# Larry Schnapf - Schnapf Judgment

## Dirty Little Secrets

Nearly all state and federal environmental cleanup laws have reporting obligations. However, the circumstances and parties who have the obligation to report contamination will vary significantly. In many cases, the reporting obligations are linked to the discovery of contamination that exceeds a reportable quantity or RQ. The RQ will vary according to the particular contaminant.

At first glance, this may seem like a reasonable approach. However, when one 'digs' a little deeper, it becomes clear that the way reporting obligations are structured have actually facilitated the proliferation of brownfields and allows many sellers of corporate property to keep the presence of contamination secret. Indeed, a common provision now appearing in transactional documents is a so-called 'No Look' or 'No Hunt' clause that prevents the buyer from conducting further investigations on its property if it wants to maintain the contractual protections it obtained from the seller. In fact, it is not uncommon for environmental lawyers to spend a significant amount of time on deals negotiating and drafting what and how information about contamination is to be disclosed.

The reason for all this is because the reporting obligations are often expressed in terms of the discharge of a certain quantity of a chemical over a certain period of time such as 24 hours. Now, back in the 1970s this made alot of sense when environmental management practices were still in their infancy and the principal problem was stopping ongoing discharges of hazardous substances.

Management of hazardous substances and wastes has significantly improved over the nearly three decades since the passage of CERCLA and RCRA so that NEW discharges from a facility are no longer the most important concern. Instead, it is the legacy of historical contamination from these past practices that have had to continually confront.

Unfortunately, the reporting obligations often do not address purely historical contamination since (1) the regulations often use present tense gerunds such as spilling, discharging, releasing, disposing and (2) it is difficult to determine how much of the contamination was discharged over the relevant reporting period. In other words, was it a drip, drip of PCB-contaminated oil from a condenser or percolation of wastes thru an unlined lagoon over 20 years, or was there a sudden release of hazardous materials from some containment structure or container.
Another regulatory oddity is that cleanup standards and reporting obligations are not congruent so that there could be contamination above above cleanup levels that may not be reportable because the contamination occurred over a very long period of time yet for some chemicals there

may be a discharge that requires reporting but does not result in any risk-based cleanup obligation.

As a result, owners and sellers of property with purely historical contamination take the position that they have no obligation to disclose the presence of the contamination even if the contamination is present in concentrations that exceed applicable cleanup standards. In the absence of a regulatory driver, the owner/seller can then contractually prohibit the buyer from disclosing the contamination unless an overburdened regulatory somehow stumbles across the contamination.

Now, some academics, government legislators and judges have expressed the view that this is really not that big a problem because the marketplace can address this issue. After all, they say, a buyer can always require a seller to disclose and cleanup a site. Of course, this ignores the practical market reality that buyers may not have the leverage to extract such concessions, may not realize they need such information or that they may even want to know.
I think the absence of reporting obligations for purely historical contamination has contributed to the creation of brownfields as owners can just abandon their properties and while the local real estate market may be aware of concerns, overtaxed regulators may have no clue about the potential contamination.

My suggestion is that we link reporting obligations to cleanup standards so that if a phase 2 discovers soil or groundwater contamination, the contamination must be reported. No more time spend on trying to figure out how much of the chemical escaped into the ground or less time for lawyers to argue over how to deal with the results of the due diligence.

I also think that all phase 2 reports should be required to be sent to a centralized state database. Just think of all the wasted time and money that goes into repeating phase 2 reports over the years. If a consultant was able to access a database and see that sampling had been collected in the past in a certain area, it could use that information to advise its client that there is no need to sample in a particular area or that the area was already sampled and recommend sampling in other areas to better delineate the contamination.

Why are we still discovering contaminated sites nearly 30 years after CERCLA? Why haven't we cleaned up more sites? Why are there so many brownfield sites? I think the inadequate reporting obligations are a bit reason.

# BROWNFIELDS AND MARKET MYTHOLOGY

How is it that in the 21st century property owners and operators are still allowed to abandon property without first having to remediate the sites?

When the brownfield movement arose in the mid-1990s, the justification for those programs was that liability concerns and uncertainty over cleanup costs had contributed to the creation of brownfields. However, I believe that justification was premised more on lore and unexamined assumptions. The real reason for the creation of brownfields was because property owners were allowed to abandon property without being required to remediate the sites.

