
Playing Poker with Pollution: Why It Is Time to Change the CERCLA Reporting Obligations

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Three decades after the passage of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.*, this country is still adding to its inventory of contaminated sites. Many of these contaminated properties have been transferred or sold a number of times since CERCLA was passed, yet regulators frequently are not notified about the environmental conditions uncovered during due diligence. Often times, regulators and community officials may only learn about contamination after an owner has filed for bankruptcy or abandoned the property.

This article argues that the CERCLA reporting obligations and similar state laws are contributing to the creation of brownfields or delaying remediation. It proposes administrative solutions that EPA could adopt that will accelerate the pace of cleanups and allow the public to access information about the potential risks posed by sites in their communities.

Section 103(a) of CERCLA provides that any person in charge of a vessel or facility must immediately notify the National Response Center as soon as the person has knowledge of a release of hazardous substances that exceeds the reportable quantities (RQs) promulgated by EPA. 42 U.S.C. § 9603(a). The primary purpose of the notification obligation was to ensure that the federal government became aware of potentially serious releases of hazardous substances so that it could determine if a response was necessary or evaluate the adequacy of any cleanup action implemented by others. 50 Fed. Reg. 13,456, 13,466 (Apr. 4, 1985).

When EPA developed its RQs, the agency decided to use a 24-hour period for determining if a reportable release had occurred. The statute did not mandate this approach. Instead, EPA adopted the 24-hour RQ because this was the approach used for section 311 of the Clean Water Act (33 U.S.C. § 1321). *Id.* This framework made sense back in the early 1980s when the improper management of hazardous waste was rampant. However, management practices have significantly improved and the principal concern now is not new discharges, but the threat posed by the thousands of sites that have historical contamination from past practices. Yet because the notification obligation is linked to the RQs, the presence of well-known contamination exceeding applicable standards

may not be reportable. Owners and sellers of historically contaminated property often take the position that they have no obligation to disclose the contamination because they do not know if the contamination was a result of a release that exceeds the RQ or simply the result of *de minimis* leaking over an extended period. Moreover, because the reporting obligation is limited to a “person in charge,” potential purchasers of property have no obligation to report contamination discovered during due diligence. Without accurate information about the existence or extent of contamination, regulators cannot effectively administer their remedial programs or protect communities from unacceptable risks.

Remedial programs are built upon self-reporting, but market forces discourage parties from volunteering adverse environmental information to regulators. As rational economic actors, property owners are loathe to generate information about environmental conditions, much less share that information with other parties since they are uncertain what the sampling will reveal and the resulting impact on asset values. Moreover, if the buyer walks away from the transaction, the owner will have lost a sale and now faces an accelerated cleanup obligation without the sales proceeds. Finally, owners are concerned about tort liability that could arise from disclosure.

Conventional efficient market theory is predicated on the notion that all participants have equal access to materially important information. However, because contamination is usually not easily discoverable and information about contamination is costly to obtain, contaminated properties operate in a distorted market. Often, the seller possesses superior or private knowledge about environmental conditions

Some academics and government regulators have expressed the view that reporting obligations are not a problem because a buyer can always require a seller to disclose or cleanup a site. However, this view ignores the practical market reality that buyers often do not have the leverage to extract such concessions, may not realize they need such information or that they may not even want to know. In the absence of a regulatory driver, sellers have been able to employ “no look” contracts that contractually prohibit the buyer from further investigating or disclosing contamination in the future. In these types of situations, the buyer might only be indemnified if it is compelled to remediate the site by a regulator, giving the buyer little incentive to voluntarily clean up the site. In the

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meantime, the unknown contamination can migrate from a site and expose the community to unknown risks.

The conventional narrative has been that CERCLA liability has led to the creation of brownfields because purchasers and lenders were concerned about remediation costs. However, the reality is far more complex and intertwined with the economic dislocations and globalization of the past three decades. One significant reason for the creation of brownfields has been that property owners have been allowed to abandon sites without being first being required to report or remediate them. If the CERCLA reporting obligations required information regarding historical contamination to be disclosed, many of these viable companies that relocated their operations would have been forced to remediate the facilities at that time. Who knows how much of the \$14 billion in brownfield funding that EPA has awarded in the past fifteen years would have not been necessary if the CERCLA reporting obligations applied to historical contamination.

