 (W.D. Wash. 1991) (holding that waste oil that absorbs chromium from deposits scraped from underground storage tank walls during cleaning is subject to CERCLA); *New York v. Exxon Corp.*, 744 F. Supp. 474, 489-90 (S.D.N.Y. 1990) (holding that waste oil in which concentration of hazardous substances has increased during normal use is subject to CERCLA); *Washington v. Time Oil Co.*, 687 F. Supp. 529, 532-33 (W.D. Wash. 1988) (holding that hazardous substances not normally added in refining may make substance subject to CERCLA, even though substance being refined is petroleum).

166. No. CIV.A.86-1401-W, slip op. (W.D. Okla. Apr. 15, 1991).

167. *Royal N. Hardage*, No. CIV.A.86-1401-W, slip op. at 10. The court reasoned that, even assuming contaminated drilling mud qualifies as petroleum under CERCLA's petroleum exclusion, it is still regulated because it is "specially listed or designated" as a hazardous substance by a different part of the statute. *Id.* at 10-11; see 42 U.S.C.

## 1. Release Reporting

From a practical standpoint, the question of whether a material is subject to the CERCLA petroleum exclusion is probably encountered most often in connection with release reporting. With regard to release reporting, CERCLA provides:

Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility in quantities equal to or greater than [the reportable quantity of that substance], . . . immediately notify the National Response Center . . . of such release. . . .<sup>168</sup>

The EPA has established a reportable quantity (RQ) for most CERCLA hazardous substances.<sup>169</sup> The RQ is based on a twenty-four-hour release period,<sup>170</sup> and in cases in which the EPA has not established an RQ, CERCLA provides that it shall be one pound.<sup>171</sup>

Since petroleum, including crude oil, natural gas, natural gas liquids, and synthetic gas usable for fuel, is specifically excluded from the definition of a "hazardous substance," CERCLA does not currently require reporting of spills of these materials.<sup>172</sup> If the petroleum exclusion is revised or eliminated, spills of materials commonly found in oil and gas wastes may need to be reported under the release reporting provisions of CERCLA.<sup>173</sup>

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§ 9601(14) (1988) (providing that "term 'hazardous substance' . . . does not include petroleum . . . or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance" elsewhere in statute).

168. 42 U.S.C. § 9603(a) (1988).

169. *See* 40 C.F.R. § 302.4(a) (1994) (designating list of hazardous substances as set out in Table 302.4).

170. *Id.* § 302.6(a).

171. *See* 42 U.S.C. § 9602(b) (1988) (stating that, unless superseded by regulations establishing RQ for any particular hazardous substance, one pound shall be deemed quantity requiring notification).

172. *Id.* § 9601(14)(F).

173. Common materials that may need to be reported if spilled or released include:

SUBSTANCE	CERCLA REPORTABLE QUANTITY ("RQ")
Hydrogen Sulfide	100 pounds
Benzene	10 pounds
Toluene	1000 pounds
Xylene	1000 pounds
Ethyl Benzene	1000 pounds

## 2. Petroleum Exclusion Reauthorization Issues

Because changes in the CERCLA petroleum exclusion could trigger an indirect impact on release reporting, this author recommends that the petroleum exclusion remain unchanged. Moreover, to assist industry in assessing potential liabilities, Congress should clarify the extent of the petroleum exclusion. This legislation should exclude from CERCLA liability all materials produced or indigenous to crude oil or natural gas, such as basic sediment and water.

### D. *Clarification of Who Is an "Owner" for CERCLA Liability Purposes*

Oil and gas interest holders are often uncertain about the extent of their liability under CERCLA because the definition of "owner" is sometimes itself uncertain. For example, an "owner" of a facility or site is defined as a PRP who is jointly and severally responsible for any response costs expended to remediate hazardous substances at a particular facility or site.<sup>174</sup> One type of owner is, "in the case of an onshore facility or an offshore facility, any person owning or operating such facility."<sup>175</sup> The circular nature of this wording obviously obscures any resolute definition, and led one court to comment that this definition "is a bit like defining 'green' as 'green.'"<sup>176</sup>

#### 1. Pipeline Easements and Rights Of Way

An interesting issue arises as to whether pipeline right-of-way holders, easement holders, or oil and gas lessees are owners under CERCLA. This issue becomes especially important because of the possibility that more oil and gas wastes will be reclassified as CERCLA hazardous substances. Several recent decisions address this

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40 C.F.R. § 302.4 (1994); *see also* PRODUCED WATER IN SENSITIVE COASTAL HABITATS 45, 49 (U.S. Dep't of Interior ed., 1989) (listing some of chemical contents of produced water, including benzene, toluene, ethylbenzene, xylene, naphthalene, and many others).