There seems to have been almost a mythological belief that has been built up over the past decade that it is the costs to remediate brownfield sites that is impeding redevelopment. However, if the empirical information coming from the New York BCP is representative of the rest of the country, the cleanup costs for brownfield sites are only 1%-5% of the potential redevelopment value-with most of the sites bundled around 1%. These costs hardly represent "material" liability or cost (which is the term routinely used in transactions) and would seem to be insufficient to "complicate" redevelopment. In many cases, the remediation costs are simply a "delta" over the construction costs.

New York now requires the projected development costs to be calculated and disclosed by applicants seeking to enroll in the BCP. I would suggest that this might be useful for all states and even the government so that they can focus these precious resources on sites or projects where the remedial costs truly material.

It also seems to me that to prevent future creation of brownfields, what we really need are tougher laws requiring owners/operators to investigate, disclose and remediate contamination before they may legally close down operations. Companies are required to provide employees with 60 days advance notice before they may close a plant under federal and state WARN acts. Maybe we need environmental WARN acts as well.

The inherent problem with brownfield programs are that rely on the market participants to voluntarily discover and remediate contaminated sites. I probably reviewed 10,000 CMBS transaction over the past decade and encountered way too many sites that were never remediated with any governmental oversight. There has been an epidemic of self-directed cleanups.

The last five years witnessed an incredible lessening of lending underwriting standards. When we removed the fear of liability from lenders, when lenders were competing in a "Henny Youngman economy" where borrowers could pit lenders against each other, when lenders could sell their loans to unwitting investors so that they did not have to be concerned if a environmental problem was discovered in a couple of years, there is very little incentive for market participants to ensure that sites are properly remediated.

Our current regulatory structure relies on lenders to be surrogate regulators. How many bubbles do we have to suffer through before we recognize that the "animal spirits" will overwhelm a regulatory framework that relies on the voluntary, good faith efforts of market participants.

I agree with Barry that an inflexible and rigid remediation regime can stall cleanups. However, I believe we moved too far to reliance on a transactional model for discovering and remediating sites. The reason we are still discovering contaminated sites 30 years after Love Canal and 29 years after the passage of CERCLA is because transacting parties have been conspiring to not disclose historical contamination.

If the CERCLA reporting obligations were amended to require that historical contamination must be reported, the sites would be forced to be cleaned up under either CERCLA or a state brownfield program.

Many of my colleagues share these views but feel constrained to acknowledge the foregoing by professional obligations to clients or fear about losing clients. However, this is such an important issue especially for future generations, and we are in a critical pivot point in the nation's environmental policy that someone has to speak the truth about the dirty secret of environmental cleanups.

**AAI-All Hat and No Cattle (or for city slickers-all bird and no cage)?**

I would estimate that 75% of the 10,000 phase 1 reports I reviewed over the past decade as counsel to several conduit lenders were subject to AAI. I suspect there are few lawyers who personally reviewed as many phase 1 reports as I did during the past decade. Thus, my views on AAI have been shaped by this experience. While the following statements are not based on empirical data, they are also not a result of unexamined assumptions or unexplored convictions.

1. AAI was an incremental improvement over the existing practice-

However, because of a number of concessions (including the definition of environmental professional), it created a lower ceiling rather than a higher floor.

2. Market participants views phase 1 reports as commodity products-

They did not distinguish between good and bad reports. Thus, they choose consultants largely on pricing. While there is not a deliberate effort to conceal or not properly investigate, the pricing pressure essentially eliminates full service engineering firms. Most of the low-priced reports are produced by firms that are incompetent or not concerned about producing quality product. The historical investigations are awful. That is how we end up with housing developments on former bombing ranges, etc.

3. Those consultants who try to do quality reports face pressure from lenders and their counsel to "sanitize" their reports. The consultants usually comply because they want the repeat. high volume business.

4. During the real estate boom, there was incredible timing pressure. I cannot begin to tell you how many drug stores and big boxes were built on contaminated sites where because of tight construction schedules the owners remediated the sites without going through any formal voluntary cleanup program. Many asked their consultants to observe earth-moving activities and remove visibly-contaminated soils but others just did the usual pave and wave. The number of self-directed cleanups was epidemic in FLA and Cal but also occurred a lot in Michigan as well.

5. Too many times, institutional and engineering controls were not implemented and not picked up by the bottom-feeder consultants because it took too much time to search to the local land records. And of course, state regulators frequently did not have the resources to verify that the controls were properly implemented.

