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I. LIABILITY FOR CONTAMINATED PROPERTY UNDER FEDERAL LEGISLATION

The federal Superfund statute, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA),[1] imposes liability on certain individuals and companies for the remediation of properties that release or threaten to release "hazardous substances."

A. LIABILITY

"Hazardous substances" are defined in CERCLA[2] to include hazardous waste as defined in the Resource Conservation and Recovery Act (RCRA),[3] materials listed or designated as toxic pollutants under the Clean Water Act (FCWA),[4] any hazardous air pollutant listed under the Clean Air Act (CAA),[5] any imminently hazardous chemical substance listed under the Toxic Substance Control Act (TSCA),[6] and any additional substance designated pursuant to the Act.[7] A listing of hazardous substances can be found at 40 C.F.R. § 302.

Section 107(a) of CERCLA[8] defines the persons liable for the remediation of property contaminated by hazardous substances.[9] Among

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1. 42 U.S.C. § 9601-9675 (1994) *amended by* Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99,499, 100 Stat. 1613 (1986).
2. *See* 42 U.S.C. § 9601(14) (1994) for the statutory definition.
3. 42 U.S.C. § 6921 (1994).
4. 33 U.S.C. §§ 1321, 1317 (1994).
5. 42 U.S.C. § 7412 (1994).
6. 15 U.S.C. § 2606 (1994).
7. 42 U.S.C. § 9602 (1994).
8. 42 U.S.C. § 9607(a) (1994).
9. The full text of 42 U.S.C. § 9607(a) reads as follows:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section -

those liable are: the current owner and operator of a vessel or a facility; under some circumstances, the previous owners and operators of any facilities that disposed of relevant hazardous substances; persons who arrange, for example by contract, for disposal or for the transportation for disposal of hazardous substances; and transporters of hazardous wastes, if they select the disposal sites, and if a release or the threat of a release of the substance concerned occurs at these sites. Basically, anyone who ever had contact with the relevant hazardous substance can be found liable for remediation costs.

The extent of liability is specified in § 107(c) of CERCLA.[10] The responsible parties are liable for all costs of remedial action[11] incurred by the United States Government or a State not inconsistent with the National Contingency Plan, other necessary response costs[12] consistent with the National Contingency Plan, and damages for injury to natural resources, including the reasonable costs of assessing such injury resulting from the release of a hazardous substance.[13]

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(1) the owner and operator of a vessel or a facility,
(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance ...."

10. 42 U.S.C. § 9607(c) (1994).

11. *See* Thomas v. Outboard Marine Corp., 479 U.S. 1002 (1986). *Thomas* clarifies that "response," remedial" or "removal" action, as used in § 104 of the Act, includes entry on a waste site.

12. In Key Tronic Corp. v. United States, 114 S. Ct. 1960, 1962 (1994), the Supreme Court held that a private litigant's activities in identifying other potentially responsible parties were "necessary costs of response." In contrast, litigation-related attorney fees for prosecuting private response recovery action were not recoverable under CERCLA. Moreover, fees for legal services during negotiations with the EPA that culminated in a consent decree were not recoverable. *Id.*

13. 42 U.S.C. § 9607(c) reads as follows:
(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; [and]

The courts have held that liability under Superfund is joint and several, except where the responsible parties can show that it is clearly divisible.[14] Parties found liable at a Superfund cleanup can be held liable for the entire cost even if they were only responsible for a portion of the material sent there or the material they sent there only caused a small portion of the costs.[15] This is particularly onerous when there are large "orphan shares," or shares of clean up cost for which no responsible party can be found.[16]

B. DEFENSES

Section 107(b) of CERCLA sets forth the only defenses under the Act.[17] The liability of an otherwise responsible person is excluded if he can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance was caused solely by an act of God, an act of war, or an act or omission of a third party.[18] However, under specific circumstances a person is not regarded as a third party, such as acting in connection with a contractual relationship with the defendant.[19]

The third party exemption only applies if the defendant establishes by a preponderance of the evidence that he or she exercised due care with respect to the hazardous substance concerned in light of all relevant facts

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(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release . . .