174. *See* 42 U.S.C. § 9607(a)(2) (1988) (providing that liability extends to any person who at time of disposal of hazardous substance owned or operated such facility).

175. *Id.* § 9601(20)(A)(ii).

176. *See* Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364, 1368 (9th Cir. 1994) (commenting on CERCLA "owner" definition).

issue, but there are no clear answers to these questions in most jurisdictions.

In *Long Beach Unified School District v. Dorothy B. Godwin California Living Trust*,<sup>177</sup> two companies had pipeline easements across land that had been contaminated by a waste pit operated by an unrelated entity.<sup>178</sup> The new property owner filed a cost-recovery action against the easement holders, claiming that they were “owners” under CERCLA.<sup>179</sup> Although the two companies had pipelines running across the property, the property owner did not allege that the companies in any way contributed to the contamination.<sup>180</sup> The United States Court of Appeals for the Ninth Circuit noted that liability, if any, would have to be predicated on the classification of the pipeline easement holders as owners because they did not fall under the definition of an operator.<sup>181</sup> The court recognized that easement holders are not regarded as owners at common-law; rather, they merely have the right to use lands owned by others for a specific purpose.<sup>182</sup> Accordingly, the court held that pipeline easement holders are not owners under CERCLA.<sup>183</sup>

Similarly, in *Grand Trunk Western Railroad Co. v. Acme Belt Recoating, Inc.*,<sup>184</sup> a company had a surface easement granting it access to a loading dock on contaminated land owned by a third party.<sup>185</sup> The issue in *Grand Trunk Western Railroad Co.* was

177. 32 F.3d 1364 (9th Cir. 1994).

178. *Long Beach Unified Sch. Dist.*, 32 F.3d at 1365–66.

179. *Id.* at 1366.

180. *Id.* Leaks from underground gasoline storage tanks and natural gas distribution systems tend to migrate along underground pipelines because the soils in the pipeline trench are usually more permeable than undisturbed soil. In this case, there was no argument that the toxic materials migrated or were affected by the pipeline right of way. *Id.*

181. *See id.* at 1367 (discussing distinction between owner and operator). The court found that the school district’s assertion that the defendants’ pipelines crossed the waste pit at issue, thus putting defendants “‘in a position to prevent’ the contamination,” was insufficient to render the defendants operators under CERCLA. *Id.*

182. *Long Beach Unified Sch. Dist.*, 32 F.3d at 1368–69. Commentators have noted that because pipeline easement holders do not have a right to exclusive possession of the land and only have a limited privilege to its use, their interest is distinguishable from an ownership interest. *See* Melissa A. McGonigal, Comment, *Extended Liability Under CERCLA: Easement Holders and the Scope of Control*, 87 Nw. U. L. REV. 992, 995 (1992) (advocating presumption that easement holders are not “owners” and should not be held liable under CERCLA).

183. *Long Beach Unified Sch. Dist.*, 32 F.3d at 1370.

184. 859 F. Supp. 1125 (W.D. Mich. 1994).