6. It may be true that lender underwriting standards have recently tightened but that is because lenders are afraid to do loans. Once the "green shoots" begin to blossom, we can be sure that underwriting standards will again lapse as banks compete for borrowers. It has happened too many times during our lifetimes to believe otherwise.

7. It is true that an inadequate AAI report could expose an owner to liability for failure to comply with continuing obligations. But in the absence of any significant litigation, the fact that most of the loans were being sold off by banks and many developers/owners figured they would flip the properties in a few years and not be around when an enforcement action might be brought, they were usually not too concerned about what was commonly viewed as a "hypothetical" or "technical" liability. Those of us who raised these issued would be considered called a Dr. Doom.

In sum, I would characterize AAI as "all hat and no cattle" (or for you city slickers- "all cage and no bird")in terms of improving environmental due diligence standards.

"The Hottest Places in Hell are reserved for those who, in time of great moral crisis, maintain their neutrality"

# Due Care and Continuing Obligations

There have been alot of ASTM standards issued the past few years but one of the more important ones will likely be the Continuing Obligations practice that is currently in draft form. It is important because it is critical for landowners to maintain their liability protection after they take title.

It is important for consultants, attorneys and landowners to realize that the landowner liability protections are affirmative defenses-that means the person seeking to assert the defense has the burden of proving that they qualify for the liability protection. I suspect the caselaw under the third party defense and innocent landowner defenses will serve as an example of how courts are going to interpret the scope of the reasonable steps/continuing obligations obligations. If so, the courts will narrow construe the defenses-in other words make it hard for parties to establish that they are not liable.

The recent decision in U.S. v. Honeywell, *2008 U.S. Dist. LEXIS 13432* (C.D. Ca. 2/22/08) decision in California and the 2006 AMCAL v. Pacific Clay, 457 F.Supp.2d 1016. (E.D. Ca. 2006) illustrate that there is plenty of liability remaining out there for purchasers of contaminated property who move around contaminated soil. I think we would do a disservice to clients if potential users of the practice if we suggest that all they need to do is erect a fence or notify the authorities.

It should also be pointed out that some jurisdictions still hold that passive migration is disposal though a majority of courts that holds passive migration is not a release. Landowners in jurisdictions where mere migration is disposal will probably have to implement more rigorous

actions to satisfy 'reasonable steps' (i.e. Stop ongoing releases) than those in jurisdictions following the majority rule.

Thus, landowners need to be very careful not to inadvertently forfeit their liability after they take title. Obviously, the determination of what steps are 'reasonable' will be site-specific. However, we can probably make some general observations.

As part of the reasonable steps obligations, landowners have to stop continuing releases, prevent any threatened future releases and prevent or limit exposure to releases of hazardous substances. It would seem from any reading of the legislative language, history and the 1995 EPA Guidance on Contaminated Aquifers that a BFPP, ILO or CPO do not have to remediate groundwater. On the other end of the spectrum, it is also probably clear that simply erecting a fence or notifying the authorities is probably not going to satisfy the reasonable steps requirement in most cases.

The big question is what does such a party have to do about contaminated soil? I think it is fair to suggest that they would also not have to engage in long-term remedial measures such as would have to be implemented as part of a RI/FS. It would seem to me that landowners seeking certainty about whether they have implemented 'reasonable steps' should probably anticipate that they will have to perform the equivalent of removal actions or interim remedial measures such as removal of USTs, excavation of grossly contaminated soils and probably installation of vapor mitigation systems. I think source removal and eliminating the exposure pathway should be the admission price for liability relief

# Meat Eaters and Environmental Disclosure

The New York Times ran an article yesterday (Sunday) on e-coli contaminations issues associated with hamburger meat. the link is at http://www.nytimes.com/2009/10/04/health/04meat.html?_r=1.

Amidst the reporting on poor inspections and oversight by the USDA, what struck me was the contractual agreements negotiated by slaughterhouses and their customers. The slaughterhouses prohibited their customers from sampling the meat for e-coli at the risk of being cut-off from further supplies!

The contractual prohibitions on sampling of meat imposed by slaughterhouses should be void as a matter of public policy. How is it in the public interest to prevent supermarkets and other companies selling meat for consumption by the public to be prevented from sampling the meat to ensure it is not contaminated. This contractual arrangement should be prohibited just like landlords are not allowed to rent substandard properties or manufacturers cannot void warranties on their products.