See In re Acushnet River & New Bedford Harbour Proceedings re Alleged PCB Pollution, 716 F. Supp. 676 (D. Mass. 1989).

14. *See, e.g.*, United States v. Colorado & Eastern R.R., 50 F.3d 1530 (10th Cir. 1995); County Line Investment Co. v. Tinney, 933 F.2d 1508 (10th Cir. 1991); *See also* Lynda J. Oswald, *New Directions in Joint and Several Liability under CERCLA?*, 28 U.C. DAVIS L. REV. 299 (1995).

15. The Supreme Court of Wisconsin emphasized in *City of Edgerton v. General Casualty Co. of Wisconsin*, 517 N.W.2d 463 (1994), that voluntary settlement is preferable to governmental cleanups, for which reimbursement is sought from the responsible parties. Parties can contractually arrange for the allocation of the financial burden of CERCLA liability. *See* James W. Conrad Jr., *So Sue Me: Common Contractual Provisions and Their Role in Allocating Environmental Liability*, 26 ENVTL. L. REP. 10219 (1996).

16. The case law involving joint liability is extensive. *See, e.g.*, Laidlaw Waste Sys., Inc. v. Mallinckrodt, Inc., 925 F. Supp. 624 (E.D. Mo. 1996); Borough of Sayreville v. Union Carbide Corp., 923 F. Supp. 671 (D. N.J. 1996); Akzo Coatings, Inc. v. Ainger Corp., 909 F. Supp. 1154 (N.D. Ind. 1995); United States v. A & F Materials Co., Inc., 578 F. Supp. 1249 (S.D. Ill. 1984).

17. 42 U.S.C. § 9607(b) (1994).

18. *Id.*

19. *See* Keister v. Dow Chem. Co., 723 F. Supp. 117 (E.D. Ark. 1989).

and circumstances, and he or she took precautions against foreseeable acts or omissions of any such third party and their consequences.[20]

C. INNOCENT LANDOWNERS

In addition to the defenses under § 107(b) of CERCLA, owners of property from which there is a release or threatened release are not liable if they are "innocent landowners." A landowner is "innocent" for the purposes of CERCLA if he falls under one of the following three categories:

1. Pure security interests without more do not impose liability. Section 101(20)(A) of CERCLA provides: "[An owner or operator] does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility."[21]

2. According to § 101(20)(D) of CERCLA, state and local governments who obtain title involuntarily such as through bankruptcy, tax delinquency, etc., and who do not contribute to the release or threatened release are not deemed owners or operators.[22]

3. A purchaser of contaminated property who would otherwise have no defense under § 107(b)(3) of CERCLA can escape liability through the exercise of due diligence.[23] The term "contractual relationship" includes, for the purpose of § 107(b)(3) of CERCLA, land contracts or other

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20. 42 U.S.C. § 9607(b) (1994). The full text of this section reads as follows:
(b) Defenses
There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by-
(1) an act of God;
(2) an act of war;
(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
(4) any combination of the foregoing paragraphs.

21. 42 U.S.C. § 9601(20)(A) (1994).

22. 42 U.S.C. § 9601(20)(D) (1994).

23. 42 U.S.C. § 9601(35)(A) (1994).

instruments transferring title or possession, unless the defendant acquired the contaminated real property after the disposal of the hazardous substance at the facility.[24]

In addition to falling under any of these categories, the defendant must show one of the following three circumstances in order to be exempted from liability.[25] First, it must be shown that the defendants "did not know and had no reason to know" that the relevant hazardous substance was disposed of on, in, or at the facility.[26] Second, government entities which acquired the facility through involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation, are also exempted from liability.[27] Third, defendants who acquired the facility by inheritance or bequest are not subject to recovery claims under Superfund.[28]

The first exemption requires that the defendant had "no reason to know" about the contamination. This requirement is satisfied if the landowner has undertaken, at the time of acquisition, "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability."[29] A court will consider the defendant's specialized knowledge, as well as all reasonably ascertainable information, including the purchase price of the

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24. The full text of 42 U.S.C. § 9601(35)(A) reads as follows:

"The term 'contractual relationship,' for the purpose of section 9607(b)(3), includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence . . . ."