185. *Grand Trunk W. R.R.*, 859 F. Supp. at 1128-29.

whether the company, because of its easement, would be liable for CERCLA cleanup costs as an owner or operator, even if it neither contributed to the release of hazardous substances at the loading dock nor had authority to control the operations at the site.<sup>186</sup> The United States District Court for the Western District of Michigan held that easement holders are not owners under CERCLA because they do not own property in the traditional sense of being able to exercise dominion and control over the property.<sup>187</sup> The court further held that the easement holder in this case could not be held liable as an operator.<sup>188</sup> Although the easement holder may have had some rights to the property, the court concluded that the easement holder was not an operator because it had no control over the polluting company's decision regarding hazardous substance storage and disposal.<sup>189</sup>

## 2. Oil and Gas Leases

Whether holders of oil and gas leases may be considered owners under CERCLA turns on how the courts classify oil and gas leasehold interests. One treatise suggests the following possibilities:

A profit a prendre, a corporeal hereditament, an incorporeal hereditament, an estate in land, not an estate in land, an estate in oil and gas, not an estate in oil and gas, a servitude, a chattel real, real estate, interest in land, not an interest in land, personal property, a freehold, a tenancy at will, property interest, and the relation of landlord and tenant.<sup>190</sup>

In most states, oil and gas leases are classified as incorporeal hereditaments or nonpossessory interests in land.<sup>191</sup> As such, oil and gas lessees in these states may argue that oil and gas leases are like easements and, therefore, the lessees should not be considered owners under CERCLA. Even within a given state, oil and gas leases may be classified in more than one manner. For example, in Oklahoma, oil and gas leases are considered personal property in relation to judgment liens, ad valorem taxes, and sales by adminis-

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186. *Id.* at 1129.

187. *Id.* at 1131. In reaching this conclusion, the court relied on the Ninth Circuit's *Long Beach Unified School District* ruling. *Id.*

188. *Id.* at 1133.

189. *Grand Trunk W. R.R.*, 859 F. Supp. at 1133.

190. W.L. SUMMERS, *THE LAW OF OIL AND GAS* § 152, at 371-74 (2d ed. 1954).

191. RICHARD W. HEMINGWAY, *LAW OF OIL & GAS* § 6.1, at 240 (2d ed. 1983).



trators of estates, but are considered nonpossessory interests in real property in relation to the homestead, conveyancing and recording, and the statute of frauds.<sup>192</sup> In Texas, courts have adopted the minority view that oil and gas leases are determinable fee interests, vesting lessees with title to the oil and gas in place.<sup>193</sup> One Texas court has described the oil and gas lease as “a sale of an interest in land.”<sup>194</sup> In jurisdictions adopting the Texas view, the courts may be more likely to find that oil and gas lessees are owners under CERCLA.

An oil and gas lease is both a contract and a conveyance in which the possessory ownership attributes—the right to explore, produce, and use the surface—have been conveyed to the lessees.<sup>195</sup> Like holders of pipeline easements, lessees may argue that they are not owners, but merely have the right to use the land of another for a specified purpose. Presently, no published cases address the issue of whether oil and gas lessees are owners under CERCLA.

### 3. Minerals

Even when the surface estate has been severed, most jurisdictions recognize the mineral estate as a fee simple absolute interest in the real property.<sup>196</sup> Accordingly, mineral owners have the right to use the surface to explore for oil and produce the underlying minerals.<sup>197</sup> As holders of fee interests in real property, mineral owners in these jurisdictions may be considered owners under CERCLA. Again, no cases address the issue of whether mineral owners are owners within the CERCLA definition.

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192. *Continental Supply Co. v. Marshall*, 152 F.2d 300, 305–06 (10th Cir. 1945), *cert. denied*, 327 U.S. 803 (1946).

193. *See Cherokee Water Co. v. Forderhouse*, 641 S.W.2d 522, 525 (Tex. 1982) (noting that oil and gas leases in Texas do not create same interest as that created under leases between landlords and tenants). Mississippi and New Mexico have also adopted this view. RICHARD W. HEMINGWAY, *LAW OF OIL & GAS* § 6.1, at 244 n.32 (2d ed. 1983).

194. *See Avis v. First Nat'l Bank*, 174 S.W.2d 255, 258 (Tex. 1943) (declaring rule of construction for sales of oil and gas leases).

195. EUGENE O. KUNTZ ET AL., *OIL AND GAS LAW* 107 (1986).

196. *See* JOAN BURK, *PETROLEUM LANDS AND LEASING* 14 (1983) (stating that mineral rights are generally considered real property that owner may “grant, sell, or convey in part or in whole”).

