

8-1-1996

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### Recommended Citation

Katherine Fairbanks, *The Industri-Plex Model: Beneficial Reuse of a Superfund Site*, 23 B.C. Env'tl. Aff. L. Rev. 851 (1996), <http://lawdigitalcommons.bc.edu/ealr/vol23/iss4/5>

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# THE INDUSTRI-PLEX MODEL: BENEFICIAL REUSE OF A SUPERFUND SITE

*Katherine Fairbanks\**

## I. INTRODUCTION

The Industri-Plex Superfund site in Woburn, Massachusetts has been labeled a Superfund success story.<sup>1</sup> The site, placed on the National Priorities List (NPL)<sup>2</sup> in 1983 as the fifth most contaminated site in the country,<sup>3</sup> is undergoing a transformation: "Industri-Plex, once the site of animal-hide piles so rank they drove neighbors indoors, is slated to become a regional transportation center producing thousands of jobs in what the EPA hopes will be a model for the Superfund."<sup>4</sup> When remediation is complete, the site will be the first example of the planned "beneficial reuse" of a Superfund site.<sup>5</sup> "Beneficial reuse," the Environmental Protection Agency's (EPA's) buzzword for redevelopment, is part of the EPA's overall campaign to facilitate the "safe and sustainable reuse of idled and underutilized

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\* Articles Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 1995-1996.

<sup>1</sup> See Richard Kindleberger, *After the Spill is Gone*, THE BOSTON GLOBE, Mar. 7, 1993, at A1; Woburn, Mass. Site to be Restored, Converted to Transportation Facility, Env'tl. L. Update (BNA), Oct. 8, 1992, available in Westlaw BNA-NED database (Julie Belaga, EPA Region I Administrator, commenting: "[t]his is the first time in the history of the superfund program that we are able to take a piece of property and restore it to productive use in the community. . . . We hope the efforts and design here will serve as a model for a nationwide effort to find ways to turn hazardous waste sites into usable property once they are cleaned up."); *A Superfund Success Story?*, Greenwire, Oct. 6, 1992, available in Westlaw BNA-NED database.

<sup>2</sup> See *infra* text accompanying notes 25-31 for a description of the NPL.

<sup>3</sup> Amendments to National Oil and Hazardous Substance Contingency Plan; National Priorities List, 48 Fed. Reg. 40,658 (1983) (codified at 40 C.F.R. pt. 300).

<sup>4</sup> Scott Allen, *Doubts Cast on Cleanup of Woburn Industrial Site*, THE BOSTON GLOBE, June 17, 1995, Metro/Region, at 1.

<sup>5</sup> See Kindleberger, *supra* note 1, at A1.

industrial and commercial facilities where redevelopment and expansion are complicated by actual and perceived environmental contamination.<sup>6</sup> In the case of Industri-Plex, the anticipated redevelopment includes a regional transportation facility with a 2,500 car park-and-ride center, commuter rail service, airport shuttle transportation, and, potentially, a vertiport for helicopter travel.<sup>7</sup>

The location of Industri-Plex, in a thriving industrial area where there is little undeveloped land remaining, makes it a desirable target for developers.<sup>8</sup> The most crucial factor in the reuse of the Industri-Plex site, however, is not the character or location of the land. Rather, beneficial reuse is possible because of a settlement agreement reached between the EPA and the parties funding the cleanup<sup>9</sup> and because of the EPA's plan to enter into a prospective purchaser agreement to relieve future owners of liability for pre-existing contamination at the site.<sup>10</sup> By lifting the burden of liability that normally falls on current owners under § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),<sup>11</sup> the EPA and the parties funding the cleanup have made Industri-Plex property salable. The sale of the land, in turn, promises to generate revenues sufficient to pay taxes owed to the City of Woburn, costs incurred by the EPA and Massachusetts, and a portion of the costs of remediation assumed by the parties funding the cleanup.<sup>12</sup> The framework for the beneficial reuse of Industri-Plex is the 1989 consent decree between the EPA, Massachusetts, and twenty-six defendants<sup>13</sup> and the prospective purchaser agreement between the EPA and the future owners of Industri-Plex.<sup>14</sup>

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<sup>6</sup> *Materials on EPA Initiative on Administrative Reforms to Superfund*, Daily Env't Rep., Feb. 17, 1995, available in Westlaw, BNA-DEN database.

<sup>7</sup> Kindleberger, *supra* note 1, at A1.

<sup>8</sup> Telephone interview with Daniel Winograd, Attorney, Environmental Protection Agency, Region I, (Apr. 1, 1995) [hereinafter Winograd interview].

<sup>9</sup> See discussion *infra* section IV.

<sup>10</sup> See discussion *infra* section V.

<sup>11</sup> CERCLA, 42 U.S.C. § 9607 (1988). CERCLA was promulgated in 1980, but subsequently was reauthorized and amended by a new act entitled "Superfund Amendments and Reauthorization Act of 1986" (SARA). CERCLA as amended by SARA is codified at 42 U.S.C. §§ 9601-75 (1988 & Supp. V 1993). Subsequent references to CERCLA will be deemed to incorporate the SARA amendments as well.

<sup>12</sup> See *infra* text accompanying section IV.C.

<sup>13</sup> *United States v. Stauffer Chem. Co.*, No. 01-88-COV 3, 1989 EPA Consent LEXIS 137 (Mass. Dist. Ct. Oct. 28, 1989) [hereinafter Consent Decree].

<sup>14</sup> Proposed Administrative Settlement Under the Comprehensive Environmental Response, Compensation, and Liability Act; In re: Industri-Plex Superfund Site; Woburn, MA, 61 Fed. Reg. 2,824 (1996) [hereinafter Settlement].

Section II of this Comment provides an initial overview of CERCLA and its liability provisions that hinder the resale and reuse of Superfund sites like Industri-Plex. Section III presents a brief history of the Industri-Plex site, including the uses that ultimately caused the release of hazardous substances on the site, the discovery of the release, and the administrative actions that led to the 1989 consent decree. Section IV explains what a consent decree is and describes in detail the terms of the Industri-Plex consent decree. Section V describes the EPA's new policy on prospective purchaser agreements and the agreement proposed for Industri-Plex. Finally, Section VI discusses how the consent decree, as applied to the Industri-Plex site, and the prospective purchaser agreement, have solved the CERCLA liability problem and whether the combination of agreements will be a viable solution at other Superfund sites.

## II. OVERVIEW OF CERCLA

CERCLA provides the EPA with the authority to respond to the release,<sup>15</sup> or threatened release, into the environment of any hazardous substance or "of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare."<sup>16</sup> Response on the part of the EPA may take the form of removal<sup>17</sup> or remedial action,<sup>18</sup> or any other response measure consistent with the National Contingency Plan<sup>19</sup> that is necessary to protect the public

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<sup>15</sup> "The term 'release' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . ." CERCLA, 42 U.S.C. § 9601(22).

<sup>16</sup> *Id.* § 9604(a)(1).

<sup>17</sup> Removal actions are short-term responses to an emergency which may include "security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for . . ." *Id.* § 9601(23).

<sup>18</sup> Remedial action refers to actions taken to effect a permanent remedy. These actions may include:

storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated containment materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.

*Id.* § 9601(24).

<sup>19</sup> "National Contingency Plan" refers to the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. §§ 300.1-920 (1995). The stated purpose of the "National Contingency Plan" is "to provide the organizational structure and procedures for preparing for and

health or welfare or the environment.<sup>20</sup> Where the EPA determines that the response action will be effected promptly and properly by the potentially responsible parties,<sup>21</sup> the EPA may delegate its authority to a potentially responsible party who has agreed to finance and perform the remediation.<sup>22</sup> Alternatively, CERCLA authorizes the EPA to finance the cleanup through the "Hazardous Substance Superfund,"<sup>23</sup> a federally funded hazardous waste trust fund.<sup>24</sup> Superfund resources only may be used, however, to finance remedial actions at sites that are included on the NPL.<sup>25</sup>

The NPL is the list of sites where there have been releases, or threatened releases, of hazardous substances which warrant long-term remedial evaluation and response.<sup>26</sup> Congress, when it enacted CERCLA, mandated certain revisions to the National Contingency Plan, including the creation of a system to identify and list the sites where contamination is the most severe and remediation is most urgently needed.<sup>27</sup> A site is placed on the NPL if it meets one of the following criteria: (1) the release<sup>28</sup> scores sufficiently high on the Hazard Ranking System;<sup>29</sup> (2) a state has designated the site as its highest priority; or (3) both The Agency for Toxic Substances and Disease

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responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants." *Id.* § 300.1.

<sup>20</sup> CERCLA, 42 U.S.C. § 9604(a)(1).

<sup>21</sup> The term "potentially responsible party" refers to any party that the EPA, in accordance with CERCLA's liability provisions, may pursue to conduct or finance the cleanup of a Superfund site. 40 C.F.R. § 35.6015(a)(32) (1994).

<sup>22</sup> CERCLA, 42 U.S.C. § 9604.

<sup>23</sup> *See id.* § 9611. The EPA was authorized to use up to \$8.5 billion for the five-year period beginning October 17, 1986 and up to \$5.1 billion for the period commencing October 1, 1991 and ending September 30, 1994. *Id.* § 9611(a). These authorized funds "remain available until expended." *Id.*

<sup>24</sup> *See* I.R.C. § 9507 (1994) (provision creating Hazardous Substance Superfund).

<sup>25</sup> 40 C.F.R. § 300.425(b)(1) (1994).

<sup>26</sup> *Id.* § 300.425(b).

<sup>27</sup> CERCLA, 42 U.S.C. §§ 9605(8)(A)-(B).

<sup>28</sup> "Release," as used in the EPA's regulations implementing CERCLA, is synonymous with "facility" and "site." *See* Amendments to National Oil and Hazardous Substance Contingency Plan; National Priorities List, 48 Fed. Reg. 40,658 (1983) (codified at 40 C.F.R. pt. 300).

<sup>29</sup> The Hazard Ranking System (HRS) is described in EPA regulations as follows:

[t]he revised HRS evaluates four pathways: ground water, surface water, soil exposure, and air. The HRS serves as a screening device to evaluate the relative potential of uncontrolled hazardous substances, pollutants, and contaminants to pose a threat to human health or the environment. Those sites that score 28.50 or greater on the HRS are eligible for the NPL.