During the past fifteen years, EPA and states have increasingly relied on their brownfield and voluntary cleanup programs to remediate contaminated sites. These programs are essentially a market-based approach to remediation where the market decides which sites have sufficient value to remediate. While these state programs have encouraged the remediation of contaminated sites, they are not robust enough to make a substantial reduction in the nation's inventory of contaminated sites. Studies have estimated that there are from 290,000 to one million contaminated sites in the country. Many of these sites and the risks they pose are unknown. Yet, according to a study by the Midwest-Northeast Institute, approximately 6,000 to 7,000 sites were cleaned annually prior to 2006. Even at the height of the real estate bubble of 2007-08, the pace may have increased to 10,000 remediated sites annually. Clearly, if we continue to rely primarily on the current incremental, market-based approach to addressing these sites, many contaminated legacy sites will likely never be addressed.

Reliance on the real estate market to address these properties does not resolve the larger problem. One way to accelerate the pace of cleanups, however, is to revise one or more sections of CERCLA to impose a mandatory obligation on property owners to investigate suspected releases and disclose the existence of contamination that exceeds unrestricted cleanup standards. Because contamination can impact human health and public resources, information about contamination should be regulated as a public good and not be hidden behind archaic notions of *caveat emptor*. EPA could implement this recommendation by adopting one or more of the following administrative reforms.

I. Revise Reportable Quantity to Eliminate the 24-Hour Period

One way EPA could close the historic contamination loophole is to eliminate the 24-hour period from its section 103(a) reporting obligations. Instead, contamination would have to be disclosed if it exceeded applicable soil or groundwater standards established by the agency. Once this information

is in the public domain, decisions can be made about who is responsible for cleanup. Many current landowners or prospective purchasers who discover historical contamination might be able to assert a liability defense. Indeed, disclosure could be the *quid pro quo* for the liability relief.

The CERCLA legislative history indicates that EPA has broad authority to revise the reporting requirements if underreporting is occurring. Senate Report No. 96-848, 96th Cong., 2d Sess. 29 (1980). Because delays in reporting could exacerbate an already serious condition, Congress said EPA should err on the side of protecting human health and the environment when administering this authority. 48 Fed. Reg. 23,552, 23,566 (May 25, 1983).

Some have argued enhanced disclosure will discourage redevelopment of contaminated properties, thereby pushing development to undeveloped or "greenfields." However, many states and local governments have adopted "smart growth" initiatives that make it increasingly difficult to build on undeveloped sites.

Others have argued that mandatory reporting will stigmatize properties. However, there are plenty of opportunistic investors willing to buy contaminated sites that their proprietary models tell them are undervalued. Indeed, empirical information from the New York Brownfield Cleanup Program indicates that cleanup costs are only 1 to 5 percent of the potential redevelopment value, with most of the sites bundled around 1 percent. Often, the remediation costs are simply a "delta" over the construction costs. In addition, several states have established reporting obligations that do not use the RQ approach, and many states have imposed affirmative obligations on owners or operators of underground storage tanks to investigate suspected releases. There is no evidence that these disclosure schemes have disrupted the real estate markets in those states.

Mandatory disclosure would level the playing field among known contaminated sites and unknown contaminated sites, and eliminate the moral hazard created by the current approach. Currently, property owners that disclose historical contamination are disadvantaged since the sites with unreported contamination are being overvalued. Once the contamination is disclosed, the risk posed by the contamination can be assessed and sellers will be forced either to remediate sites or convey the property at a price that would be attractive to a buyer willing to remediate the sites as part of a redevelopment plan.

Mandatory disclosure could also encourage buyers to perform more thorough diligence since more information would now be publicly available and would therefore be accessible at a more cost-effective price. Greater disclosure will also facilitate lending since uncertainty over environmental risks would be reduced.

