Superfund Update

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CERCLA Statistics (to 9/30/13)

- 45,118 sites assessed (of 50,893)
- 1,739 proposed, final and deleted NPL sites
  - Compare: >2,000 RCRA corrective action sites
- 1,156 sites (66.4%) with all Construction Complete
- 12,270 removal actions at 9,042 sites
- >1.4 million acres of land determined to be protective for people; and 470,568 acres determined ready for anticipated use.
CERCLA Statistics to 9/30/13 (Continued)

- Enforcement Program:
  - ~ $32.2 billion worth of cleanup work by PRPs
  - ~ $6.4 billion in cost recovery
- EPA cleanup expenditures: ~ $22.4 billion
- Total: ~60.8 Billion
  - Billions more at federal facilities
Superfund Trends

- NPL Listings are up
  - 2004-2007 average = 13/yr final listings
  - 2008-2013 average = 20.5/yr final listings
    - 2000-2003 average = 22.75/yr final listings
  - No longer characterized as “tool of last resort”

- More complex, costly sites
  - Urban rivers; large mining sites

- More fund-lead sites
  - Historically PRPs paid ~70% (cleanups + cost rec.)
  - Currently ~ 60%
Trends: Construction Completions (CC)

- Two thirds of all NPL sites have CC
- Non-CC sites generally more complex & costly:
  - ~ 40% are federal facilities (generally large/complex) and/or high cost (> $50 M).
    - But federal facilities & high cost sites = only 12% of all CC sites.
  - Non-CC sites average 4.2 Operable Units each; CC sites average 1.8 OUs.
  - 60% of non-CC sites have construction underway…
    - … but at only 12% of these is it the final construction project.
Trends: Funding

- Congressional appropriations flat from mid-1990s to 2008
- 2009: $600 M extra Stimulus funding
- Appropriations for remedial cleanups cut 18% in 3 years
  - 2011: $605 M … 2014: $500 M
  - No new federally funded construction starts in 2012, few in 2013 & 2014
  - Additional cuts to removal, enforcement & pipeline budgets
- Slight increase in President’s FY-2015 budget proposal
- President has proposed reauthorization of Superfund tax
  - Even if enacted, does not guarantee increased appropriations
Regulatory, Policy & Guidance Developments
All Appropriate Inquiries Rule

- Original rule recognized ASTM E1527-05
- 12/30/13: EPA publishes final rule recognizing ASTM E1527-13
  - AAI must include assessment of vapor intrusion
    - Should have been done under older standard
  - Updated definitions of REC (Recognized Environmental Condition) & HREC (Historical REC)
  - New term: CREC (Controlled REC)
  - Clarified definition of “de minimis condition”
  - “Release” has same meaning as under CERCLA
BFPP Guidance Concerning Tenants

- 12/5/12: EPA issues Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision
  - EPA will exercise enforcement discretion to not pursue tenants for pre-existing contamination, provided –
    - They are not, and have no affiliation (other than lease) with, owners, operators, disposers, generators or transporters; and
    - Take reasonable steps w/r/t contamination; do not impede response actions; cooperate with authorities; etc.
- Guidance very important to developers of renewable energy on contaminated sites.
Groundwater Remedy Completion Strategy

- Draft released for comment 12/29/13
- “Exit strategy” for long-term GW cleanups
  - Does not alter/supersede existing reg or guidance
  - Intended to promote national consistency
  - Could result in earlier termination of some GW cleanups with diminishing returns?

- Key steps:
  - Understand site conditions
  - Design site-specific evaluations & metrics
  - Collect data, conduct evaluation
  - Make management decisions
RD/RA Negotiation Process

- Duration of RD/RA negotiations increased significantly over two decades:
  - Average duration 1990-1993 = 197 days
  - Average duration 2005-2009 = 449 days

- 9/30/09 - OECA Interim Policy on Managing Duration of RD/RA Negotiations
  - Average duration 2010-2011 = 269 days
    - Relatively small data set

- 9/28/12 – OECA Revised Policy
RD/RA Negotiations: Revised Policy

- Process intended to be more flexible
- Enforcement process to be engaged earlier, at Proposed Plan stage
  - Negotiation Plan to be developed starting prior to ROD, with benchmarks, deadlines
  - Consider bifurcation of RD and RA to get work started sooner
  - Consider mixed funding, mixed work and UAOs for all or part of the work
RD/RA Negotiations: Revised Policy