National Priorities List for Uncontrolled Hazardous Waste Sites, 60 Fed. Reg. 8,212 (1995) (proposed Feb. 13, 1995).

Registry<sup>30</sup> and the EPA determine that the release poses a danger to public health and the EPA decides that remediation is the most cost-effective response method.<sup>31</sup>

The EPA, when it decides to take remedial action at a Superfund site, first will identify the potentially responsible parties who are tagged with liability by § 107 of CERCLA.<sup>32</sup> Section 107 lists four categories of parties who are liable for response costs<sup>33</sup> at a Superfund site: (1) the present owner or operator of a facility;<sup>34</sup> (2) the owner or operator of a facility at the time of disposal of a hazardous substance; (3) any person who arranged for disposal or treatment of hazardous wastes owned or possessed by that person at a facility; and (4) any person who accepts or accepted hazardous substances for transport to a facility selected by that person.<sup>35</sup> While CERCLA does not expressly provide for strict and joint and several liability,<sup>36</sup> the effect of CERCLA is to impose such liability on any party who falls within any of the four categories of liable persons.<sup>37</sup>

The inclusion of the current owner of a facility in the list of liable parties poses a particular threat to potential purchasers of Superfund

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<sup>30</sup> The Agency for Toxic Substances (ATSDR) was created in CERCLA, 42 U.S.C. § 9604(i)(1). The ATSDR is charged with effectuating and implementing "the health related activities of [CERCLA]." *Id.* Specific mandates of ATSDR include establishing a national registry of serious disease and illness, establishing a national registry of individuals who have been exposed to toxic substances, compiling a comprehensive list of areas where toxic releases have resulted in closure or restricted access, preparing, and annually updating, a list of hazardous substances most commonly found at NPL sites, and performing a health assessment for each NPL site. *Id.* §§ 9604(i)(1)-(6).

<sup>31</sup> 40 C.F.R. § 300.425(e) (1994).

<sup>32</sup> CERCLA, 42 U.S.C. § 9607.

<sup>33</sup> "Response costs" include all costs of removal or remediation action by the EPA, a state, or an indian tribe that are not inconsistent with the National Contingency Plan; any other necessary costs of response incurred by any other person consistent with the National Contingency Plan; costs associated with natural resources damage or assessments; costs of required human health assessments; and interest accruing on any of these response costs. *Id.* § 9607(a)(4).

<sup>34</sup> "Facility means (A) any building, structure, installation, equipment, pipe or pipeline . . . , well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . ." *Id.* § 9601(9).

<sup>35</sup> *Id.* § 9607(a).

<sup>36</sup> CERCLA's guidance with respect to the interpretation of "liable" or "liability" is limited to the statement that these terms will be construed according to the standard of liability under § 1321 of the Clean Air Act. CERCLA, 42 U.S.C. § 9601(32).

<sup>37</sup> *E.g.*, *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 841 (4th Cir.), *cert. denied sub nom. Mumaw v. Nurad, Inc.*, 506 U.S. 940 (1992); *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1506-07 (6th Cir. 1989); *United States v. Monsanto*, 858 F.2d 160, 167-72 (4th Cir.), *cert. denied*, 490 U.S. 1106 (1988).

sites.<sup>38</sup> In *New York v. Shore Realty Corp.*, the United States Court of Appeals for the Second Circuit applied strict liability to hold the current owner liable for response costs.<sup>39</sup> The owner had purchased the land for real estate development and knew at the time of purchase that the land had been used by its prior owners to store hazardous waste.<sup>40</sup> In reaching its conclusion, the court stated, “[w]e agree with the State . . . that [§ 107(a)(1)] unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation.”<sup>41</sup> The significance of this holding is that the current owner of property may have to pay for the cleanup of hazardous wastes which were generated entirely by a prior owner.<sup>42</sup>

The only defenses to CERCLA liability are those specifically enumerated in CERCLA.<sup>43</sup> These statutory defenses absolve a defendant of liability in certain circumstances which must be proven by a preponderance of the evidence.<sup>44</sup> To successfully invoke a statutory defense, the defendant must show that the release or threat of release of a hazardous substance and the resultant damages were caused solely by: (1) an act of God; (2) an act of war; or (3) an act or omission by a third party other than an employee of the defendant, or one in a direct or indirect contractual relationship with the defendant.<sup>45</sup> The third defense, known as the “innocent purchaser defense,” appears to release from liability a person who purchased the property after it had been contaminated by the previous owner.<sup>46</sup> CERCLA’s definition of “contractual relationships,” however, drastically diminishes application of the innocent purchaser defense.<sup>47</sup> Contractual relationships under CERCLA include “land contracts, deeds, or other instruments transferring title or possession,” unless the purchaser seeking to invoke the defense can establish by a preponderance of the evidence that, even after making all appropriate inquiries into the previous

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<sup>38</sup> See CERCLA, 42 U.S.C. § 9607(a)(1).

<sup>39</sup> *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1037 (2d Cir. 1985).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1044.

<sup>42</sup> See *id.* at 1037. See generally Michael A. Bell, Note, *The Effect of Superfund Liability on Property “Owners,”* 92 W. VA. L. REV. 125 (1989); Diana L. McDavid, Note, *Liabilities of the Innocent Current Owner of Toxic Property Under CERCLA,* 23 U. RICH. L. REV. 403 (1989).

<sup>43</sup> CERCLA, 42 U.S.C. § 9607(a).

<sup>44</sup> *Id.* § 9607(b).

<sup>45</sup> *Id.* §§ 9607(b)(1)–(3).

<sup>46</sup> See *id.* § 9607(b)(3).

<sup>47</sup> See *id.* § 9601(35)(A).

ownership and uses of the property, the purchaser had no reason to know that any hazardous substances had been disposed of at the site.<sup>48</sup> The "innocent purchaser defense," therefore, is not available to a purchaser with any prior knowledge of a release or potential release.<sup>49</sup>

Because "congressional intent to impose liability on the blameworthy is achieved imperfectly,"<sup>50</sup> CERCLA's liability provisions raise several concerns for the prospective purchaser of a Superfund site. First, if a party purchases a property before remediation is complete, the party becomes a current owner and, as such, becomes a liable party from whom the EPA may seek to recover response costs.<sup>51</sup> Second, even if the party is willing to wait until the EPA has certified that the remediation process is complete, there is no guarantee that the EPA will not, at some future time, decide that further remediation is necessary and force the current owner to bear the costs.<sup>52</sup> Even after the EPA has deleted a site from the NPL and listed the site on its Construction Completion List,<sup>53</sup> potential liability still adheres to the site, as the inclusion of a site on the Construction Completion List has no legal significance.<sup>54</sup>

Finally, situations occur in which a party purchases a Superfund site for industrial reuse and, through that use, aggravates or contributes to the existing contamination at the site.<sup>55</sup> In this case, there is nothing to prevent the EPA from pursuing cleanup costs from the current owner.<sup>56</sup> Each of these scenarios is theoretically possible, but

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<sup>48</sup> CERCLA, 42 U.S.C. § 9601(35)(A). The "innocent purchaser defense" also can be invoked where the defendant is a governmental entity which acquired the facility by escheat, through involuntary transfer or acquisition, or through eminent domain, or where the defendant acquired the facility by inheritance or bequest. *Id.* §§ 9601(35)(A)(ii)-(iii).

<sup>49</sup> *Id.* § 9607(b)(3).

<sup>50</sup> Thaddeus Bereday, *Contractual Transfers of Liability Under CERCLA Section 107(e)(1): For Enforcement of Private Risk Allocations in Real Property Transactions*, 43 CASE W. RES. L. REV. 161, 175 (1992).

<sup>51</sup> Winograd interview, *supra* note 8.

<sup>52</sup> *Id.*

<sup>53</sup> Sites qualify for the Construction Completion List when: "(1) any necessary physical cleanup levels or other requirements have been achieved; (2) the EPA has determined that the response action should be limited to measures that do not involve construction [e.g., institutional controls, *see infra* note 137]; or (3) the site qualifies for deletion from the NPL," because the EPA has determined that no further response action is appropriate under Superfund. National Priorities List for Uncontrolled Hazardous Waste Sites, 60 Fed. Reg. 8,212, 8,213 (1995) (proposed Feb. 13, 1995).

<sup>54</sup> *Id.*

<sup>55</sup> Winograd interview, *supra* note 8.

<sup>56</sup> *Id.*



unlikely to occur.<sup>57</sup> Nevertheless, in light of the fact that CERCLA includes current owners in its list of liable parties and caps the liability of an owner at the total of all costs of response plus \$50 million, the small chance that a new owner will be held liable for response costs is a risk sufficient to deter prospective purchasers.<sup>58</sup> The prospective purchaser's fear of incurring response costs is not unreasonable: according to EPA estimates, the average cost per site for remedial planning and feasibility studies, the remedial action itself, and maintenance of the remedial measures, is approximately \$30 million.<sup>59</sup> One commentator summarized the dilemma that prospective purchasers face: "[a]lthough relatively few industrial sites are so contaminated as to become candidates for the Superfund cleanup list, the costs associated with such a cleanup are so overwhelming that no reasonable purchaser would risk incurring what amounts to an open-ended contingent liability."<sup>60</sup>

Another problem for prospective purchasers of Superfund sites is that, in the event the EPA chooses to pursue them for response costs, the new owners would be foreclosed from invoking the "innocent purchaser defense."<sup>61</sup> Inclusion of a site on the NPL constitutes public notice of the presence of hazardous wastes at that site.<sup>62</sup> Anyone who purchased property on a Superfund site would be presumed to know that there had been a release, or threat of release, of a hazardous substance on that site.<sup>63</sup> This knowledge destroys the "innocent purchaser defense," which is only available to those who diligently investigate the site and yet fail to discover that there has been a hazardous substance disposed of at the site.<sup>64</sup>

A final point regarding the "absolute" quality of CERCLA liability is that all forms of cost allocation agreements between private parties<sup>65</sup> are unavailing when it comes to cost recovery actions by the

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<sup>57</sup> *Id.*

<sup>58</sup> See CERCLA, 42 U.S.C. §§ 9607(a)(1), (c)(1)(D).