Bringing this topic back to the environmental world. does this arrangement sound familiar? If you do any corporate transactional work you have no doubt come across the "no look" or "no hunt" provisions where the seller prohibits the buyer from conducting environmental sampling after the closing at the risk of voiding any contractual indemnity.

As you know, I have been vocally pushing for reforming the CERCLA reporting requirements so that owners of property would be required to disclose the existence of historical contamination which is not currently required to be reported. CERCLA requires reporting of releases of hazardous substances that exceed a "Reportable Quantity" (RQs) which are expressed in quantity over a 24 hour period. When dealing with historical contamination, owners can hide behind the fact they do not know if the contamination was a "drip, drip, drip" over a decade or a single spill. This concept of the right of contracting parties to hide information that can impact the public health and welfare be it contaminated meat or contaminated drinking water simply has no place in the 21st century. Just like a person does not have a First Amendment right to yell fire in a theater, the right of privacy or the antiquated notion of "caveat emptor" should not apply when the public health is involved. Our legal system has done away with these concepts when it comes to new residential constructions and manufactured products. I see no reason or any reason why this transparency should not be applied to contamination-be it to food or drinking water.

# Superfund tax and Brownfields

The NY Times had article on superfund tax today (page 16) http://www.nytimes.com/2009/04/26/science/earth/26superfund.html

I do not find it a coincidence that the brownfield movement took off after the superfund tax was allowed to expire in 1995.

The brownfield program is basically a market-driven approach to cleaning up sites. Unfortunately, it only worked for sites with good development potential. Sites that did not make sense from a real estate development perspective and with no requirement for owners to disclose historic contamination remained unremediated.

The RBCA reforms also seemed to have origins in budget concerns. State petroleum trust funds pushed RBCA as a way to save funding. Indeed, to this day it seems that the administrators of state UST and dry cleaner funds seem more focused on preserving financial viability of their funds than expediting cleanups. For example, UST and dry cleaner trust funds usually prioritize cleanups based on impacts to groundwater. If groundwater is not used for drinking water, the sites are given low priority. I believe only one state takes vapor intrusion into account when ranking sites for priority cleanups. Thus, while sites wait 5 or 10 years to be eligible for funding, the plumes can migrate off-site towards residential neighborhoods (though less likely at regional malls), and while the sites are enrolled in the programs the owners have no liability except for a de minimus deductible.

Talk about creating a moral hazard….all in the name of preserving state funds.

### Top Ten CERCLA Reforms

If we have learned anything over the past two years it is that the market cannot discipline itself and will unleash the "animal spirits" if not properly regulated. Without proper controls, there's just the law of the jungle because there is greed. Greed has to be tempered by fear and regulation.

it is important to understand that that the mismanagement of risk is not limited to Wall Street but is embedded in all other parts of our economy. Thus, there are lessons to learned from the credit crisis that are applicable to environmental regulation. The inherent problem with brownfield programs are that rely on the market participants to voluntarily discover and remediate contaminated sites. Yet the last five years witnessed an incredible lessening of lending underwriting standards. When we removed the fear of liability from lenders, when lenders were competing in a "Henny Youngman economy" where borrowers could pit lenders against each other, when lenders could sell their loans to unwitting investors so that they did not have to be concerned if a environmental problem was discovered in a couple of years, there is very little incentive for market participants to ensure that sites are properly remediated. The "animal spirits" will always overwhelm a regulatory framework that relies on the voluntary, good faith efforts of market participants.

We are in a unique period in our country's history. The old Wall Street is gone and we are going to re-invent the car companies. We need to re-evaluate how we as a society identify and allocate risk and that includes environmental risks. Without greater transparency and greater oversight we are not going to be able to properly manage the environmental risks that continue to exist in this country. While we are at it, we might as well also try to reform our approach to contaminated sites.

In an ideal world, the regulators would supervise all the cleanups but we will be living in an era of constrained budgets and limited government resources for quite awhile.

Thus, I have to swallow hard and grudgingly admit that the future is probably going to be voluntary cleanups conducted by licensed professionals that are audited by the government. The key to me is to make sure we have robust programs that do not incentivize a race to the bottom but instead encourage better quality cleanups.