25. *See* 42 U.S.C. § 35(A) (1994).

26. 42 U.S.C. § 9601 (35)(A)(i) (1994).

27. 42 U.S.C. § 9601 (35)(A)(ii) (1994).

28. 42 U.S.C. § 9601 (35)(A)(iii) (1994). However, U.S. EPA policy has claimed that some minimal duty of due diligence still exists.

29. The full text of 42 U.S.C. § 9601(35)(B) (1994) reads as follows:

To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (A) of this paragraph, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

property, and the ability to detect contamination by appropriate inspection.[30]

Section 101(35)(C) of CERCLA further specifies that none of the three exemption circumstances noted in §§ 101(35)(B)-(C) or in § 9607(b)(3) shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under CERCLA. Furthermore, no defenses are available to a defendant who had actual knowledge of the release or threatened release of a hazardous substance at his facility and subsequently transferred ownership of the property to another person without disclosing such knowledge. Any such defendant is treated as liable under § 107(a)(1) of CERCLA.[31] However, none of the defenses shall affect the liability of a defendant who, by any act or omission, caused or contributed to the release or threatened release of a relevant hazardous substance.[32]

D. SUMMARY

In short, under federal Superfund legislation and the numerous cases interpreting it, anyone who purchases property knowing that it is contaminated to some degree may be found jointly and severally liable for the remediation of the property. Absent some form of relief,[33] contaminated

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30. *See* 42 U.S.C. § 9601(35)(B) (1994).

31. The full text of 42 U.S.C. § 9601(35)(C)-(D) reads as follows:

(C) Nothing in this paragraph or in section 9607(b)(3) of this title shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 9607(a)(1) of this title and no defense under section 9607(b)(3) of this title shall be available to such defendant.

(D) Nothing in this paragraph shall affect the liability under this chapter of a defendant who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance which is the subject of the action relating to the facility.

32. *Id.*

33. On the federal level, the only Brownfields initiative so far is the funding of fifty redevelopment projects of abandoned urban sites. U.S. ENVIRONMENTAL PROTECTION AGENCY, BROWNFIELDS ACTION AGENDA (1995). Among the many proposals to revise the federal Superfund program, is the recent suggestion by legislators in the 104th Congress to address Brownfields in the federal Superfund statute. *See* Environmental Law Reporter, *Recent Developments In the Congress, Overview, June 1996*, in 26 ENVTL. L. REP., Volume Year XXVI, News and Analysis, 10312.

For further discussion of Superfund reform issues, *see, e.g.*, Scott C. Whitney, *Superfund Reform: Clarification of Cleanup Standards to Rationalize the Remedy Selection*

industrial property which cannot be returned to pristine conditions will find neither a buyer nor a lender.[34] It will remain out of the development loop, off the tax rolls, and a drag on the neighborhood and city in which it is located.[35]

It should be remembered, however, that an owner or operator of contaminated property is under no obligation to remediate the property unless there is an administrative or judicial order to that effect. More specifically, the federal or state government can only recover costs which are "not inconsistent with the national contingency plan," and private claims are only recoverable if they are "consistent with the . . . plan."[36]

II. ILLINOIS SUPERFUND LAW

A. STRUCTURE

Illinois' Superfund law was essentially the same as federal law in terms of regulated substances[37], persons liable, and required cleanups. Now, however, it differs in the structure of the remedies available to the state. The recent Brownfields legislation[38] repealed joint and several liability in favor of proportionate liability based on causation. The provisions of Illinois' Superfund law are scattered through the Illinois Environmental Protection Act[39] ("the Illinois Act").[40]

Process, 20 COLUM. J. ENVTL. L. 183 (1995); John Pendergrass, *Use of Institutional Controls as Part of Superfund Remedy: Lessons from Other Programs*, 26 ENVTL. L. REP. 10109 (1996).