<sup>59</sup> National Priorities List for Uncontrolled Hazardous Waste Sites, 60 Fed. Reg. 8,212, 8,216 (1995) (proposed Feb. 13, 1995).

<sup>60</sup> Gail V. Karlsson, *The Impact of Environmental Liabilities on Real Estate Contract Negotiations*, 8 PACE ENVTL. L. REV. 37, 39 (1990) (footnotes omitted).

<sup>61</sup> See CERCLA, 42 U.S.C. §§ 9601(35)(A), 9607(b)(3).

<sup>62</sup> Amendments to National Oil and Hazardous Substance Contingency Plan; National Priorities List, 48 Fed. Reg. 40,658, 40,659 (1983) (codified at 40 C.F.R. pt. 300).

<sup>63</sup> See National Priorities List of Uncontrolled Hazardous Substances, 60 Fed. Reg. 8,212, 8,213-14 (1995) (Feb. 13, 1995).

<sup>64</sup> See CERCLA, 42 U.S.C. §§ 9601(35)(A), 9607(b)(3).

<sup>65</sup> These agreements may take the form of an indemnification or hold harmless agreement, or an "as is" clause incorporated in a purchase and sale agreement. Bereday, *supra* note 50, at

government.<sup>66</sup> A buyer may negotiate an agreement that shifts CERCLA costs to the seller, but the buyer, at the EPA's discretion, still may be held liable under CERCLA § 107 for any necessary remedial or response action at the site.<sup>67</sup> In the event the EPA chooses to pursue the buyer, the agreement between the buyer and seller simply gives the buyer the right to seek reimbursement from the seller.<sup>68</sup> From the buyer's perspective, this arrangement is obviously flawed: "[i]f the burdened party breaches the agreement or becomes insolvent, the original allocation of liability provided by [CERCLA] remains unaltered."<sup>69</sup>

Because of CERCLA's stringent liability provisions, Superfund sites are not attractive to developers and are instead "cleaned up, fenced in, and abandoned."<sup>70</sup> Representative Michael G. Oxley (R-Ohio), Chairman of the House Commerce Subcommittee on Commerce, Trade, and Hazardous Materials,<sup>71</sup> commented on the need to reform CERCLA to encourage redevelopment of abandoned industrial property and noted, "we are failing to recycle one of the most valuable resources we have."<sup>72</sup> It is difficult to know how many sites remain untenanted, undeveloped, and unutilized. According to Larry Eastep, the manager of remedial project management for the Illinois Environmental Protection Agency, as of March, 1995, there were at least 5,000 abandoned, contaminated industrial sites in Illinois alone.<sup>73</sup> In the case of

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163-64. As Bereday explains in his overview of private cost allocation agreements, "[w]hether these or other legal terms are used, the intent of the agreements is to distribute liability risks between the contracting parties through private negotiations." *Id.* at 165 (footnotes omitted).

<sup>66</sup> See CERCLA, 42 U.S.C. § 9607(e)(1); *Niecko v. Emro Mktg. Co.*, 973 F.2d 1296, 1300 (6th Cir. 1992) (holding that § 107(e)(1) of CERCLA allows private parties to allocate cleanup costs between themselves, but does not allow the transfer of liability); *Mardan v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1459 (9th Cir. 1986) (noting that "arrangements apportioning CERCLA liabilities between private 'responsible parties' . . . cannot prejudice the right of the government to recover cleanup or closure costs from any . . . party").

<sup>67</sup> See CERCLA, 42 U.S.C. § 9607(e)(1); *Niecko*, 973 F.2d at 1300; *Mardan*, 804 F.2d at 1459. This is the nature of a private cost allocation agreement: "[p]rivate cost allocations impose obligations on the parties who negotiate the agreement. However, the buyer and seller cannot bind the rights of the government or other third parties, such as the next generation of purchasers." Bereday, *supra* note 50, at 198.

<sup>68</sup> Bereday, *supra* note 50, at 198.

<sup>69</sup> *Id.*

<sup>70</sup> Kindleberger, *supra* note 1, at A1.

<sup>71</sup> This subcommittee has primary jurisdiction within the House of Representatives over Superfund. Andrew M. Ballard, *Superfund: Overhaul of Superfund Law Necessary to Foster Redevelopment, Member Says*, Daily Env't Rep. (BNA), Mar. 29, 1995, available in Westlaw, BNA-DEN database.

<sup>72</sup> *Id.*

<sup>73</sup> *Illinois: Chicago Launches Study of Reuse of Contaminated Industrial Sites*, Daily Env't Rep. (BNA), Dec. 19, 1994, available in Westlaw, BNA-DEN database.

Superfund sites, the danger to human health and the environment has been minimized through remedial action, but the specter of CERCLA liability still deters developers from purchasing remediated Superfund sites. The Industri-Plex Superfund site in Woburn, Massachusetts is being remediated under a plan that will circumvent the trend toward disuse and abandonment and instead will promote the beneficial reuse of Superfund sites.

### III. INDUSTRI-PLEX: HISTORY OF THE SITE

The EPA's 1986 Record of Decision (ROD) begins with the following description of Industri-Plex:

[t]he Industri-Plex Site is a 245-acre industrial park located in Woburn, Massachusetts, . . . an old industrial community located approximately ten miles northwest of Boston. Primarily known for its tannery industry at the turn of the century, Woburn is presently experiencing an economic revitalization with the infusion of a number of computer and service-related businesses. The intersection of two major highways, Route 128 traversing east to west and Route 93 oriented north and south, has turned the northeastern third of the city into a commercial/industrial area.<sup>74</sup>

In the ten years that have passed since the EPA prepared its ROD, Woburn and other cities along Route 128 have remained important players in the ongoing technology boom.<sup>75</sup> A February, 1996 article in *The Boston Globe* discussed the tremendous volume of traffic on Route 128<sup>76</sup> and the development that has created the congestion.<sup>77</sup> The Route 128 corridor plays an important role in the state's economy:

John R. Regan, executive director of the Massachusetts Office of Business Development, stresses that Route 128 today is an engine that drives the state's efforts to attract new businesses. The "Greater Boston Metro Area," which includes Boston and Route 128 to the ocean, accounts for more than 50% of the state's gross domestic product . . . .<sup>78</sup>

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<sup>74</sup> *Industri-Plex Record of Decision, EPA-ID MAD076580950*, "Site Location and Description," Sept. 30, 1986, available in LEXIS, Envirns library, Rods file [hereinafter ROD]. The ROD is unpaginated. Therefore, cites to the ROD do not include page numbers, but reference instead the descriptive title of the section from which the information is taken.

<sup>75</sup> See Alice Hinkle & Diana Brown, *Route 128: 60 Years of Stop and Go*, THE BOSTON GLOBE, Feb. 25, 1996, West Suburban Weekly, at 1, 10.

<sup>76</sup> The article noted that the stretch of Route 128 that runs through Woburn has average daily traffic of approximately 190,000 vehicles. That figure puts Route 128 in the running for "the dubious title as the state's busiest highway." *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

The Industri-Plex site will resume its place on the "Technology Highway"<sup>79</sup> after the current remediation effort is complete, and the contamination of more than a century of industrial operations finally is brought under control.

The evolution of the Industri-Plex site in Woburn, Massachusetts from raw, undeveloped land to a seriously contaminated Superfund site began in 1853 with the establishment of The Woburn Chemical Works.<sup>80</sup> The Woburn Chemical Works manufactured chemicals for the local textile, leather, and paper industries until 1863, when the Merrimac Chemical Company (Merrimac) replaced The Woburn Chemical Works at the site.<sup>81</sup> Merrimac's main products were sulfuric acid and related chemicals.<sup>82</sup> In 1899, Merrimac purchased the William H. Swift Company and became the leading producer of arsenic insecticides.<sup>83</sup> In 1915, Merrimac organized a separate company which also operated on the site and produced organic chemicals, including phenol, benzene, picric acid, toluene, and trinitrotoluene (TNT).<sup>84</sup> Monsanto Chemical Works (Monsanto) of St. Louis, Missouri purchased the Merrimac operations in 1929 and continued production at Industri-Plex until 1931.<sup>85</sup> The wastes generated by the industrial activities between 1853 and 1931 were disposed of randomly over a wide area and were used for two purposes: (1) to fill lowlands, wetlands, and shallow ponds in order to provide more usable land for further industrial use; and (2) as construction material to build dikes and levees to contain liquid wastes.<sup>86</sup>

The second wave of hazardous waste contamination at Industri-Plex began in 1934, when New England Chemical Industries purchased the site and constructed an animal hide glue manufacturing plant.<sup>87</sup> The plant operated under several different owners from 1935 until 1969.<sup>88</sup> The gluemaking process entailed the extraction of collagen from animal tissue.<sup>89</sup> This process involved cooking raw, salted or

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<sup>79</sup> "Technology Highway" is one of many descriptive names applied to Route 128 over the years. *Id.*

<sup>80</sup> ROD, *supra* note 74, "Site History."

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> ROD, *supra* note 74, "Site History."