197. RICHARD W. HEMINGWAY, *LAW OF OIL & GAS* § 1.3, at 24 (2d ed. 1983).

#### 4. "Owner" Definition Reauthorization Issues

The EPA has refused to issue guidelines on the question of whether easement holders should be considered owners under CERCLA,<sup>198</sup> but the relatively limited case law suggests that easement holders are not PRPs under CERCLA.<sup>199</sup> Moreover, because the courts' classifications of oil and gas leases vary widely, there is a danger that, without legislative clarification, courts will reach quite different conclusions on whether oil and gas lessees can be owners under CERCLA. These varying conclusions would bring uncertainty and inconsistency into the law. Mineral interests, especially those severed from the surface estate, also raise questions regarding who is an owner or operator under CERCLA. Legislative clarification is the only way to ensure certainty for these various interest holders.

#### E. *Clarification of the Degree of Inquiry Required to Assert the Innocent Purchaser Defense*

CERCLA provides an affirmative defense to liability for any person who can establish by a preponderance of the evidence that the release was caused solely by an act or omission of a third party who is not an agent or employee of the defendant, and who has no contractual relationship with the defendant.<sup>200</sup> Because a contractual relationship can be created under CERCLA by deed or other instrument of conveyance, this third-party defense is not available to a purchaser in the typical real estate or oil and gas transaction.<sup>201</sup> However, Congress amended CERCLA in 1986 to add certain exceptions to the definition of a contractual relationship; therefore, a purchaser can now use the innocent purchaser defense even though a contractual relationship exists.<sup>202</sup>

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198. See Melissa A. McGonigal, Comment, *Extended Liability Under CERCLA: Easement Holders and the Scope of Control*, 87 Nw. U. L. Rev. 992, 1033 (1992) (contending that EPA's refusal to issue regulations clarifying easement holders' liability leaves question open to be decided by courts on individual basis, thus leading to unpredictability in CERCLA law).

199. See *supra* notes 177-89 and accompanying text.

200. 42 U.S.C. § 9607(b)(3) (1988).

201. See *id.* § 9601(35) (stating that "contractual relationship" includes land contracts, deeds, or other instruments transferring title or possession).

202. See *id.* § 9601(35)(A), (B) (noting exceptions to liability in cases involving contractual relationship, provided certain conditions are met).

Under the innocent purchaser defense, purchasers are not liable for hazardous substances placed on the property before they acquired title if they: (1) acquired the facility not knowing or having reason to know that any hazardous substance was disposed of or released on the property; or (2) acquired the property by inheritance or bequest.<sup>203</sup> Additionally, the purchasers must show that they exercised due care with regard to the hazardous substance, and took precautions against acts of third parties.<sup>204</sup>

In order to assert this defense, purchasers must show that they did not have reason to know of the existence of hazardous substances on the property and that they undertook "all appropriate inquiry" into the previous ownership and use of the property.<sup>205</sup> No specific definition exists, but "all appropriate inquiry" should take into account: (1) any specialized knowledge or experience on the part of the defendant; (2) the relationship of the purchase price to the value of the property if uncontaminated; (3) commonly known information about the property; and (4) the ability to detect contamination by appropriate inspection.<sup>206</sup> The legislative history of the 1986 amendments indicates that the standard of "all appropriate inquiry" was intended to evolve, with new, higher standards replacing older ones as public awareness of the risks of hazardous materials grows.<sup>207</sup>

The requirement that innocent purchasers make "all appropriate inquiry" to utilize the defense is a major reason why purchasers conduct environmental audits prior to acquiring property. In an attempt to clarify the conflicting case law and establish what inquiry satisfies CERCLA, the American Society of Testing Materials (ASTM) created a screening document to protect purchasers from CERCLA liability.<sup>208</sup> Whether the ASTM standards will be

203. *Id.* § 9601(35)(A)(i), (iii).

204. 42 U.S.C. § 9607(b)(3) (1988).

205. *Id.* § 9601(35)(B).

206. *See id.* (listing factors courts should consider when determining whether defendant undertook all appropriate inquiry).