34. *See* James T. Harrington, *Lender Liability Under Superfund: The Saga Continues as EPA Steps In*, ENVTL. WATCH, Spring 1991, 2.

35. For a general view of the economic impact of Brownfields issues, *see* E. Lynn Grayson & Stephen A.K. Palmer, *The Brownfields Phenomenon: An Analysis of Environmental, Economic, and Community Concerns*, 25 ENVTL. L. REP. 10337 (1995); Howard M. Shanker & Laurent R. Hourclé, *Prospective Purchaser Agreements*, 25 ENVTL. L. REP. 10035 (1995).

36. *See* 42 U.S.C. § 9607 (1994). For the burden of proof concerning the consistency with the plan, *see* United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 747 (8th Cir. 1987); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578 (D. Md. 1986).

37. *See, e.g.*, National Envtl. Services Corp. v. Illinois Pollution Control Bd., 570 N.E.2d 1245 (Ill. App. Ct. 1991). The Fourth District Appellate Court held that "hazardous waste" within the meaning of the Act includes infectious medical hazardous waste. *Id.*

38. For an introduction to Brownfields legislation, *see* R. Michael Sweeney, *Brownfields Restoration and Voluntary Cleanup-Legislation*, 2 ENVTL. L. 101 (1995); Grayson & Palmer, *supra* note 35.

39. 415 ILL. COMP. STAT. ANN. 5/1 (West 1993 & Supp. 1996).

40. For an overview of agencies, other administrative bodies, their functions, and the rulemaking process under Illinois environmental law, *see* James T. Harrington, The Structure

Section 22.2(f) of the Illinois Act provides that the same persons are liable under the Illinois Act as under the federal Act, including the owners and operators[41] of facilities where there is a release or threat of release,[42] any person who at the time of the disposal on the owned or operated the facility, any one who arranged for the disposal of the hazardous substance, and transporters who selected the site of disposal.[43]

The terms "facility" and "owner and operator" are defined in section 22.2(h). The provisions are similar to the federal ones, but important clarifications have been made.

B. FIDUCIARY LIABILITY

The Illinois Act is more explicit than the federal act with regard to fiduciary liability. Section 22.2(h)(2)(D) provides that the fiduciary is not an owner or operator. Instead the trust assets themselves are considered the owner. Section 22.2(h)(2)(E) further defines lender liability to protect the lender from liability even in the case of foreclosure and possession if the lender does not exercise actual managerial control over the facility that causes a release or the threat of release. In addition, section 22.2(h)(2)(F) provides that individuals owning residential property are not "owners or operators" unless they own ten or more units or the individual or his agent caused the release or threat of release.

C. DEFENSES

Section 22.2(j) provides the same basic defenses as federal law with additional provisions for innocent landowners incorporated directly into the section. Section 22.2(j)(6) provides the same essential definition of "innocent landowner" as the federal law (i.e., a purchaser who made all appropriate inquiry, taking into account the nature of the property, the price, as well as any specialized knowledge that the purchaser may have).

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of the Illinois Environmental Program (Mar. 8, 1995) (unpublished manuscript on file with Ross & Hardies, Chicago).

41. In *People v. Brockman*, 550 N.E.2d 222 (Ill. App. Ct. 1989), the court had to decide whether section 22.2(f) of the Illinois Act permits third party actions. In this case, a landfill operator who was sued by the State could assert third party claims under the Illinois Act against generators and transporters who potentially had contributed to the disposal of unpermitted wastes at the landfill.

42. The definition of "release" was at issue in *People v. Van Tran Electric Corp.*, 503 N.E.2d 1179, (Ill. App. Ct. 1987). Under section 3(ww), a release of a hazardous substance does not fall under the scope of the Act if it results in exposure to persons solely within a workplace. However, if it can be established that the released substance migrates off the property of the workplace, a release of a hazardous substance within the meaning of the Act is given.

43. *See, e.g.*, Central Ill. Light Co. v. Illinois Commerce Comm'n, 626 N.E.2d 728 (Ill. App. Ct. 1993). *See also Brockman, supra* note 41.