The federal Emergency Planning and Community Right to Know Act (EPCRA) program and California's Proposition 65 law serve as examples of the environmental benefits that can result when greater disclosure is required. When EPCRA was enacted in 1986, commentators warned that the information would result in a wave of litigation. Not only did the dramatic increase in toxic tort lawsuits never materialize but the disclosures motivated facilities to reduce their emissions substantially. Mark Cohen, *Information as a Policy Instrument in Protecting*

the Environment: What Have We Learned? 31 ELR 10425 (Apr. 2001). Likewise, Proposition 65 has been credited with causing companies to lower the content of dangerous chemicals in their products significantly. Clifford Rechtschaffen and Patrick Williams, *The Continued Success of Proposition 65 in Reducing Toxic Exposures*, 35 ELR 10850 (Dec. 2005).

To motivate property owners to disclose historical contamination, EPA could adopt an amnesty program for property owners who voluntarily disclose contamination within one year of the reforms—much like EPA has done with its audit policy. Property owners who voluntarily disclose their sites would be treated as Bona Fide Prospective Purchasers (BFPPs) provided they did not cause the contamination, and would only be responsible for complying with continuing obligations where the sites did not pose an imminent and substantial endangerment to human health or the environment.

II. Clarify Guidance on Reporting Obligations under Section 103(c)

Section 103(c) contains a separate and distinct reporting obligation. 42 U.S.C. § 9603(c). This section provides that owners or operators are required to notify EPA by June 9, 1981, of the existence and location of facilities where hazardous waste had been stored, treated or disposed before December 1980 unless the facility obtained interim status under RCRA. Persons who knowingly failed to comply with this notification obligation were precluded from asserting any of the affirmative defenses contained in section 107.

EPA's 1981 guidance indicated the reporting obligations applied to inactive facilities that did not previously file a notice under RCRA section 3010 and that frequent spills or leakage over a period of years could create *de facto* disposal facilities that would be subject to the 103(c) notification requirement. 46 Fed. Reg. 22,144, 22,149 (Apr. 15, 1981).

EPA subsequently issued three interpretative documents indicating that the reporting obligation under 103(c) was not a single time obligation but was a "lasting" obligation when an owner or operator discovered pre-1981 disposal. See Letter from Lisa K. Friedman to Barry R. Bedride, (Dec. 28, 1984); Memorandum from Carolyn Barley and Barbara Hostage (Dec. 15, 1985) and Memorandum from Thea McManus and Hubert Watters (June 9, 1988).

The only reported decision involving 103(c) is *City of Toledo v. Beazer Materials and Services, Inc.*, 833 F. Supp. 646 (N.D. Ohio 1993). As part of its claim under the citizen suit provision of CERCLA section 310, the plaintiff asserted the defendant/former owner failed to comply with section 103(c). In dismissing this count, the court ruled that section 103(c) imposed a one-time reporting obligation that had expired on June 9, 1981. Since the violation was a wholly past violation, the plaintiff could not maintain an action under section 310.

The court did not address if the reporting requirement applied to owners or operators who discover the existence of pre-1981 hazardous waste after June 9, 1981. Since 103(c) imposes an affirmative duty on owners and operators to examine reasonably

available records, failure to review information that could have detected or prevented a release might be considered a failure to exercise due care/appropriate care that is necessary to assert the landowner liability protections. See 46 Fed. Reg. at 22,145

EPA should reaffirm its earlier guidance that section 103(c) imposes a continuing reporting obligation on owners or operators of facilities. To encourage reporting and to minimize the burden on current landowners, EPA could offer a one-year penalty amnesty to current landowners to disclose such historical hazardous waste activity as long as the owners were not active polluters.

III. Issue Guidance on Section 111(g)

Section 111(g) required EPA to promulgate regulations requiring owners or operators to notify persons potentially injured by releases of hazardous substances. Until EPA issues its regulations, owners or operators of a facility or vessel are required to "provide reasonable notice to potential injured parties by publication in local newspapers serving the affected area" of releases from their facilities. 42 U.S.C. § 9611(g). In the preamble to its 103(a) regulations, EPA said the 111(g) notification was independent of the reporting requirements of section 103(a). 50 Fed. Reg. 13,456, 13,464 (Apr. 4, 1985).