207. *See Hemingway Transp., Inc. v. Juniper Dev. Group (In re Hemingway Transp., Inc.)*, 174 B.R. 148, 166 (Bankr. D. Mass. 1994) (reviewing legislative history and concluding that Congress intended standard for all appropriate inquiry to be flexible and evolve).

208. *See Janet S. Kole, Superfund and Risk Management for Owners of Real Estate*, RISK MANAGEMENT, Nov. 1993, at 30, 40 (noting that ASTM released screening document and proposed standard for performing Phase I environmental site assessments). Many lenders, hoping to avoid CERCLA liability, perform an environmental screen for smaller

adopted as the norm or accepted by the courts as the standard for “all appropriate inquiry” is unclear.<sup>209</sup>

### 1. Case Law Regarding the Innocent Purchaser Defense

The courts have been unpredictable in applying the CERCLA innocent purchaser defense, many times relying on the specific facts involved to determine the application of this defense. Additionally, both the courts and Congress have recognized that the appropriate standard of inquiry needed to assert the defense will change over time.<sup>210</sup>

In *BCW Associates, Ltd. v. Occidental Chemical Corp.*,<sup>211</sup> both the buyer and its lessee had engineering consulting firms prepare independent reports prior to the purchase.<sup>212</sup> In these reports, the consultants concluded that there were no environmental problems.<sup>213</sup> The United States District Court for the Eastern District of Pennsylvania, however, found that the buyer and its lessee neither exercised due care nor took adequate precautions.<sup>214</sup> The court based its determination on the nature of the lessee’s activities, which caused the contaminated dust to “rain down” from structures on the property.<sup>215</sup> *BCW Associates, Ltd.* has been criticized by at least one commentator who had difficulty imagining

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transactions, which involves asking a “bare minimum” of pertinent questions about the property. *Id.*

209. *See id.* (noting that “it will be interesting to see how the courts . . . handle these ASTM documents”). Because of the courts’ changing requirements for the inquiry needed to assert the innocent purchaser defense, and their unpredictable case-by-case application of the statutory provisions, the ASTM standards may not be adopted as the universal standard for due diligence. *See* R. Patrick Quinn, *All Appropriate Inquiry & CERCLA’s Innocent Purchaser Defense: The Need for a Legislative Standard*, 5 HOFSTRA PROP. L.J. 65, 98–99 (1992) (pointing out that because ASTM standards lack legislative or regulatory authority, standard for due diligence will lack uniformity and continue to rise as cautious purchasers and lenders attempt to avoid CERCLA liability).

210. *See Hemingway Transp., Inc.*, 174 B.R. at 166–68 (noting that legislative history indicates that standard of inquiry was intended to evolve over time based on case-by-case basis, and reviewing previous court decisions to conclude that appropriate standard has evolved).

211. No. CIV.A.86-5947, 1988 WL 102641 (E.D. Pa. Sept. 29, 1988).

212. *BCW Assocs., Ltd.*, 1988 WL 102641, at \*2.

213. *Id.*

214. *Id.* at \*17-18.

215. *Id.* at \*3.

what more the buyer and the lessee could have done to avoid liability.<sup>216</sup>

In *CPC International, Inc. v. Aerojet-General Corp.*,<sup>217</sup> the United States District Court for the Western District of Michigan found that the innocent purchaser defense did not apply in a case involving a buyer of a closed chemical manufacturing plant who knew at the time of the purchase that the facility was contaminated.<sup>218</sup> Although the purchaser did not know the true extent of the contamination, the court pointed out that the buyer had aggravated the contamination.<sup>219</sup>

In *United States v. Serafini*,<sup>220</sup> the government sued an owner and its partners for CERCLA response costs incurred for the cleanup of a site seventeen years after its purchase.<sup>221</sup> When acquired, the property was littered with over 1,000 drums containing hazardous substances.<sup>222</sup> Prior to the purchase, the buyer neither visually inspected nor inquired into the past uses of the property, but merely examined maps of the property.<sup>223</sup> The government moved for summary judgment, arguing that the failure to conduct an on-site inspection established that the buyer did not qualify as an innocent purchaser as a matter of law.<sup>224</sup> The United States District Court for the Middle District of Pennsylvania denied the motion for summary judgment because: (1) the government presented no evidence “that the defendant’s failure to inspect or inquire was inconsistent with good commercial or customary practices”; and (2)

216. See L. Jager Smith, Jr., *CERCLA's Innocent Landowner Defense: Oasis or Mirage?*, 18 COLUM. J. ENVTL. L. 155, 166 (1993) (pondering court's decision to hold BCW and its lessee responsible for CERCLA cleanup when court did not find any fault with their actions or the environmental audits conducted by consultants).