I believe a key to this approach is greater transparency.If I was king, following would be my top ten reforms that I would like to see:

**(1) Revise AAI to require sampling when RECs or releases are identified-**

AAI currently does not require disclosure of releases or RECs that are discovered during phase 1 investigations. Technically, the AAI obligation is completed when the purchaser identifies a release. There was a suggestion in the preamble suggesting that sampling might be appropriate in some cases. However, the agency felt that sampling should be related to compliance with the post-closing continuing obligations. But how can an owner claim they are exercising due care or appropriate care with respect to releases at a site if they do not go thru the trouble of finding out what contamination is present?

I propose that a phase 1 that reveals evidence of a release should be reportable. The quid pro quo for liability relief should be to sample to see what is in the ground or groundwater so decisions can be made on what is best for the community. Disclosure would not create any additional or new liability for the purchaser if the purchaser would otherwise qualify for on of the liability defenses. Once the contamination is known to the regulator, the state would have the decision to

take on long-term remediation, not the new owner. Of course, if the purchaser is not interested in liability relief, then it certainly would be free not to sample. This is in my opinion a minor burden in exchange for liability relief. THE MARKETPLACE WILL ADJUST TO NEW PLAYING RULES.

Some have argued that sampling and disclosure should be a business decision. I believe this is wrong-headed. If an owner is going to get liability protection it should at the very least determine if there is contamination at a site and disclose it to the regulator. This is in my opinion a minor burden in exchange for liability relief. Moreover, once the contamination is known to the regulator, a decision can be made to either use public money or pursue the responsible party. The purchaser would still be able to assert its defenses to liability.

How can an owner claim they are exercising due care or appropriate care with respect to releases at a site if they do not go thru the trouble of finding out what contamination is present. Remember, AAI by its plain terms only requires identification of release, not further investigation. There was so suggestion in the preamble that sampling might be appropriate but I would have preferred a more affirmative statement be placed in the regulatory text.

**(2) Require reporting of historical contamination when discovered so we no longer have "no hunt" or "no look" contracts (may require amending CERCLA 103(C)-**

Section 103(a) requires persons in charge of facilities with knowledge of releases that exceed the reportable obligations (RQ) that EPA is required to promulgate under section 102. Because the RQs are expressed in volume released over a 24 hour period, there is a large and gapping loophole since it is rarely possible to determine how much volume was discharged over a 24 hour period for a release that occurred decades ago. RQs made sense in 1970s when we had lots of mismanagement scenarios but now the overwhelming number of contaminated sites are from contamination that occurred decades ago (no current releases).

Thus, the mere presence of contamination in groundwater (or soil) above applicable standards is NOT currently required to be reported at the federal level nor in most states if it is purely historical in nature. This is why we can have corporate transactions where both parties know where the bodies are buried but they agree not to disclose and actually count on non-enforcement in pricing the deal and estimating their cleanup costs. My suggestion is that the cleanup standard becomes the reporting obligation. If one finds contamination above applicable cleanup standards, it has to be reported.

There is an obscure clause in section 103(c)CERCLA that has been known as the "lasting provision". In the early years of the CERCLA program construed to require all owners of properties with releases to report the contamination regardless if there is a reportable quantity. However EPA has come to view this section has only imposing a one-time reporting obligation. The former interpretation could once again be used although it might make sense to either issue new guidance if EPA wanted to take a "Scalia-like" textural approach to this section. Given the two decade interpretation of that section it might be better to seek clarifying legislative amendment that would expressly state that it applies to historical contamination.

Thus, I would propose that the CERCLA reporting obligations were amended to require that historical contamination that exceeds applicable soil or groundwater cleanup standards must be reported. My purpose is to end this game of hiding the ball. There are thousands of properties with contamination that is known to owners that are not disclosed because the contamination is purely historical (old releases). If this information was in the public domain, we would have a better basis to make reasoned risk determinations, we would be able to avoid wasting limited and finite resources on data gathering but instead direct it to remediation or mitigation, and we'd expedite the cleanup of brownfield sites. In theory, the obligation to disclose should be broader (more stringent) than a cleanup obligation.

Some have argued that such mandatory disclosure would stigmatize properties. This rationale has often been used to manipulate the archaic CERCLA reporting obligations, and negotiate terms that prevent a purchaser from reporting or investigating historical contamination. So while the contamination goes unreported, it might also migrate and then become an NPL site because the contamination was not addressed earlier.

The excuses for maintaining the current "hidden ball trick" don't stand up under any analysis. In my view, property with unreported contamination is being overvalued. If a site gets disclosed or listed, and its value gets depressed maybe that is just the site finding its appropriate valuation. If a purchaser will not develop the land because of the contamination, then they can be ordered to do the cleanup., the sites would be forced to be cleaned up under either CERCLA or a state brownfield program.