EPA has never proposed or promulgated any regulations under section 111(g). Just as EPA is correcting its failure to issue financial assurance regulations under section 108, EPA should promulgate regulations under 111(g) if it declines to revise the 103(a) RQs.

IV. Revise the All Appropriate Inquiries (AAI) Rule to Require Sampling of Identified Releases (or ASTM Recognized Environmental Conditions)

In 1986, Congress added the Innocent Landowner (ILO) defense which was actually a subset of the Third Party Defense. 42 U.S.C. § 9607(b). Under the ILO defense, a person would not be considered to be in a "contractual relationship" (one of the four elements of the Third Party Defense) if the owner performed an "appropriate inquiry" into the past uses of the property and as a result did not know or have any reason to know of releases of hazardous substances. Courts were instructed to consider five factors in evaluating if the owner satisfied the ILO: (1) any specialized knowledge or expertise of the defendant; (2) if the purchase price indicated awareness of the presence of a risk of contamination; (3) commonly known or reasonable information about the property, the obviousness of the presence of contamination at the property; and (4) the ability to detect such contamination by appropriate inspection. 42 U.S.C. § 9601(35)(B). The case law has not uniformly interpreted the ILO defense but a preponderance of cases hold that a party would not qualify as an ILO if it did not perform sampling.

When CERCLA was amended in 2002, Congress added the BFPP and Contiguous Property Owner (CPO) defenses and modified the ILO (collectively the Landowner Liability Protec-

tions or LLPs). As part of these amendments, Congress added five criteria to the appropriate inquiry factors and instructed EPA to promulgate a rule based on those ten factors.

When EPA promulgated its AAI rule, the agency said a purchaser did not have to conduct sampling but simply identify a release to comply with AAI. 70 Fed. Reg. 66,070, 66,089 (Nov. 1, 2005). Thus, if a purchaser learned of a release during its investigation but did not disclose or remediate the release, it would still be considered to have performed an appropriate inquiry. EPA felt that sampling should be related to compliance with the post-closing continuing obligations. *Id.* However, EPA did acknowledge that sampling might be appropriate in some cases such as to plug data gaps. *Id.* EPA also suggested a court could conclude that sampling should have been conducted depending on the obviousness of the contamination and the ability to detect the contamination. *Id.* at 66,101.

I propose that EPA revise the regulatory text of AAI to impose an affirmative obligation to sample suspected releases identified in a Phase 1 Report. If a Phase 2 identifies contamination above cleanup standards, the information would then have to be disclosed. If an owner wants to qualify for one of the LLPs, the *quid pro quo* should be that it disclose its due diligence results so that regulators can decide if and how to address the contamination. To motivate owners to disclose the information, EPA should borrow from its audit policy and only require owners to comply with continuing obligations if they were not an active polluter. Thus, even if the deal fell through, the owner would be rewarded for disclosing the due diligence results by having minimized its cleanup obligations.

Some have suggested that such mandatory sampling and disclosure would frustrate the purposes of the 2002 CERCLA Amendments to encourage brownfield redevelopment. However, Congress actually added obligations to landowners when it modified the 1986 all appropriate inquiries criteria and then created the continuing obligations. Moreover, when enacting CERCLA, Congress deliberately cast a wide liability net to protect human health and the environment. In promulgating AAI, EPA seemed to lose sight of the principal goal of CERCLA. It seems to have focused more on protecting property owners and not enough on ensuring that local communities are protected by providing them with timely information about conditions identified in Phase 1 or Phase 2 reports.

There is a dearth of objective data on how well AAI is facilitating cleanups. Unfortunately, EPA does not track the number of cleanups performed under state brownfield programs but only cleanups completed by EPA Brownfields grantees. Thus, we only have anecdotal accounts that are generally used to support unexamined assumptions about the impact of disclosure on transactions. We know from industry sources that the average number of Phase 1 reports during the past seventeen years has ranged from 200,000 to 250,000 annually. However, we do not know how many of those reports identified releases, how many such reports proceeded to Phase 2 reports, and how many of those then proceeded to cleanups. Such data could help EPA evaluate the effectiveness of its brownfield program and AAI.