Section 22.2(j)(E) establishes a detailed description of what constitutes an appropriate inquiry and establishes a rebuttable presumption against the state and a conclusive presumption against private individuals if the owner had undertaken the specified investigations prior to the purchase. The examination must be undertaken by a qualified professional other than a practicing attorney who is qualified by education and experience to undertake the investigation and who is either a registered professional engineer or carries $500,000 in insurance.

A detailed Phase I examination, including review of the public records, the site, and the history of the property, must be conducted. If the Phase I indicates the presence or likely presence of hazardous substances, then a Phase II examination including intrusive testing of soil and groundwater is required.

Taken together, these stringent requirements make it very difficult to prove that an investigation that did not discover the contamination of a site was adequate.

D. EXTENT OF THE LIABILITY

Section 4(q) of the Illinois Act provides that the Illinois Environmental Protection Agency may give notice to a responsible party specifying the cleanup to be undertaken at a site. If the responsible party fails to carry out the directed remediation,[44] section 22.2(k) provides that the state may recover the cost of the cleanup, plus three times that amount as punitive damages.[45]

E. SUMMARY

Under Illinois Law, as under federal law, the owner or operator of contaminated property may be held liable for the cost of remediation.

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44. The liable party may seek contribution from response action contractors if they can establish, in good faith, grossly negligent or intentional conduct on the side of the contractor. *See Brockman, supra* note 41.

45. In *City of Quincy v. Carlson*, 517 N.E.2d 33 (Ill. App. Ct. 1987), the court found that this provision is not mandatory. A potentially responsible party can make a good faith defense and challenge the validity of the agency's order prior to the imposition of punitive damages. No damages will be awarded if the potentially responsible party can establish that he acted "without sufficient cause," according to section 22.2(k) of the Illinois Act.

The forum for hearing cost-recovery actions is the Pollution Control Board or the circuit court; both bodies have concurrent jurisdiction. People v. NL Industries, 604 N.E.2d 349 (Ill. 1992). *See also* People v. Van Tran Electric Corp., 503 N.E.2d 1179 (Ill. App. Ct. 1987).

There is no liability for cleanup unless a notice has been received from the state or the state has incurred liability not inconsistent with the Illinois contingency plan or a private party has incurred costs consistent with the plan.

III. THE ILLINOIS VOLUNTARY CLEANUP PROGRAM

Prior to the passage of the recent Brownfields legislation, Illinois had established a Voluntary Cleanup or "Pre-Notice" program for voluntary cleanup of sites under state supervision. By cleaning the site voluntarily, potentially responsible persons hoped to receive a release from liability from the Illinois Environmental Protection Agency.[46]

A. REVIEW AND EVALUATION

According to section 22.2(m), the EPA may offer "review and evaluation services for actions at sites where hazardous substances may be present," provided the owner or operator submits a written work plan, allows for Agency inspection, agrees to perform the work as approved by the Agency as well as to pay the Agency costs, and makes an upfront payment of $5,000.[47]

B. RELEASE PROGRAM

Section 4(y) of the Illinois Act states:

> The Agency shall have the authority to release any person from further responsibility for preventive or corrective action under this Act following successful completion of preventive or corrective action undertaken by such person upon written request by the person.

Further guidance on the release from further liability was developed by the Agency. On July 12, 1993, the Agency issued the Illinois Pre-Notice Site Program, which included the Agency's guidance for the voluntary cleanup program and enumerated the steps necessary to obtain a release. Sites eligible for the program could not be subject to current enforcement action or administrative orders or notices by the state or federal governments. Cleanup requirements under the federal law such as RCRA were not applicable to eligible sites either. The guidance provided detailed require-

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46. *See* James T. Harrington, *The Illinois Voluntary Clean Up Program: A Panacea or Trap Problem?*, ILL. MFR., Nov./Dec. 1993, at 14.

47. *See* People v. NL Indus., 604 N.E.2d 349 (Ill. 1994).

ments for the program including particular requirements for the Work Plan and Site Safety Plan for Remedial Investigation.