- Negotiation Plan will identify trigger for issuance of UAO
  - “We encourage use of EPA’s UAO authority in appropriate cases as a key component to expediting the RD/RA negotiation process.”
- Special Notice Letter (SNL) to be issued w/in 90 days of ROD
- Goal: complete negotiations w/in 120 days of SNL
Tronox Bankruptcy & Fraudulent Conveyance Case

- 2004-6: Kerr-McGee creates Tronox, spins it off
- 2006: Anadarko purchases K-M for $18B
- 2009: Tronox bankrupt
- 2011: Bankruptcy settlement w/ US, 22 states, 6 local gov’ts. & Navajo Nation
  - Gov’ts. receive $300 M cash + 88% stake in fraudulent conveyance case
Tronox Fraudulent Conveyance Case

- 2009: Tronox sues K-M & Anadarko alleging fraudulent conveyance
  - Alleges Tronox was under-capitalized, loaded with $$ billions of K-M’s environmental liabilities
- US intervenes as co-plaintiff
- 2012: Lengthy trial
- Dec. 2013: Judge awards plaintiffs $5 - $14 B
  - Exact amount subject to further hearing
  - US, other governments, share 88%
- April 2014: Parties settle for $5.15 B
  - R2 Sites: > 8.8% of total
Burlington Northern

District Court Ruling

- Shell and RRs liable
- Harm is divisible
- Apportions liability: 6% to Shell, 9% to RRs
- Calculation of RR share based on these factors:
  - 0.19 (fraction of site owned by RRs)
  - 0.45 (fraction of time B&B operated on RR property)
  - 0.66 (2 of 3 COCs managed on RR property)
  - 1.5 (50% “margin of error” factor)
  - \((0.19 \times 0.45 \times 0.66 = 0.06) \times 1.5 = 0.09\), or 9%
- All parties appeal to 9th Circuit.
Circuit Court Decision

- Circuit Court holds:
  - Shell liable as “arranger”
  - No reasonable basis for apportioning liability, so defendants should be held jointly and severally liable.

- All parties appeal to Supreme Court
Supreme Court Decision

- Supreme Court holds:
  - Shell not liable as arranger -- word implies “intentional steps to dispose of hazardous substances”
  - District court had reasonable basis for apportionment

- Court confirms that equitable considerations play no role in divisibility analysis, which is a purely legal issue.*

* Equitable considerations may be used to allocate costs in contribution actions among jointly and severally liable parties, but not to apportion legal liability.
“Arranger” Liability under BNRR

- What does it mean to “arrange for disposal” of a hazardous substance under CERCLA § 107(a)(3)?
- S.Ct calls for “fact-intensive inquiry” into arrangement
- **Intent to dispose** is key to “arranger” liability
- Is Aceto still good law?
Divisibility of Harm under BNRR

- Must be a “reasonable basis” for apportioning harm
- Relevant factors may include:
  - chronology (years of activity)
  - geography (relative acreage used or controlled)
  - volume of hazardous substances
  - type of contaminants (toxicity, etc.)
- Shares (including orphan shares) must total 100%
  - *Burlington* court’s flawed arithmetic
  - Not mandated by Supreme Court
- Is the default rule still joint and several liability?
Flawed Arithmetic

- Fractions multiplied make smaller fractions
  - Shares not likely to add up to 100%

- Consider simplified hypothetical:
  - Owner A owns Site for 10 years
    - Spills chemical X
  - Owner B owns Site for next 10 years
    - Spills chemical Y
  - Chemicals X and Y similar in toxicity; and similar quantities spilled
  - 100% Area X 50% Time X 50% Toxicity = 25% each
Impact on Negotiations

- **BNRR** issues often raised in negotiations
  - Potentially applicable at many sites
  - Stakes high for both government and PRPs
  - Uncertainty affects negotiations between government and PRPs; also among PRPs
  - More trials -- fewer cases resolved in motion practice
  - Confusion of *apportionment* and *allocation*
  - More sites w/ orphan share? More Mixed Funding?
Burlington Northern Progeny

- ~ 56 Arranger decisions
- ~ 26 Apportionment decisions
- Few Circuit Court opinions
- Little new ground broken
- Joint & Several liability is alive and well
**Burlington Northern: Arranger Progeny**

  - Zotos hired 3rd party to dispose of unwanted products
  - Zotos knew wastes would be dumped at landfill owned by Grace, because Zotos employees regularly observed salvage operations
  - Zotos ruled an “arranger.”