Mandatory disclosure would equal the playing field among known contaminated sites, suspected contaminated sites and unknown contaminated sites. Right now, property owners that disclose historical contamination out of an abundance of caution or because they believe it is the right thing to do are put at a disadvantage to those who follow the ostrich approach. Talk about creating a moral hazard!

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. Continuing the ostrich approach will only guarantee another two decades of CERCLA litigation and cleanup delays.

My point is that the practice of environmental law and remediation as devolved to the point where we are essentially falling into the "Tragedy of the Commons" scenario.

Disclosure of contamination will not create NEW liability. If the site is contaminated, there is liability. The more transparent the process, the better off we all will be. There will be plenty of opportunistic investors who would be willing to swoop up contaminated sites that their proprietary decision-making processes tell them are over-stigmatized.

If we are going to finally put behind us this legacy of contaminated sites, we need to embrace an approach outside the current approach. We can list a “parade of horribles” why my suggestions may not work but it is clear that the current system is not working. We need to try some new

creative approaches. Some may work and some may fail miserably. We're going to re-invent Wall Street and the auto companies so we might as well also try to re-invent our approach to contaminated sites.

Let's dispense with the tired old excuses and the “nattering nabobs of negativisim” (thank you William Safire!). People will have to change the way things have been done. It may be hard learning new tricks but I would suggest that my ideas are the kind of change many of us would believe in and that we voted for in November.

**(3) Revise lender liability so that banks that originate and sell loans like CMBS do not qualify for secured creditor exemption-**

This is a tough one for me. Lenders have become surrogate regulators in our de-regulatory model and facilitated the horrible phase 1 reports that missed lots of contamination by hiring the commodity shops. Lenders did not care since they were selling the loans. Conduit lenders are not holding "indicia of ownership" primarily to protect security interest but instead are being driven by fee profits (but allowed to assert applicable CERCLA LLPs). The secured creditor exemption was intended for banks that hold loans on their books and manage the loans-not those that cobble together risky loans and spread them like a disease across the world. If a borrower goes belly-up when they default on a risky loan, between the taxpayers and the lender, I think the lender that did not engage in proper risk management, should pay the price. AGAIN, THE MARKET WILL ADJUST.

**(4) Create database of phase 2 reports both to provide enhance community information, oversight of the regulators/regulated and reduce transactional costs for future deals-**

I would suggest that all phase 2 reports to be disclosed to the spill response center so a public database could be created. Can you imagine how much money is being wasted in each transaction repeating the same sampling that was done numerous times in
the past? The idea is to get these sites reported and cleaned up. Once they are reported, the owners will have to start the cleanup process.

Talk about burdens, just think about the thousands of phase 2 reports that are done each year because prior phase 2 reports are not available. If there was a database of phase 2 reports, then local governments seeking to redevelop sites as well as private prospective purchasers would not have to spend needless sums repeating investigative work that was already done but that is not available for a plethora of legal and business reasons.

Some have expressed concern about potential third party liability. The repository could contain some waiver to gain access to the reports. The waiver could state that the information is dated, may not reflect current conditions, etc. Moreover, once this system was set up, I’m sure every consultant could insert the appropriate disclaimer language in their reports going forward. If those who believe in "efficient" markets are correct, the marketplace will adjust to the new reality.

If everyone knew the information would be part of the public domain, there should be no expectation of privacy. How is this different from the current situation where responsible parties or volunteers pay for documents for a site investigation or cleanup that are placed in a public repository for the site?

**(5) Strong enforcement focus and penalties for non-disclosure;**

**(6) An AAI-like rule for Continuing Obligations/Due Care-**

EPA should issue regulation describing steps that it believes constitutes "due care" (for TP defense) or appropriate care/reasonable steps for BFPP and CPO liability protections. Better than letting the courts or commodity-shop consultants decide

**(7) Source removal for groundwater contamination as part of any risk-based cleanup approach as water resources are going to be the KEY concern for climate change-**

Ok. Maybe in-situ treatment would work. My point is that owner should eliminate the source of the contamination so that the water can clean itself up over a reasonable amount of time so that future generations can use it if need be. I am not suggesting they do full-fledged long-term remediation where they would qualify for one of the landowner liability protections. We should not be writing off groundwater when future generations are going to need to use that water due to water scarcity caused by climate change. This is immoral from an intergenerational standpoint. Just as lame as our grandfathers discharging wastewater into unlined lagoons.