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

limed hides, hide fleshings, or chrome tanned leather scraps from cattle, hogs, and sheep in hot water.<sup>90</sup> The material remaining in the tank after cooking the raw materials and drawing off the glue consisted of wood shavings, raw products, and hide materials and was called "tankage."<sup>91</sup> The tankage was buried on the Industri-Plex site, in some cases directly on top of materials left behind from Merrimac's on-site disposal.<sup>92</sup>

In 1968, the Mark-Phillip Trust, a real estate development trust, purchased approximately 120 acres of the 245-acre Industri-Plex site.<sup>93</sup> In the early 1970s, the Mark-Phillip Trust began filling and excavating portions of the property to facilitate the sale of various parcels.<sup>94</sup> In 1975, excavation by the Mark-Phillip Trust reached the buried tankage which, having been unearthed, released a pungent "rotten egg" odor into the surrounding areas.<sup>95</sup> The prevailing wind direction carried the odor to towns east of Woburn, where it became known as the "Woburn Odor."<sup>96</sup> Despite the pervasive odor, the Mark-Phillip Trust continued to excavate the glue wastes and pile them on the sides of a small pond in a corner of the site.<sup>97</sup> These stockpiles came to be known as the "hide piles" and during the excavation reached dimensions of 40 feet high, 250 feet long, and 100 feet wide.<sup>98</sup> The odor problem was so severe that workers reported episodes of becoming physically ill and there were continuous complaints to state regulatory agencies regarding the obnoxious odor and the severe headaches and nausea it caused.<sup>99</sup> Even six years after active excavation ceased, the odor emanating from the hide piles still affected surrounding areas whenever the hide piles were disturbed.<sup>100</sup>

In 1977, the Suffolk County Superior Court issued an order prohibiting the Mark-Phillip Trust from disturbing two small sections of the site where the EPA believed the remaining glue wastes were concentrated.<sup>101</sup> The order only partially achieved the desired containment

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<sup>90</sup> ROD, *supra* note 74, "Site History."

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Winograd interview, *supra* note 8.

<sup>94</sup> ROD, *supra* note 74, "Site History."

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> ROD, *supra* note 74, "Alternatives Evaluation."

<sup>100</sup> *Id.*

<sup>101</sup> ROD, *supra* note 74, "Site History."

of the wastes, since the stockpiles continued to generate and release substantial amounts of hydrogen sulfide even while undisturbed.<sup>102</sup>

In 1979, the United States Attorney's Office, on behalf of the United States Army Corps of Engineers and the EPA, brought an action against the Mark-Phillip Trust for wetlands violations.<sup>103</sup> An injunction was issued and further development activity stopped.<sup>104</sup> In May, 1985, both state and federal consent decrees were approved by the respective courts.<sup>105</sup> These consent decrees required the Mark-Phillip Trust to investigate the nature and extent of the hazardous waste problems and to resolve the wetlands filling issues.<sup>106</sup> In exchange, the Mark-Phillip Trust would be able to develop and sell certain portions of the site in order to provide funding for continued remedial investigations and cleanup.<sup>107</sup> The Mark-Phillip Trust, due to insufficient financial resources, has never effectuated the terms of the 1985 state and federal consent decrees.<sup>108</sup> A separate consent decree, pursuant to which the responsible parties are currently cleaning up the Industri-Plex site, was finalized in 1989.<sup>109</sup>

#### IV. INDUSTRI-PLEX: THE 1989 CONSENT DECREE

Settlement under CERCLA is governed by § 122.<sup>110</sup> Under § 122, the EPA has discretion to enter into a settlement agreement with any person to perform a response action at a Superfund site, provided that the agreement is in the public interest and is consistent with the National Contingency Plan.<sup>111</sup> The settlement agreement must be entered in the appropriate United States district court as a consent decree.<sup>112</sup> As such, the consent decree constitutes a "judgment"<sup>113</sup> binding the parties who sign the decree; CERCLA specifies, however, that participation in a consent decree is not tantamount to an admission of liability.<sup>114</sup> CERCLA itself does not outline the structure of a

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> ROD, *supra* note 74, "Site History."

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> See generally Consent Decree, *supra* note 13.

<sup>110</sup> CERCLA, 42 U.S.C. § 9622.

<sup>111</sup> *Id.* § 9622(a).

<sup>112</sup> *Id.* § 9622(d)(1)(A).

<sup>113</sup> See *id.* §§ 9622(2)(A)-(B) (referring to the consent decree as a "final judgment").

<sup>114</sup> *Id.* § 9622(a)(1)(B).

consent decree.<sup>115</sup> CERCLA § 122(c)(1), however, does call for the inclusion of a covenant not to sue to limit the liability of the parties to the agreement.<sup>116</sup> The decision as to whether to include a covenant not to sue, as well as what the scope of that covenant should be, resides in the EPA.<sup>117</sup> The covenant not to sue, whatever its scope, only inures to the benefit of those parties who sign the consent decree and only protects those parties against certain actions brought by the United States.<sup>118</sup> The covenant not to sue, as a general rule, does not extend to actions brought by the United States to recover costs or damages not included in the consent decree<sup>119</sup> or to “liability premised upon conditions that were unknown” as of the date the consent decree became effective.<sup>120</sup> For a covenant not to sue to become effective, the EPA first must certify that the remedial action at the site has been completed successfully.<sup>121</sup> Even after the EPA “launches” the covenant not to sue by certifying that remediation is complete, a potentially responsible party who is not a signatory to the consent decree remains subject to the full panorama of liability under CERCLA § 107.<sup>122</sup>

The 1989 Industri-Plex consent decree constitutes settlement of two suits: the first, a suit brought by the United States, on behalf of the EPA, pursuant to §§ 106–07 of CERCLA,<sup>123</sup> and § 7003 of the Solid Waste Disposal Act (SWDA);<sup>124</sup> and the second, a suit brought by the

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<sup>115</sup> In 1991 the EPA published a Model Consent Decree in the Federal Register. Model CERCLA RD/RA Consent Decree, 56 Fed. Reg. 30,996 (1991). The stated goal of the Model Consent Decree is “to achieve a greater number of settlements in a more expeditious manner, on terms acceptable to the United States and consistent with the intent of CERCLA, thereby permitting more remedial work to proceed.” *Id.*

<sup>116</sup> CERCLA, 42 U.S.C. § 9622(c)(1).

<sup>117</sup> *Id.* §§ 9622(c)(1), (f)(1). Factors bearing on that discretionary decision include: (1) whether the consent decree promotes the public’s interest in expeditious, properly executed response actions; and (2) whether the beneficiary of the covenant not to sue has complied with the terms of existing consent decrees. *Id.* §§ 9622(f)(1)(A)–(D).

<sup>118</sup> *Id.* §§ 9622(c)(1)–(2).

<sup>119</sup> *Id.* § 9622(e)(2)(A).

<sup>120</sup> *Id.* § 9622(f)(6). “In extraordinary circumstances,” the EPA may choose to extend the covenant not to sue to liability arising from unknown conditions. *Id.* § 9622(f)(6)(B). In general, this extremely broad covenant not to sue will be granted only where the “terms, conditions, or requirements of the [consent decree] . . . are sufficient to provide all reasonable assurances that public health and the environment will be protected from any future releases at . . . the facility.” *Id.*

<sup>121</sup> CERCLA, 42 U.S.C. § 9622(f)(3).

<sup>122</sup> *Id.* §§ 9607(a), 9622(c)(2).

<sup>123</sup> *Id.* §§ 9606–07.

<sup>124</sup> SWDA, 42 U.S.C. § 6973.

Commonwealth of Massachusetts (Massachusetts) pursuant to § 107 of CERCLA and numerous state law provisions.<sup>125</sup> Under the terms of the consent decree, twenty-five of the twenty-six responsible parties agreed to conduct the remediation and to be perpetually liable for future response costs at the site.<sup>126</sup> The consent decree requires that these twenty-five defendants make payments to a Remedial Trust.<sup>127</sup> Their payments are then disbursed by the trustee of the Remedial Trust, as necessary, to finance the remediation.<sup>128</sup> The final responsible party, the Mark-Phillip Trust, agreed to convey all of its holdings in the Industri-Plex site to a Custodial Trust.<sup>129</sup> Upon completion of the remedial action, the Custodial Trust will sell the Mark-Phillip Trust property, with the proceeds to be distributed to the City of Woburn, the United States, Massachusetts, and ultimately, to the settling defendants.<sup>130</sup> The results of the remedial action will be preserved through "Institutional Controls"—covenants that require the maintenance of certain remedies and bind all future owners of the property.<sup>131</sup> The following subsections describe in detail the terms of the Industri-Plex consent decree that govern the remediation at the site.

#### *A. Responsibilities of Settling Defendants Under the Consent Decree*

The consent decree imposes a joint and several obligation on all settling defendants,<sup>132</sup> except the Mark-Phillip Trust, to finance and perform the remedial work at Industri-Plex and to reimburse the

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<sup>125</sup> Consent Decree, *supra* note 13, at \*1-3. Massachusetts's suit was based on the following state laws: The Massachusetts Clean Water Act, MASS. GEN. L. ch. 21 § 27(14) (1994); The Massachusetts Hazardous Waste Management Act, MASS. GEN. L. ch. 21C (1994); The Massachusetts Oil and Hazardous Material Release Prevention and Response Act, MASS. GEN. L. ch. 21E (1994); The Massachusetts Solid Waste Management Act, MASS. GEN. L. ch. 21H (1994). Consent Decree, *supra* note 13, at \*2, \*78.

<sup>126</sup> Consent Decree, *supra* note 13, at \*16-22.

<sup>127</sup> The Remedial Trust, created pursuant to the terms of the consent decree, manages the financial aspects of the remediation. See *infra* section IV.B and accompanying text.

<sup>128</sup> Consent Decree, *supra* note 13, at \*24-25.

<sup>129</sup> The Custodial Trust was established, as required by the terms of the consent decree, to hold and manage the Mark-Phillip Trust property during remediation and to supervise the eventual sale of the property. See *infra* section IV.C and accompanying text.

<sup>130</sup> Consent Decree, *supra* note 13, at \*26-39.

<sup>131</sup> *Id.* at \*42-45. See *infra* note 137 for definition of Institutional Controls.

<sup>132</sup> "Settling defendants" refers to the potentially responsible parties identified by the EPA in accordance with § 9607 of CERCLA who became the defendants in the EPA's suit to compel settlement and who ultimately signed the consent decree. See Consent Decree, *supra* note 13, at \*1-7.