217. 777 F. Supp. 549 (W.D. Mich. 1991), *aff'd in part, rev'd in part sub nom.* *United States v. Cordova Chem. Co.*, 59 F.3d 584 (6th Cir. 1995).

218. *CPC Int'l*, 777 F. Supp. at 581. The owner of the site did not appeal the decision, but the corporate parent did. *United States v. Cordova Chem. Co.*, 59 F.3d 549, 592 (6th Cir. 1995). The Sixth Circuit reversed the placing of liability on the corporate parent by piercing the corporate veil, and remanded the case for a clearer determination of whether additional contamination occurred during the corporate parent's brief ownership. *Id.*

219. *Id.* The court specifically noted that “the contamination created by prior owners [had] spread unabated off site, worsening the contamination problem.” *Id.*

220. 706 F. Supp. 346 (M.D. Pa. 1988).

221. *Serafini*, 706 F. Supp. at 347-48.

222. *Id.* at 348.

223. *Id.* at 353.

224. *Id.*

the government failed to submit affidavits from real estate developers as to whether it was customary and good commercial practice to visually inspect property.<sup>225</sup> The court noted in a subsequent, related opinion that the facts concerning the adequacy of the inquiry were in dispute and warranted a trial.<sup>226</sup> The *Serafini* opinion has been criticized as an example of the courts' unwillingness to impose CERCLA liability on individuals.<sup>227</sup>

In *United States v. Pacific Hide & Fur Depot, Inc.*,<sup>228</sup> the government sought to recover cleanup costs from property owners who obtained their interests by inheritance from their parents and grandparents.<sup>229</sup> The owners had not been involved in management of the site during the period of hazardous substance contamination.<sup>230</sup> The United States District Court for the District of Idaho held that the owners were entitled to assert the innocent purchaser defense, despite their failure to make any inquiry into the condition of the property.<sup>231</sup> In reaching its decision, the court reasoned that: (1) inheritances should be treated leniently; (2) there was no evidence that the contamination was obvious; and (3) the owners had no special knowledge and were unsophisticated in environmental matters.<sup>232</sup>

In sum, courts have been unpredictable in applying the innocent purchaser defense. Some courts have imposed CERCLA liability

225. See *Serafini*, 706 F. Supp. at 353 (calling government's argument "tempting," but finding that landowners' inaction was appropriate).

226. *United States v. Serafini*, 711 F. Supp. 197, 197-98 (M.D. Pa. 1988). In the earlier *Serafini* opinion, the court had denied the government's motion for a partial summary judgment, in part because the government had presented no evidence to support the motion. *Id.* at 198. In this subsequent proceeding, the court denied the government's supplemental motion for a partial summary judgment because the government's supporting affidavits, which contended that it was customary business practice when defendants purchased the property for commercial real estate purchasers to inspect property prior to acquisition, were directly countered by the defendant's affidavits, which stated the exact opposite. *Id.*

227. See Richard H. Mays, *The Blessed State of Innocence: The Innocent Landowner Defense Under the Superfund*, 20 Env't Rep. (BNA) No. 19, at 809, 811 (Sept. 8, 1989) (contending that *Serafini* decision undermined requirement for "all appropriate inquiry" because facts in case indicated that purchasers could have easily seen hazardous waste barrels on site at time of purchase).

228. 716 F. Supp. 1341 (D. Idaho 1989).

229. *Pacific Hide & Fur Depot, Inc.*, 716 F. Supp. at 1342-45.

230. *Id.* at 1345.

231. *Id.* at 1348.

232. *Id.* at 1349.

on purchasers who, in good faith, investigated the prior use of the property. At the same time, perhaps out of fairness concerns, some courts have been unwilling to impose liability on purchasers who did not properly investigate the property prior to acquisition.