The cleanup objectives for the site were to be established by the Agency. The general objectives which came to be applied were taken from the underground storage tank program. They were based on the Illinois Pollution Control Board's Groundwater Regulations. They required that *both* the groundwater and the soil above it achieve the stringent state groundwater standards. This was often called the "drinkable dirt" standard. It should be noted that groundwater standards were not based on what concentrations remediation could achieve in the soil, but on the federal drinking water standards for potable water and the level of treatment which could be obtained from treatment technologies in order to achieve the drinking water standards. The Agency also provided for site specific standards to be established by an Agency working group, but these seldom ever formed the basis for a section 4(y) release. As a consequence, there was a great deal of uncertainty as to what standards the agency would apply, and how the agency decided how clean a remediated site had to be.

C. THE PROGRAM IN PRACTICE

Many sites entered into agreements with the Agency for supervision of voluntary cleanup efforts. The reasons were varied, but they included the desire to seek an Agency release and, more often, the desire to avoid an Agency directed cleanup under 4(q) of the Illinois Act. Of the sites that entered the program, only a few obtained a release under Section 4(y) of the Illinois Act.

The Agency readily accepted the program and obtained a Memorandum of Understanding with the United States Environmental Protection Agency to the effect that the federal agency would not challenge the State's release. However, industry and the real estate community did not accept the program for various reasons. Most importantly, the program was not very practical, because the cleanup standards required to obtain a release were both overly rigid and practically unobtainable for many sites. The drinkable dirt standard was both a bad joke and reality. In addition, the program did not always take into account background contamination found in old industrial areas.

Furthermore, the Agency had complete control over the procedures and cleanup standards without review by the Pollution Control Board[48] or the courts. The program did not provide for the use of institutional controls

48. The functions of the IEPA and the Pollution Control Board are defined in sections 4 and 5 of the Act. *See also* City of Waukegan v. Pollution Control Bd., 311 N.E.2d 146 (Ill. 1974), People v. NL Indus., 604 N.E.2d 349 (Ill. 1992).

such as deed restrictions limiting future use of the property. An abandoned chemical plant would have to be cleaned up as though it were to be used as a playground.

The review time for plans, objectives and work plans often seemed long and frustrating. Given the frustrations, industry worked through its trade groups to redesign[49] the program to be more user friendly and to encourage the redevelopment of property throughout the state.[50] While the program originally advanced by industry met considerable resistance from the Agency, the recent Brownfields legislation was mutually accepted and is a workable scheme for the redevelopment of contaminated industrial sites.

IV. CONCLUSION

Both federal and state law impose significant liability on the owner of contaminated property unless they are an innocent purchaser. By definition, industrial property usually puts a purchaser on notice of potential contamination, and it is very hard to prove that an investigation that did not discover the contamination was adequate. Property that is discovered to be contaminated suffers a loss of market value, saleability and loanability which may make it impossible to return it to productive use.

Only a program with reasonable and knowable standards, known procedures, and reasonably predictable results concluding in an acceptable degree of protection for owners, future owners and mortgage lenders will encourage widescale redevelopment. The original Illinois Pre-Notice Program was not perceived as meeting this test. It was in everyone's interest to establish a program that would both work and be perceived to work fairly. Both interested provided parties and the Agency came to realize that a mutually agreeable program could be developed through negotiation and form the basis for the Brownfields legislation.

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49. For a discussion of industry's opportunities to participate in the rulemaking process, *see* James T. Harrington, *The Importance of Negotiations in Illinois Environmental Rulemaking and Overview of the Illinois Environmental Regulation Process*, 13 N. ILL. U. L. REV. 531 (1993); James T. Harrington & Barbara A. Frick, *Opportunities for Public Participation in Administrative Rulemaking*, 15 NAT. RESOURCES L. 537 (1983).

50. *See* James T. Harrington & David L. Rieser, *The Industry Brownfield Initiative*, ILL. MFR., May/June 1995, at 8.