EPA and Massachusetts for response costs.<sup>133</sup> The Mark-Phillip Trust, which did not have the financial resources to make a direct contribution to the costs of remediation, agreed instead to convey all of its holdings in Industri-Plex to the Custodial Trust.<sup>134</sup> The proceeds from the sale of the Mark-Phillip Trust property by the Custodial Trust will help to finance the remediation.<sup>135</sup> The remedial work to be performed at the site by the settling defendants will provide for the containment and treatment of hazardous substances.<sup>136</sup> This work includes the following elements:

- (1) surface cleanup/surface preparations;
- (2) design and construction of a cap or caps over areas of the Site found to contain contamination;
- (3) regrading or restructuring and capping of certain portions of the "hide piles";
- (4) design and construction of an impermeable cap and a venting and air pollution control system for the East hide pile;
- (5) design and implementation of a Groundwater/Surface Water Investigation Plan to examine whether or to what extent Hazardous Substances at the site contaminate or threaten to contaminate groundwater and/or surface water;
- (6) design of Institutional Controls<sup>137</sup> to ensure that activities on the Site will not impair the effectiveness of the remedy;
- (7) design and operation of an interim groundwater remedy . . . and operation and maintenance of the interim groundwater remedy for the time required to achieve the performance standards approved or developed by the EPA . . . ; and
- (8) Long-term Operation and Maintenance (including monitoring).<sup>138</sup>

The consent decree assigns sole responsibility for the performance of the remedial work to Monsanto<sup>139</sup>—the settling defendant who

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<sup>133</sup> Consent Decree, *supra* note 13, at \*17.

<sup>134</sup> Winograd interview, *supra* note 8.

<sup>135</sup> Consent Decree, *supra* note 13, at \*30–\*39.

<sup>136</sup> *Id.* at \*18. The term "Hazardous Substances," for purposes of the Industri-Plex consent decree, includes odors emanating from the Hide Piles. *Id.* at \*9.

<sup>137</sup> "Institutional Controls" refers to the land use restrictions and other regulations or controls designed to preserve and prevent the disturbance of the caps and other structures that will be constructed at the site as part of the work, as well as other ground-covering structures which already exist at the site and serve the same purpose as a cap. *Id.* at \*9–\*10.

<sup>138</sup> *Id.* at \*18–\*19. The consent decree defines Long-Term Operation and Maintenance as "all activities required under the Operation and Maintenance Plan as approved or developed by Plaintiffs [the EPA and the Commonwealth of Massachusetts] pursuant to this Consent Decree." *Id.* at \*10.

<sup>139</sup> *Id.* at \*18–\*19. Monsanto, however, does not have sole responsibility for the Inauguration of Institutional Controls. *Id.* at \*18. See *infra* note 205 for definition of Inauguration of Institu-

agreed to pay approximately fifty percent of the costs.<sup>140</sup> If Monsanto is unable or refuses to perform any part of the remedial work, the responsibility devolves upon the other settling defendants (excluding the Mark-Phillip Trust, whose contribution is limited to the conveyance of its property to the Custodial Trust).<sup>141</sup> The settling defendants, before commencing the remedial work, were required to provide assurance of their financial ability to complete the work and to pay any claims arising from the performance of the work.<sup>142</sup> Additionally, within thirty days of entering into the consent decree, the settling defendants were required to reimburse the EPA and Massachusetts for costs incurred for remedial actions that predated the consent decree.<sup>143</sup> As the remedial work progresses, the settling defendants must continue to reimburse the EPA and Massachusetts for all oversight costs—those costs associated with (1) reviewing and monitoring the work and (2) developing the plan for the Institutional Controls and any necessary additional remedial action.<sup>144</sup> The settling defendants also agreed to indemnify the EPA and Massachusetts for all causes of action arising on account of the acts or omissions of the settling defendants (or any person acting on the settling defendants' behalf) in carrying out their responsibilities under the consent decree.<sup>145</sup>

The terms of the consent decree, including the obligations of the settling defendants to finance and perform the work, are binding upon the settling defendants' successors and assigns.<sup>146</sup> In addition, the consent decree provides that certain requirements will run with the land and bind successors-in-title.<sup>147</sup> As used in the consent decree,

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tional Controls. Each settling defendant or successor-in-title that is a landowner at the time specified for the Inauguration of Institutional Controls must finance and perform the Inauguration of Institutional Controls. Consent Decree, *supra* note 13, at \*20.

<sup>140</sup> David Rotman, *Major Superfund Cleanups OK'D*, CHEMICAL WEEK ASSOCS., Feb. 15, 1989, at 15.

<sup>141</sup> Consent Decree, *supra* note 13, at \*19. Hereinafter, the term "settling defendants" will refer to all settling parties except the Mark-Phillip Trust whose obligations under the consent decree are limited, effectively, to conveyance of its property to the Custodial Trust.

<sup>142</sup> *Id.* at \*22-\*23. This financial assurance may take the form of a performance bond, a letter of credit, a guarantee by a third party, or internal financial statements (renewed annually) from Monsanto or from a group of the settling defendants. *Id.*

<sup>143</sup> *Id.* at \*65-\*66.

<sup>144</sup> *Id.* at \*66.

<sup>145</sup> *Id.* at \*67-\*68. As a necessary corollary to the settling defendants' agreement to perform the remedial work and to indemnify the EPA and Massachusetts, the consent decree mandates that the settling defendants take out \$10 million of comprehensive general liability and automobile insurance and maintain that insurance for the duration of the remediation. *Id.* at \*68-\*69.

<sup>146</sup> Consent Decree, *supra* note 13, at \*13.

<sup>147</sup> *Id.* at \*44, \*54.

“successor-in-title” means “any person who acquires any possessory interest in any property included in the Site, other than a person who acquires a possessory interest solely to protect a security interest in the property and who has not exercised any right to enter or possess the property.”<sup>148</sup> The covenants that run with the land and bind successors-in-title are: (1) the requirement to maintain Institutional Controls;<sup>149</sup> and (2) the requirement to provide access to the EPA, Massachusetts, the settling defendants, and their representatives and contractors, where necessary to carry out the terms of the consent decree.<sup>150</sup> To ensure that future owners of the land have notice of the restrictions imposed on the land, the consent decree requires that the settling defendants who are landowners record notice of the restrictions at the Registry of Deeds.<sup>151</sup> All subsequent deeds must reference the recorded location of these restrictions.<sup>152</sup> The requirement of recorded notice of Institutional Controls is preserved until the EPA and Massachusetts determine that Institutional Controls are no longer necessary and record a notice to that effect.<sup>153</sup>

Liability imposed on the settling defendants by the consent decree includes an obligation to pay stipulated penalties.<sup>154</sup> Stipulated penalties are fines for failure to complete work according to the timeline agreed upon.<sup>155</sup> The consent decree calls for a fine of \$750 per day where the settling defendants fail to comply with certain provisions of the consent decree<sup>156</sup> or fail to timely complete the “minor milestones” established by the Remedial Design/Action Plan.<sup>157</sup> The fines increase for noncompliance with certain other sections<sup>158</sup> of the con-

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<sup>148</sup> *Id.* at \*13.

<sup>149</sup> *Id.* at \*42–\*45.

<sup>150</sup> *Id.* at \*53–\*57.

<sup>151</sup> Consent Decree, *supra* note 13, at \*44, \*53–\*55. The Mark-Phillip Trust was required to record the notice of Institutional Controls and related covenants before conveying its property interests to the Custodial Trust. *Id.* at \*44.

<sup>152</sup> *Id.* at \*44.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at \*74–\*76.

<sup>155</sup> *Id.* at \*74–\*75.

<sup>156</sup> Consent Decree, *supra* note 13, at \*74. The relevant sections of the consent decree are: Section VIII (“Assurance of Ability to Complete Work”), Section XI (“Designation of Coordinator”), and Section XIII (“Progress Reports”). *Id.*

<sup>157</sup> *Id.* at \*74–\*75. The Remedial Design/Action Plan “describe[s] studies, plans, and remedial actions to be undertaken at or with respect to the Site.” *Id.* at \*12.

<sup>158</sup> *Id.* at \*74–\*75. The relevant sections of the consent decree are: Section XIV (“Other Plans, Reports and Items Requiring Agency Approval”), Section XIX (“Reimbursement of Response Costs”), and Section XXVI.A (“Access to Information”). *Id.*

sent decree or for failure to timely complete the "major milestones" set forth in the Remedial Design/Action Plan.<sup>159</sup> Of all stipulated penalties incurred by the settling defendants, one-half are payable to the EPA and one-half to Massachusetts.<sup>160</sup>

If the matter which triggers the stipulated penalties is disputed by the settling defendants, the stipulated penalties continue to accrue but payment is stayed pending resolution of the matter.<sup>161</sup> A June, 1995 article in *The Boston Globe* reported that "[m]ore than ten years into its cleanup job, the [remediation] company has not been penalized by the EPA once."<sup>162</sup> The article, however, recounted an employee's story which, if true, could lead to penalties.<sup>163</sup> The employee, a technician involved in excavating contaminated soil at the site, reported that he returned unexpectedly one night to the Industri-Plex site and witnessed the night crew pumping arsenic-contaminated water into a drainage ditch bound for the Mystic River.<sup>164</sup>

A separate schedule of stipulated penalties applies to situations where any settling defendant who owns land in Industri-Plex or any successor-in-title fails to comply with requirements (1) to maintain institutional controls; (2) to provide access to the property to the EPA, Massachusetts, and the settling defendants and their representatives; or (3) to record notices of covenants to provide access.<sup>165</sup>

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<sup>159</sup> *Id.* at \*12. The fines are calculated according to the following table:

<i>Time Elapsed</i>	<i>Penalty per day</i>
1st thru 7th day	\$ 1,500.00
8th thru 14th day	\$ 2,500.00
15th thru 28th day	\$ 4,000.00
29th thru 60th day	\$ 6,000.00
Beyond sixty days	\$ 10,000.00

*Id.* at \*75.

<sup>160</sup> *Id.*

<sup>161</sup> Consent Decree, *supra* note 13, at \*73.