## 2. Innocent Purchaser Defense Reauthorization Issues

In response to the uncertainty regarding what constitutes “all appropriate inquiry,” members of the 103rd Congress introduced legislation specifically addressing the question of when purchasers have made all appropriate inquiry.<sup>233</sup> Under the proposed bill, purchasers who obtained a Phase I audit of the property by an environmental professional prior to the purchase could establish a rebuttable presumption of innocence.<sup>234</sup> The Phase I audit required an inquiry into the chain of title for the last fifty years, an examination of aerial photographs that reflect the use of the property, a determination of whether any environmental cleanup liens had been filed, a review of reasonably obtainable federal, state, and local records with regard to the facility, a visual inspection of the site, and compilation and maintenance of this information.<sup>235</sup>

Because the definition of “all appropriate inquiry” will change over time, each case will turn on its own specific facts. Due to the varied nature of oil and gas properties and interests, it is quite unclear what level of inquiry an oil and gas interest holder must undertake to assert the innocent purchaser defense. For example, what environmental inquiry is needed when acquiring a[n] operating working interest, non-operating working interest, royalty interest, easement right, right of way, leasehold interest, mineral interest, or gathering system? One could argue that the level of inquiry for each of the above interests should be unique to reflect the particular environmental problems associated with each interest.<sup>236</sup> Furthermore, the ASTM standards may or may not be

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233. H.R. 570, 103d Cong., 1st Sess. (1993).

234. *Id.*

235. *Id.*; see David E. Pierce, *Structuring Routine Oil and Gas Transactions to Minimize Environmental Liability*, 33 WASHBURN L.J. 76, 78 n.10 (1993) (stating that because of high costs of Phase I assessments, which average between \$1,500 and \$3,000, “the environmental ‘tail’ begins to wave the transactional ‘dog’ ”).

236. *Cf.* Debra L. Baker & Theodore G. Baroody, *What Price Innocence? A Realistic View of the Innocent Landowner Defense Under CERCLA*, 22 ST. MARY'S L.J. 115, 122-23 (1990) (stating that sufficiency and type of environmental inquiry have developed on case-

adopted by the courts, and if adopted, may not lend themselves to oil and gas facilities. Because of this uncertainty, it may be worthwhile to incorporate legislation clarifying the definition of "all appropriate inquiry" into the current CERCLA reauthorization.

## V. CONCLUSION

The CERCLA reauthorization will be the most important environmental legislation considered during the next session of Congress. With many of the basic premises of CERCLA open to question, the new Congress and industry should be able to develop a more workable alternative to CERCLA that protects the environment, while being fair to owners and operators of private facilities. More specifically, Congress should consider eliminating retroactive liability. In so doing, Congress should be cognizant of the corresponding impact on the rest of the CERCLA structure, as well as the regulated community. For the oil and gas industry, however, the elimination of retroactive liability will be a hollow victory if Congress expands the scope of CERCLA to include formerly exempted or excluded oil and gas wastes, or fails to clarify the status of RCRA-exempt wastes. Therefore, Congress should instead clarify the definition of a hazardous substance to continue excluding oil and gas wastes, and the definition of owner to definitively exclude owners of oil and gas interests, including oil and gas lessees, mineral rights holders, and pipeline right-of-way and easement holders, from CERCLA liability.

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by-case basis and depend on purpose of investigation and knowledge gained from initial inquiries into site). Determining the appropriate level of inquiry for oil and gas interests is further complicated because courts classify different interests in numerous ways. For example, in some jurisdictions a pipeline gathering system can be considered personal property, which would remove the owner from the CERCLA definition of "owner." See *Navarro v. Lucas (In re K & A Servicing, Inc.)*, 47 B.R. 807, 812 (Bankr. N.D. Tex. 1985) (characterizing temporary pipeline, which was placed for purpose of trade, as chattel instead of fixture under Oklahoma law). Other courts consider a gathering system a fixture, treating it as real property. See *Transcontinental Gas Pipe Line Corp. v. Prince William County*, 172 S.E.2d 757, 760 (Va. 1970) (classifying gas mains as realty for tax purposes).