**(8) Financial assurance for all post-remedial obligations exceeding two years-**
Financial assurance is critical to ensuring that IC/ECs are maintained. Developers should not be able to foist IC/ECs on condo associations without adequate resources for them to administer and enforce
**(9) Periodic Compliance Monitoring For IC/EC (likely privatized as well)**;and

**(10) Require State Brownfield Programs to Be Delegatable Like UST, RCRA, CWA and CAA programs**

EPA should be required to certify that state remedial programs qualify as "state response programs" under CERCLA 128 as it is currently ambiguous if a EPA is required to officially "bless these programs. EPA delegates other environmental programs to states and given the growing importance of state voluntary cleanup programs, it seems important that EPA ensures these programs or their LSP programs are sufficiently robust. States would have to adopt the minimal CERCLA reforms above to be designated a "state response program".

The inherent problem with brownfield programs are that rely on the market participants to voluntarily discover and remediate contaminated sites. The brownfield movement was born during the heyday of the market knows best theology. I think we have seen that unfettered markets result in opacity and unlawful behavior.

The lack of regulation has unleashed what Keynes call the "animal spirits" that not only results in sub-prime mortgages to unqualified borrowers but also substandard cleanups by bottom-fishing, incompetent consultants and property owners who do not want to pay for a proper cleanup. Our current regulatory structure relies on lenders to be surrogate regulators. How many bubbles do we have to suffer through before we recognize that the "animal spirits" will overwhelm a regulatory framework that relies on the voluntary, good faith efforts of market participants?

State petroleum trust funds pushed RBCA as a way to save funding. Indeed, to this day it seems that the administrators of state UST and dry cleaner funds seem more focused on preserving financial viability of their funds than expediting cleanups. For example, UST and dry cleaner trust funds usually prioritize cleanups based on impacts to groundwater. If groundwater is not used for drinking water, the sites are given low priority. I believe only one state takes vapor intrusion into account when ranking sites for priority cleanups. Thus, while sites wait 5 or 10 years to be eligible for funding, the plumes can migrate off-site towards residential neighborhoods (though less likely at regional malls), and while the sites are enrolled in the programs the owners have no liability except for a de minimis deductible.

I have witnessed first hand the mispricing and misallocation of risk that was committed by wall street and it is important to understand that that the mismanagement of risk is not limited to Wall Street but is embedded in all other parts of our economy. We need to re-evaluate how we as a society identify and allocate risk and that includes environmental risks. Without greater transparency and greater oversight we are not going to be able to properly manage the environmental risks that continue to exist in this country.

We have seen that the market cannot discipline itself and will unleash the "animal spirits" if not properly regulated. Without proper controls, there's just the law of the jungle because there is greed. Greed has to be tempered by fear and regulation. I think we need to move back towards more oversight. That does not mean telling developers how many holes to dig or where to dig them but to make sure that sites are properly characterized and remediated.

I am certainly suggesting a new paradigm in how we approach contaminated sites but I would suggest that is far better than waiting another 30 years for market-driven brownfield or voluntary cleanup programs to whittle down our inventory of historically-contaminated sites.

# Sounds of Silence

Those of you who read my posts know that I believe the current CERCLA reporting obligations need to be changed from reportable quantities to the presence of contamination above cleanup levels.

Following is an article that appeared in the March 9th issue of Inside EPA which discusses my views along with the contrary view.

“Key Lawyer Launches Mandatory Contamination Reporting Effort”

A New York-based brownfields attorney and sympathetic community-based brownfields activists are launching an effort to amend Superfund law so that it would require disclosure of chemical contamination discovered on a property, a move the attorney says would speed up cleanups but that industry sources say would bring brownfields redevelopment to a standstill.

Lawrence Schnapf, an environmental attorney and adjunct professor of environmental law at New York Law School, told /Inside EPA/ he is drafting a letter to Sen. Frank Lautenberg (D-NJ), the newly appointed chair of the Environment & Public Works (EPW) subcommittee on hazardous materials, that will lay out a framework for requiring both public and private investigators to disclose the presence of any chemicals covered by the Comprehensive Environmental Response Compensation & Liability Act (CERCLA) -- also known as the Superfund law -- if their concentration is above cleanup thresholds. The law currently only requires notification if an ongoing release at a specified rate is discovered.