<sup>162</sup> Allen, *supra* note 4, at 1. The company hired by the settling defendants to lead the cleanup is Rust Utilities, an Alabama-based company. *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Consent Decree, *supra* note 13, at \*75. Noncompliance by settling defendants or successors-in-title with these requirements will incur penalty fines as follows:

<i>Time Elapsed</i>	<i>Penalty per day</i>
1st thru 7th day	\$ 750.00
8th thru 14th day	\$ 1,500.00
15th thru 28th day	\$ 2,500.00
29th thru 60th day	\$ 4,000.00
Beyond sixty days	\$ 8,000.00

*Id.*

The per day stipulated penalty is assessed for the first day of noncompliance and for each day thereafter that noncompliance continues.<sup>166</sup>

The section of the consent decree entitled "Covenants Not to Sue by Plaintiffs" constitutes the only curtailment of the settling defendants' perpetual and joint and several liability.<sup>167</sup> Under this section of the consent decree, the United States and Massachusetts agree not to sue the settling defendants or persons acting on their behalf for "Covered Matters."<sup>168</sup> "Covered Matters" include: (1) liability to the United States arising under §§ 106 and 107(a) of CERCLA and § 7003 of SWDA; or (2) liability to Massachusetts arising under § 107(a) of CERCLA or under certain provisions of Massachusetts state law,<sup>169</sup> where that liability relates to response costs which predate the consent decree or to any of the following list of conditions existing at the site as of the date the consent decree was entered: "(a) soil contamination which does not cause or contribute to groundwater contamination; (b) air contamination; and (c) groundwater contamination, where it results from the presence of benzene and toluene."<sup>170</sup>

The covenants not to sue take effect once the settling defendants have reimbursed the EPA and Massachusetts for response costs and, as to the Mark-Phillip Trust, once the trust has conveyed its property to the Custodial Trust.<sup>171</sup> As regards "Future Liability," however, the covenants not to sue do not apply until (1) the EPA has certified completion of the remedial action; and (2) Massachusetts has concurred in the certification.<sup>172</sup> "Future Liability" arises when conditions at the site, previously unknown to the EPA or Massachusetts, are discovered after the entry of the consent decree, or when the EPA or Massachusetts finds, based on new information, that the remedial work is no longer protective of human health and the environment.<sup>173</sup> The effect of postponing the application of the covenants not to sue to "Future Liability" is that the scope of the remedial work may be expanded at any point prior to the EPA's certification of completion, with the settling defendants being jointly and severally liable for all additional response costs.<sup>174</sup>

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<sup>166</sup> *Id.* at \*76.

<sup>167</sup> *Id.* at \*78-85.

<sup>168</sup> *Id.* at \*78.

<sup>169</sup> *Id.* at \*80-81. See *supra* note 125 for list of pertinent state law provisions.

<sup>170</sup> Consent Decree, *supra* note 13, at \*80-81.

<sup>171</sup> *Id.* at \*78.

<sup>172</sup> *Id.* at \*79.

<sup>173</sup> *Id.* at \*78-83.

<sup>174</sup> See *id.*

Even after the EPA has certified that the remedial work is complete, the "Post-certification reservations" operate to allow the EPA and Massachusetts to institute proceedings against Monsanto and other settling defendants *who own Industri-Plex property* to perform additional response actions or to reimburse the United States and Massachusetts for response costs.<sup>175</sup> The "Post-certification reservations," however, allow the EPA and Massachusetts to sue for performance or recovery of response costs only when conditions at the site, previously unknown to the United States, are discovered after the entry of the consent decree, or when the EPA or Massachusetts finds, based on new information, that the remedial work is no longer protective of human health and the environment.<sup>176</sup>

### B. *The Remedial Trust Fund*

The consent decree requires that the settling defendants execute a Remedial Trust Agreement establishing the Industri-Plex Site Remedial Trust Fund (Remedial Trust).<sup>177</sup> The Trustee of the Remedial Trust manages the financial aspects of the remedial action.<sup>178</sup> The settling defendants contribute money to the Remedial Trust, which is then disbursed by the Trustee to pay expenses incurred under the consent decree, including the expenses of administering the Remedial Trust, the Custodial Trust, and an interest-bearing escrow account.<sup>179</sup> The Trustee of the Remedial Trust is required to prepare periodic reports predicting expenses for the next 120 days and revealing the amount remaining in the Remedial Trust on the date of the report.<sup>180</sup> The settling defendants must contribute funds to the Remedial Trust to ensure that the remedial work proceeds as smoothly and efficiently as possible.<sup>181</sup>

The Remedial Trust Agreement is attached as an appendix to the consent decree and is enforceable under the terms of the consent decree against each of the twenty-five settling defendants who signed the Remedial Trust Agreement.<sup>182</sup> The settling defendants assume liability for any failure by the Remedial Trust to comply with the

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<sup>175</sup> Consent Decree, *supra* note 13, at \*81-\*84.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at \*23-\*24.

<sup>178</sup> *Id.* at \*24.

<sup>179</sup> *Id.*

<sup>180</sup> Consent Decree, *supra* note 13, at \*24-\*25.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at \*25. The Mark-Phillip Trust is not a party to the Remedial Trust Agreement.

terms of the consent decree.<sup>183</sup> Notwithstanding the enforceability of the Remedial Trust Agreement against the settling defendants, the EPA and Massachusetts are not bound by the provisions of the agreement and are free to change the allocation provisions in the agreement which dictate what percentage of the total costs of remediation each settling defendant must pay.<sup>184</sup>

### C. *The Custodial Trust and the Interest-Bearing Escrow Account*

The Mark-Phillip Trust, at the time the consent decree was negotiated, owned approximately 120 of the 245 acres within the Industri-Plex site.<sup>185</sup> Due to insufficient financial resources to pay its share of the remediation costs, the Mark-Phillip Trust agreed instead to transfer to a Custodial Trust all the property it owned, operated, or managed.<sup>186</sup> In exchange for the transfer of this property, the EPA, through the terms of the consent decree, expressly released the Mark-Phillip Trust from any obligation to finance or perform the remedial work at Industri-Plex.<sup>187</sup> The conveyances by the Mark-Phillip Trust provide reimbursement of costs that the settling defendants will incur, resolve liability of the Mark-Phillip Trust for costs incurred by the United States and Massachusetts before entry of the consent decree, settle certain claims between the Mark-Phillip Trust and the other settling defendants, and will fund future response costs associated with the Industri-Plex site.<sup>188</sup>

The consent decree mandates the establishment of the Custodial Trust and of an interest-bearing escrow account to hold and distribute funds received from the sale of the Custodial Trust property.<sup>189</sup> The Custodial Trust's duties with respect to the Mark-Phillip Trust prop-

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Winograd interview, *supra* note 8.

<sup>186</sup> *Id.*; Consent Decree, *supra* note 13, at \*28. The specific language regarding what property the Mark-Phillip Trust must transfer is as follows:

the Mark-Phillip Trust shall give, assign, convey, deed, or transfer to the Custodial Trust all property, real and personal, tangible and intangible, including all money, fees, charges, revenues, assignments of interest, collateral or otherwise owned, operated, or managed by the Mark-Phillip Trust anywhere and in any form, or by any person acting on behalf or under the control of the Mark-Phillip Trust.

Consent Decree, *supra* note 13, at \*28.

<sup>187</sup> See Consent Decree, *supra* note 13, at \*17.

<sup>188</sup> *Id.* at \*29-\*30. The Mark-Phillip Trust also agreed to assist the EPA, Massachusetts, and the settling defendants in any actions to ascertain or quiet title to, or to contest or obtain the release of any encumbrance on, the property transferred by it to the Custodial Trust. *Id.* at \*30.

<sup>189</sup> *Id.* at \*26-\*27. See *supra* note 137 for definition of Institutional Controls.

erty include: (1) to manage and maintain the property; (2) to inaugurate the Institutional Controls; (3) to comply with the Institutional Controls; (4) to abide by the covenants to provide access to the property; (5) to subdivide the property if necessary to facilitate sale; (6) to pursue potential purchasers and negotiate the terms of sale; and (7) to transfer the sales proceeds, less all necessary expenses, to the escrow account.<sup>190</sup> The Custodial Trust may not sell the Mark-Phillip Trust property until the EPA has issued a formal certification of completion of the remedial action, and unless the EPA and Massachusetts grant special permission to convey the portion of the site for which such a certification has not been issued.<sup>191</sup>

Of the first \$3 million of net proceeds<sup>192</sup> from the sale of the Mark-Phillip Trust property, ten percent will go toward the City of Woburn's claims for real estate taxes.<sup>193</sup> In addition, the City of Woburn will receive ten percent of net proceeds in excess of \$10 million, until the City of Woburn has received a total of \$645,000.<sup>194</sup> The amount remaining after deduction of the reasonable costs of sale and the taxes owed to the City of Woburn is referred to as net value and will be distributed according to the following formula: (1) of the first \$8 million of value, eleven percent goes to the United States as reimbursement for any remaining response costs which predated the consent decree;<sup>195</sup> and the remainder goes to the settling defendants to defray remediation costs; (2) of any net value in excess of \$8 million, up to and including a total value of \$10 million, fifty percent is allocated to the settling defendants and fifty percent must be held in the escrow account for future response costs; and (3) of any net value in excess of \$10 million, thirty percent goes to the settling defendants and seventy percent goes to the United States as reimbursement for response costs which predate the consent decree. If the United States already has been reimbursed for response costs, the amount remaining must be transferred to the escrow account for distribution to the settling defendants.<sup>196</sup>

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<sup>190</sup> *Id.* at \*30-\*31.

<sup>191</sup> *Id.* at \*33-\*34.

<sup>192</sup> Consent Decree, *supra* note 13, at \*33. "Net proceeds" means total sale proceeds less reasonable costs of sale. *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> According to the terms of the consent decree, these pre-consent decree costs should have been paid within thirty days after the entry of the consent decree. *Id.* at \*65-\*66.

<sup>196</sup> *Id.* at \*35-\*39.