Consistent with the general movement towards greater transparency, EPA could require all sampling reports be sent to a centralized state database as part of AAI and notification reforms. States interested in qualifying as a “state response program” and the federal enforcement deferral under CERCLA section 128 would have to establish and maintain these databases. Indeed, many states already maintain “brownfield” databases to attract developers to those sites. Significant financial resources and time are expended duplicating Phase 2 investigations at sites that have been investigated in past transactions. If there were a centralized database, private purchasers and local governments seeking to redevelop sites would not have to waste money repeating investigative work.

Some consultants have expressed concern that creating databases could expose them to liability. It is unclear how a repository would pose any different liability than reports now made available to the public for remedy selection by responsible parties or parties participating in voluntary cleanup programs. In any event, the concern could be easily addressed by requiring persons seeking access to the database to acknowledge a disclaimer that the repository was for informational purposes only without any warranty of accuracy as well as waive any right of reliance. Indeed, consultants already insert such disclaimer language in their reports.

V. Clarify Continuing Obligations

EPA’s 2003 Common Elements memorandum was not particularly helpful on what constituted reasonable steps/appropriate care, though it did suggest that landowners that qualify for the LLPs must take “some positive or affirmative steps” about releases of hazardous substances. See Memorandum from S. Bromm, “Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchase, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability” (Mar. 6, 2003). EPA should issue additional guidance elaborating on the kinds of actions that would be considered to be complying with the continuing obligations. In particular, EPA should reiterate the language in the preamble to AAI that sampling is a critical component of exercising appropriate care. After all, it is hard to exercise care about contamination if one does not know of its existence. In addition, EPA should indicate that source removal (e.g., removal of leaking tanks and impacted soil) and other measures to eliminate potential exposures (e.g., installation of sub-slab depressurization systems to eliminate vapor intrusion) should be considered to fall within the scope of the continuing obligations.

Conclusion

The practice of environmental law for transactions involving contaminated properties has in many instances deteriorated to the point where lawyers are facilitating moral hazard. If the nation is going to put behind us this legacy of contaminated sites, we need to raise the level of what is considered customary due

diligence and disclosure. It is time to reject antiquated notions that arose from our agrarian heritage and to encourage practices that lead to greater transparency that reflect the values of a twenty-first century society and promote the public good.

Mandatory reporting of historical contamination is the best long-term, sustainable approach to remediating these legacy sites and getting them back into the mainstream of commerce. We need to move the pendulum back from total reliance on a market-based approach to cleanups towards a system that has some more enforcement sticks to provide communities with meaningful opportunities to discover contamination early and shape remedial decisions for sites in their areas.

Justice Brandeis once wrote that “sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” Louis D. Brandeis, *Other People’s Money and How the Bankers Use It* 92 (1914). A recent illustration of the potential impact that improved disclosure can have was the story in the New York Times on contaminated meat. www.nytimes.com/2009/10/04/health/04meat.html?_r=1. In covering shoddy oversight by the USDA, the article revealed that slaughterhouses had adopted their own version of “no look” contracts

that prohibited their customers from sampling the meat for E. coli at the risk of being cut-off from further supplies. Once the existence of these agreements was disclosed, several large food chains discontinued this practice.

Contractual prohibitions on sampling—whether they are imposed by slaughterhouses or sellers of contaminated property—should be void as a matter of public policy and simply have no place in the twenty-first century since they allow withholding information that can impact the public health and welfare. Society prohibits landlords from renting substandard properties and manufacturers of products or new housing from voiding implied warranties.

We can list a “parade of horrors” why these suggestions may not work but it is clear that the current system is not working. We need to try some new creative approaches. The existing CERCLA reporting system is broken. Who would have ever dreamed that thirty years after passage of CERCLA we would still be discovering sites that were contaminated decades ago? If we do not change the system, our grandchildren will be discovering sites that were contaminated by our grandfathers. 🌳