  - Company that sold factory as going concern, including baghouses containing asbestos dust, not liable as “arranger.”
**Burlington Northern: Arranger Progeny**

- *United States v. NCR Corp. ("Fox River"), 2012 WL 5893489 (E.D. Wis. Nov. 23, 2012).*
  - On summary judgment court finds defendants liable,
  - Rejects argument that defendants can’t be arrangers because they didn’t know their discharges of wastewater to a POTW were hazardous.

  - NCR sells PCB-containing waste paper to recyclers
  - NCR knew wastes were hazardous, did not inform recyclers
  - NCR held liable as “arranger” after 2-week trial
Burlington Northern: Arranger Progeny


  - NL discharged radioactive wastes into Raritan River
  - Army Corps of Engineers later dredges river, places dredge spoils on EPEC property on opposite site of river
  - EPEC later sues NL for costs of assessing contamination
  - Court rejects NL’s argument that it did not arrange with Army Corps for disposal on EPEC property; holds NL liable as “arranger”
**Burlington Northern: Arranger Progeny**

  - Georgia Power sells used transformers to Ward for resale
  - Ward pays $150 to $3,200 per transformer
  - Transformers contain PCBs
  - Georgia Power held not liable as “arranger” because it intended sale of useful product, not disposal of PCBs

  - Broad River sends PCB transformers to Ward for repair
  - Broad River retains ownership during repair process
  - Court denies Broad River summary judgment, cites *Aceto*

• US not liable for issuing permits for others to dredge, and dispose of dredge material in a waterway, because Army Corps of Engineers did not own or control the hazardous substances and did not arrange for or manage their disposal.

But:

Nu-West Mining, Inc. v. United States, 768 F. Supp. 2d 1082 (D. Idaho 2011)

• US liable for requiring lessees who mined on government land to cover waste material with government-owned shale that leached selenium, which triggered need for cleanup.
Burlington Northern: Divisibility Progeny


  “… [R]ough calculation is all that is required to prove divisibility, so long as [it is] a reasonable basis for apportioning harm.”

  Rejected 5 proposed bases for apportioning liability, including waste volume, contaminant volume, years of operation, and number of “hits” for contaminated soil.

- PCS Nitrogen Inc. v. Ashley II of Charleston LLC., 714 F.3d 161 (4th Cir., Apr. 4, 2013)

  Affirms District Court decision

  Also rejects argument of current owner/operator that it should be apportioned 0% liability because no disposal during its time as O/O; that would undermine strict liability for O/Os.
Burlington Northern: Divisibility Progeny

- *United States v. NCR Corp. (“Fox River”),* 688 F.3d 833 (7th Cir. August 3, 2012).
  - NCR failed to prove harm is capable of apportionment because PCB levels contributed by NCR caused sufficient contamination in river sediment to warrant cleanup.
  - “[M]ultiple sufficient causes” of environmental harm:
    - NCR’s expert asserted that NCR had only contributed about 6% to 9% of the PCBs in the river, but …
    - … Court held it does not follow that NCR was only responsible for 6% - 9% of cleanup costs. *Had NCR been only party to dump PCBs into river, remediation would still be necessary because PCBs from NCR exceeded risk threshold.*
Burlington Northern: Divisibility Progeny

- *United States v. NCR Corp.*, 2013 U.S. Dist. LEXIS 62265 (E.D. Wis. May 1, 2013)
  - After trial, court holds 7 defendants jointly & severally liable for cleanup of contaminated river sediments; harm not capable of apportionment.
  - PCB levels contributed by defendants caused sufficient contamination to warrant clean-up, and defendants’ contamination was a necessary cause of the harm.
Burlington Northern: Divisibility Progeny

  - Court rejects Rowe’s divisibility defenses
  - Rowe failed to show that other PRPs contributed to the contamination; but in any event…
  - ...Rowe’s contamination alone exceeded EPA limits for human health and safety, so apportionment would not be appropriate.