Any net proceeds not allocated to the City of Woburn, the United States, Massachusetts, or the settling defendants will remain in the escrow account, with the principal and interest to be applied to any of the following categories of response costs incurred by the EPA or Massachusetts in the future: (1) costs incurred in deciding whether to implement further remedial action for groundwater or surface water contamination; (2) costs incurred by the EPA or Massachusetts in implementing any additional remedial action required under (1); (3) costs incurred by the EPA in performing the first two "five-year reviews" pursuant to § 121(c) of CERCLA,<sup>197</sup> or (4) contribution toward the cost of further remedial action, if it is determined within two years after completion of the second five-year review, that the completed remedial action is no longer sufficiently protective of human health or the environment.<sup>198</sup> If neither the EPA nor Massachusetts decides that any further remedial action is required or if any required action is already funded, the escrow will terminate and the balance will be distributed to the settling defendants.<sup>199</sup>

If the EPA, in consultation with Massachusetts and the settling defendants, decides that any Mark-Phillip Trust property is unsalable, the Custodial Trust will establish and fund a further trust to hold that property and to carry out any remedial measures on the property.<sup>200</sup> The settling defendants are jointly and severally liable for any failure by the Custodial Trust to comply with the terms of the consent decree.<sup>201</sup>

#### D. *Future Owners: How Does the Consent Decree Affect Them?*

According to the terms of the Consent Decree, an entity that acquires an ownership interest in the Industri-Plex site from a settling defendant who owns property on the site or from the Custodial Trust is not considered a successor or assign.<sup>202</sup> The new owner is simply a successor-in-title and, therefore, does not become liable to perform the remedial work required by the consent decree, provided that: (1) the new owner is not affiliated with, or related to, any of the settling

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<sup>197</sup> CERCLA § 121(c) provides that where the EPA selects a remedy that involves leaving a portion of the hazardous substances at the site, the EPA must review the remedial action at least every five years after completion to ensure that it is still sufficiently protective of human health and the environment. 42 U.S.C. § 9621(c).

<sup>198</sup> Consent Decree, *supra* note 13, at \*38-\*39.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at \*36-\*37.

<sup>202</sup> *Id.* at \*13-\*14.

defendants or the Mark-Phillip Trust; (2) the new owner acquires the property in a good faith, arms' length transaction for value; and (3) the new owner does not succeed to the prior owner's business.<sup>203</sup> As a successor-in-title, any new owner—including the Custodial Trust—will be obligated to carry out the Institutional Controls that run with the land and bind all successors-in-title.<sup>204</sup> Those new owners who become successors-in-title prior to the "Inauguration of Institutional Controls"<sup>205</sup> will be responsible for that aspect of the remediation.<sup>206</sup> One of the major purposes of the Institutional Controls will be to maintain the caps placed on the two hide piles and to maintain pre-existing land caps such as parking lots which, while not constructed as part of the consent decree, are nevertheless vital to ensuring that hazardous substances are not exposed.<sup>207</sup> If any successor-in-title modifies or disturbs any cap, cover, or other ground-covering structure and thereby increases the cost to the settling defendants of any remedial work, the successor-in-title who caused the increased cost must reimburse the settling defendants for that cost.<sup>208</sup> Additionally, successors-in-title assume the obligation to provide access to their property to the EPA, Massachusetts, the settling defendants, and their representatives and contractors where access is required to carry out the terms of the consent decree.<sup>209</sup>

The provisions of the consent decree regarding successors-in-title and their obligations suggest that new owners of Industri-Plex property will not be dragged unwittingly into the wide net of CERCLA liability.<sup>210</sup> The consent decree, however, provides no guaranty to these future owners, since they are not parties to the consent decree.<sup>211</sup> That this is the case is clear from the language of CERCLA itself: a consent decree does not affect "the authority of [the EPA] to maintain an

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<sup>203</sup> Consent Decree, *supra* note 13, at \*13-\*14.

<sup>204</sup> *Id.* at \*42.

<sup>205</sup> "Inauguration of Institutional Controls" means "those activities . . . necessary to make the Institutional Controls fully effective and binding [e.g., recording notices and covenants with the Registry of Deeds]" on each Industri-Plex property owner. *Id.* at \*9.

<sup>206</sup> *Id.* at \*42.

<sup>207</sup> Interview with Joseph Lemay, Project Coordinator, Environmental Protection Agency, Region I, in Boston, Mass. (Feb. 10, 1995).

<sup>208</sup> Consent Decree, *supra* note 13, at \*45.

<sup>209</sup> *Id.* at \*53-\*55.

<sup>210</sup> See *supra* notes 202-09 and accompanying text.

<sup>211</sup> The consent decree specifically states that "[n]othing in this consent decree shall be construed to create any rights in, or any cause of action by, any person not a party to this consent decree." Consent Decree, *supra* note 13, at \*15.

action under this chapter against any person who is not a party to the [consent decree]."<sup>212</sup> To bridge this gap and ensure that the land that has been remediated at a cost of millions of dollars will be returned to beneficial reuse, the EPA has revised its policy regarding the use of prospective purchaser agreements.<sup>213</sup> The next section discusses the new policy and its application at the Industri-Plex site.

#### V. INDUSTRI-PLEX: THE EPA'S NEW POLICY ON PROSPECTIVE PURCHASER AGREEMENTS

The EPA's Prospective Purchaser Agreement takes the consent decree one step farther and provides an explicit covenant not to sue between the EPA and the purchaser.<sup>214</sup> In July, 1995 the EPA published new guidance in the Federal Register regarding prospective purchaser agreements and their scope of application.<sup>215</sup> In this guidance, the EPA explained the demand and need for prospective purchaser agreements, the function of these agreements, and the new criteria governing their use.<sup>216</sup> From the buyer's narrow perspective, the need for prospective purchaser agreements stems from the simple fact that nobody wants to be tagged with CERCLA liability: "[b]ecause of the clear liability which attaches to landowners who acquire property with knowledge of contamination, the Agency has received numerous requests for covenants not to sue from prospective purchasers of contaminated property."<sup>217</sup> The need, however, is not only to appease the buyer, but to further broader regulatory and societal goals: "EPA's experience has shown that prospective purchaser agreements have also benefitted the community . . . by encouraging the reuse or redevelopment of property at which the fear of Superfund liability may have been a barrier."<sup>218</sup> The function, therefore, of prospective purchaser agreements, is "to promote cleanup for the beneficial reuse and development of contaminated properties."<sup>219</sup> The July, 1995 guidance sets forth new criteria to guide the approval of prospective purchaser

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<sup>212</sup> CERCLA, 42 U.S.C. §§ 9622(c)-(d)(1)(A).

<sup>213</sup> Announcement and Publication of Guidance on Agreements With Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement, 60 Fed. Reg. 34,792 (1995) [hereinafter Announcement].

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 34,793.

<sup>218</sup> Announcement, *supra* note 213, at 34,793.

<sup>219</sup> *Id.* at 34,792.

agreements.<sup>220</sup> The criteria are slanted toward “expanding the universe of eligible sites.”<sup>221</sup> Accordingly, a site may be the subject of a prospective purchaser agreement where “the agreement results in either (1) a substantial direct benefit to the Agency in terms of cleanup or funds for cleanup or (2) a substantial indirect benefit to the community coupled with a lesser direct benefit to the Agency.”<sup>222</sup> The impetus for, and significance of, the new 1995 criteria is evident from the EPA’s brief summary of its experience with prospective purchaser agreements under its former 1989 guidance:

[d]uring the past several years, EPA has entered into a number of prospective purchaser agreements to enable purchasers to buy contaminated property for cleanup, redevelopment or reuse. The 1989 guidance required the EPA to receive substantial benefits in terms of work or reimbursement of response costs that otherwise would not have been available. . . . EPA’s experience has demonstrated that prospective purchaser agreements might be both appropriate and beneficial in more circumstances than contemplated by the 1989 guidance. The Agency now believes that it may be appropriate to enter into agreements resulting in somewhat reduced benefits to the Agency through cleanup or response costs or in benefits that also may be available from other parties. These agreements in turn should provide substantial benefits to the community through the creation or retention of jobs, productive use of abandoned property, or revitalization of blighted areas.<sup>223</sup>

The new guidance represents an overall shift in policy: the narrow policy of furthering the EPA’s recoupment of costs has given way to a broader goal of ensuring that a parcel of land that is caught in the legal leviathan of CERCLA ultimately is put to use in a manner that ensures maximum societal benefit.<sup>224</sup> “These criteria are intended to reflect EPA’s commitment to removing the barriers imposed by potential CERCLA liability while ensuring protection of human health and the environment.”<sup>225</sup>

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<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> Announcement, *supra* note 213, at 34,793.

<sup>224</sup> *See id.* In describing the benefit criterion that guides the use of prospective purchaser agreements, the EPA acknowledged that “its past practice of limiting prospective purchaser agreements to those situations where substantial benefit was measured only in terms of cost reimbursement or work performed may have decreased the effectiveness of this tool.” *Id.* at 34,794.

<sup>225</sup> *Id.*

Sites eligible to become the subject of a prospective purchaser agreement are those sites at which “an EPA action has been taken, is ongoing, or is anticipated to be undertaken by the Agency.”<sup>226</sup> This rule of site selection represents an expansion of the earlier rule, which excluded from consideration sites such as Industri-Plex where EPA action was ongoing or completed.<sup>227</sup> In terms of practical application of this rule of site selection, the EPA instructs its personnel to consider whether the prospective purchaser agreement will generate sufficient benefit to justify its use.<sup>228</sup> The benefit, whatever form it takes, must be “substantial.”<sup>229</sup> The benefit criterion is satisfied where the EPA receives a direct benefit in the form of “a commitment to conduct the cleanup or to reimburse the EPA’s cost of cleanup.”<sup>230</sup> Under the July, 1995 guidance, the benefit criterion also is satisfied where the EPA receives “some direct benefit,” coupled with substantial indirect benefit to the community.<sup>231</sup> The EPA defined indirect benefit to include the following types of benefits: “measures that serve to reduce substantially the risk posed by the site, creation or retention of jobs, development of abandoned or blighted property, creation of conservation or recreation areas, or provision of community services (such as improved public transportation and infrastructure).”<sup>232</sup> The second prerequisite to approval of a prospective purchaser agreement is that “the continued operation of the facility or new site development, with the exercise of due care, will not aggravate or contribute to the existing contamination or interfere with the EPA’s response action.”<sup>233</sup> Where the EPA predicts that the buyer’s activities will exacerbate the existing contamination, the EPA generally will decline to enter into a prospective purchaser agreement.<sup>234</sup> In some circumstances, a prospective purchaser agreement including restrictions tailored to protect the remediated condition of the site may be an alternative.<sup>235</sup> Under the third criterion for approval of a prospective purchaser

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 34,793.

<sup>228</sup> Announcement, *supra* note 213, at 34,794. The EPA refers to the measurement of environmental benefit as the “cornerstone of the Agency’s evaluation process” of acceptable prospective purchaser agreements. *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> Announcement, *supra* note 213, at 34,794.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

agreement, the EPA may not enter into a prospective purchaser agreement if it believes that active use of the site would impose health risks on the surrounding community.<sup>236</sup> Finally, under the fourth criterion, a buyer who is a party to the prospective purchaser agreement "should demonstrate that it is financially viable and capable of fulfilling any obligation under the agreement."<sup>237</sup>

If the buyer survives each of the levels of examination, the buyer may become a party to a prospective purchaser agreement.<sup>238</sup> On January 29, 1996, the EPA published a proposal to enter into a prospective purchaser agreement at Industri-Plex.<sup>239</sup> Since the EPA already has provided for cleanup of Industri-Plex through the terms of the consent decree,<sup>240</sup> the EPA is not looking for "a substantial direct benefit . . . in terms of cleanup or funds for cleanup."<sup>241</sup> Rather, the EPA is issuing the prospective purchaser agreement under the authority of its July, 1995 policy<sup>242</sup> which allows the use of prospective purchaser agreements where "the agreement results in . . . a substantial indirect benefit to the community coupled with a lesser direct benefit to the Agency."<sup>243</sup> The indirect benefit is the regional transportation center that is planned for the site.<sup>244</sup> Based on the proposed Industri-Plex prospective purchaser agreement published by the EPA on January 29, 1996, the "lesser direct benefit" appears to be payment of \$30,000 by the prospective purchasers to the Hazardous Substances Superfund,<sup>245</sup> as well as an agreement "to abide by the institutional controls and to provide access to the property."<sup>246</sup>

## VI. INDUSTRI-PLEX AS A MODEL FOR OTHER SITES

The Industri-Plex site, after it is ultimately transformed into a regional transportation center, will represent a model remediation effort because the site will achieve beneficial reuse.<sup>247</sup> This result can

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<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> Announcement, *supra* note 213, at 34,793-94.

<sup>239</sup> Settlement, *supra* note 14, at 2,824.

<sup>240</sup> See *supra* section IV.

<sup>241</sup> Announcement, *supra* note 213, at 34,794.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> See *id.*; Kindleberger, *supra* note 1, at A1.

<sup>245</sup> Settlement, *supra* note 14, at 2,824. See *supra* note 23 and accompanying text for description of the Hazardous Substance Superfund.

<sup>246</sup> Settlement, *supra* note 14, at 2,824.

<sup>247</sup> See Kindleberger, *supra* note 1, at A1.

be attributed to careful planning and engineering by the EPA and to the EPA's willingness to make concessions to the future owners of the Industri-Plex property. The EPA's planning and engineering are represented in the 1989 consent decree. The concessions materialize in the EPA's July, 1995 policy on prospective purchaser agreements. The combination of the two agreements—the consent decree and the prospective purchaser agreement—ensures that the final product is a remediated site that, through beneficial reuse, someday will cease to be just a "Superfund Site." The formula for success, however, appears also to depend on certain underlying "fortuitous circumstances," which would have to be present for the Industri-Plex model to be adopted at other sites.

The consent decree, while primarily a vehicle to ensure financing of the cleanup and timely completion of the remedial work, contains certain terms that facilitate resale and reuse of the land. First, the consent decree imposes broad liability on the settling defendants.<sup>248</sup> Even after the EPA certifies that the remediation is complete, and the covenants not to sue become fully effective, the settling defendants are not absolved of liability.<sup>249</sup> The EPA and Massachusetts retain the right to force Monsanto and other settling defendants who own Industri-Plex property to perform additional response actions or to reimburse the United States and Massachusetts for response costs.<sup>250</sup> The broad liability imposed on the settling defendants and the presence of Monsanto, a well-financed party to lead the remediation, suggest that the EPA will not need to pursue future Industri-Plex owners for response costs. Monsanto represents one of the fortuitous circumstances: the fact that there is a well-financed defendant who agreed to lead the remediation effort and to incur enormous response costs may have made the EPA more amenable to truncating its list of potentially responsible parties through the proposed Prospective Purchaser Agreement.

The condition of settlement imposed on the Mark-Phillip Trust—conveyance of all of its property to the Custodial Trust—also furthers the plan for beneficial reuse.<sup>251</sup> The direct effect of the conveyance is that the property is freed of ownership rights and simply is waiting in trust to be purchased. The indirect effect of the conveyance is that

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<sup>248</sup> See *supra* section IV.A.

<sup>249</sup> Consent Decree, *supra* note 13, at \*81-\*82.

<sup>250</sup> *Id.*

<sup>251</sup> See *supra* text accompanying notes 185-88.

it helps finance the remediation, making the settlement terms less onerous for Monsanto and reducing the chance that the EPA will seek to expand the pool of potentially responsible parties to include future owners of the remediated Industri-Plex property. Once the EPA has certified completion of the remedial work, the Custodial Trust may sell the 120 acres of Mark-Phillip Trust property.<sup>252</sup> The sale of Mark-Phillip Trust property will generate substantial revenues. These revenues will be disbursed according to the formula set forth in the consent decree: to pay back taxes owed to the City of Woburn, to reimburse the EPA and Massachusetts for their response costs, to reimburse the settling defendants for remediation costs, and to remain in the escrow account to fund any necessary additional remedial action.<sup>253</sup> Because Monsanto stands to gain reimbursement for at least a portion of its response costs through the sale of the Mark-Phillip Trust property, Monsanto has an incentive to ensure that the remedial work is completed promptly and properly. Because residual profits from the sale of the property will be held in escrow until the EPA determines that no further remedial work is necessary, the EPA will not need to add potentially responsible parties to the original group of settling defendants.

The fact that the Mark-Phillip Trust was compelled to convey its property because of financial necessity is another fortuitous circumstance. Had the Mark-Phillip Trust been able to make a financial contribution, rather than an "in-kind" contribution, Monsanto would not have the opportunity to recoup a substantial portion of its response costs and any future response costs would have to be entirely funded by out-of-pocket contributions by the settling defendants or by new owners of the property.

The "in-kind" contribution by the Mark-Phillip Trust relates to other underlying circumstances that increase the likelihood of beneficial reuse of the Industri-Plex Superfund site—the location and nature of the land. First, Industri-Plex is situated in a desirable location where there is little property available for development. The fact is that absent CERCLA and the threat of liability, Industri-Plex would be prime industrial property. In addition, the site is industrially zoned and is serviced by an off-site water supply.<sup>254</sup> It is unlikely that Industri-Plex ever could be developed as residential property, since the

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<sup>252</sup> Consent Decree, *supra* note 13, at \*33–\*34.

<sup>253</sup> See *supra* text accompanying notes 192–99.

<sup>254</sup> Winograd interview, *supra* note 8.



method of remediation will not remove every last ounce of contaminated soil from the site, but, rather, will cap the deposits of hazardous waste scattered throughout the site.<sup>255</sup> Fortunately, owners of Industri-Plex property receive their water from an off-site source.<sup>256</sup> Therefore, even though hazardous waste remains at the site and could contaminate the groundwater if the Institutional Controls are not completely effective, contamination of the groundwater will not translate into contamination of the water supply of Industri-Plex property owners.

A responsible corporate purchaser who is looking to the property as a site for buildings and parking lots, rather than homes and parks, will not be deterred by the fact that some hazardous waste remains on the site and requires that the owner maintain a three foot layer of paving or some other cap on top of contaminated soil.<sup>257</sup> The owner still may disturb the paving or other caps where excavation is necessary for construction purposes as long as the owner takes special precautions to minimize human exposure to hazardous waste during construction.<sup>258</sup> Maintenance of the paving or caps, together with heightened safety standards where construction disturbs the caps, may impose some additional costs on the owners.<sup>259</sup> These incidental costs will be balanced by the benefits of ownership of Industri-Plex property. Industri-Plex is located at the junction of Routes 128 and 93, in close proximity to other industrial parks and to the City of Boston.<sup>260</sup> The price of the property, however, will reflect not only its prime location, but the former status of Industri-Plex as a Superfund site and consequently will be lower than other similarly situated property.<sup>261</sup> An owner who is willing to undertake the relatively small burden of maintaining institutional controls will be able to locate operations on prime industrial property, the price of which has been deflated due to the stigma of having been a "Superfund site."

The final piece of beneficial reuse is the EPA's new policy on prospective purchaser agreements. In its July, 1995 guidance, the EPA expanded the universe of sites to include sites where remediation is ongoing or completed. Additionally, the "substantial benefit" that the

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<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> Winograd interview, *supra* note 8.

<sup>260</sup> See ROD, *supra* note 74, "Site Location and Description."

<sup>261</sup> Winograd interview, *supra* note 8.

EPA must receive in exchange for the issuance of the prospective purchaser agreement may now take the form of a substantial indirect benefit to the community coupled with a lesser direct benefit to the EPA. This represents a concession by the EPA, because under the former policy the EPA only issued prospective purchaser agreements where the purchaser promised to finance or perform remediation at a contaminated site. In the case of Industri-Plex, however, the "concession" is negligible, since the remediation is already funded at two levels: by the direct contribution from Monsanto and the other settling defendants, and by the indirect contribution of the sale of the Mark-Phillip Trust property. The question remains, therefore, whether the EPA would be willing to enter into a prospective purchaser agreement at a site which was ideally situated for beneficial reuse, but for which remediation was not fully funded.

## VII. CONCLUSION

Industri-Plex is, notwithstanding its classification as a Superfund site, valuable industrial property. The only obstacle to its redevelopment is the potential CERCLA liability which adheres to any site at which there is, or has been, a release of hazardous substances. The Industri-Plex consent decree between the EPA, Massachusetts, and the settling defendants explicitly confers liability upon the settling defendants for ongoing and future response costs at the site. The proposed Prospective Purchaser Agreement between the EPA and future purchasers of Industri-Plex property explicitly relieves future owners of CERCLA liability for pre-existing contamination at the site. The combination of the two instruments, as applied to valuable industrial property, is sufficient to overcome developers' reluctance to purchase property at a Superfund site.