One community-based brownfields activist says he is also looking to support such an amendment and is gauging support among lawmakers on both EPW and the House Energy & Commerce Committee. The activist expects that interest in mandatory disclosure from lawmakers will build once the effort is more widely known. "I think he's onto something here," the source says of Schnapf's push. "I think most people would be surprised to learn that people can find contamination and not have to disclose it."

Schnapf says CERCLA case law has evolved over the years in a way that facilitates an elaborate cat-and-mouse disclosure framework, whereby developers go to great lengths to prevent known contamination from being made known to buyers or tenants, going so far as to include "no-look" clauses in contracts that ensure buyers will not seek out contamination. States and municipalities therefore have to spend public money to do site assessments when the owners "already know where the bodies are buried," Schnapf said, and such duplicative assessments are wasteful and delay the work of remediation.

"It's just become the way things are done," Schnapf said. "But this is creating a moral hazard. This is allowing companies not to disclose contamination."

Industry sources say if CERCLA were amended to make disclosure mandatory, it would make redevelopment much more difficult and would prevent developers from doing assessments at all. One private brownfields developer says mandatory disclosure "would have a tremendous chilling effect" on redevelopment, especially at a time when brownfields development is already hobbled by the stagnant real estate market. "I'd hate to see that happen," the source adds.

Superfund law currently requires that contamination be disclosed to relevant authorities if there is an ongoing release of a covered contaminant, and if that release is occurring at a certain rate, with the default being one pound of contaminant released over a 24-hour period. But, if legacy contamination is discovered, or if the release is happening at a rate that is below the specified threshold, property owners are not required to disclose and have certain legal options to keep the contamination from being discovered should the property be sold or redeveloped.

Schnapf said the law made some sense in the 1970s and 1980s when CERCLA was first passed, because continuing releases were relatively commonplace at industrial sites. But the vast majority of contamination still being cleaned up is from legacy sites rather than ongoing releases, so the mandatory reporting threshold is no longer relevant, he said.

"If you look at CERCLA, when it was passed there were lots of ongoing [releases at] dump sites," Schnapf said. "Now, 30 years later, there's not a lot of sites that have them. But Congress clearly created CERCLA with the intent of remediating contaminated properties."

Whether such an effort gains traction in Congress, however, is uncertain. The community brownfields source says issues like brownfields or Superfund traditionally have not been strong talking points by either

Congress or the environmental community, and so there is less impetus to make mandatory contamination disclosure an issue as opposed to more glamorous environmental causes like a climate change bill or support for renewable energy. "I don't know to what degree [Congress] will be receptive to this," the source says. "I say that because they may be busy working on other things. It's not the substance [of the issue] but a matter of priority."

But Schnapf said there could be a receptive congressional audience, considering that environmental issues are of particular interest to Democratic lawmakers in the 111th Congress. "We have a new Congress, a new subcommittee chairman and a lot of environmental issues getting attention," Schnapf said. "I'm just firing a shot across the bow."

Another attorney who deals with brownfields from an environmental justice viewpoint says the timing of the potential reform is both fortuitous and problematic. On the one hand, the Democratic leadership is uniquely supportive of environmental initiatives generally, and President Barrack Obama has made environmental protection a signature theme of his administration. Additionally, EPA Administrator Lisa Jackson has a professional background in Superfund issues, the source says.

But at the same time, bringing the country out of recession is an even bigger priority, and the real estate market is in particular distress. A mandatory disclosure rule could be portrayed as exacerbating an already crippled industry, a major political liability without equal political payoff.

"I think it's a fantastic idea, to let people know and help people engage" in the redevelopment process, the second attorney says. "But I don't know if [lawmakers are] in a position, with the economic downturn, to try to stymie development."

Another industry source calls the move "a spectacularly useful way to further depress the recovery" of blighted urban communities, saying such an amendment would prevent property owners from bothering to conduct site evaluations in the first place, further preventing those properties from being cleaned up and put to good use. "I would see the logic in it if it were true," the source says, referring to the idea that property owners already know what manner of contamination is on their properties.

"I don't think all that information is out there, that [property owners] do site studies and then suppress them."

Both industry sources say a more reasonable move would be to amend CERCLA to require any site studies conducted by states or municipal governments to be made public, because the studies would have been publicly funded and their sheer number is far lower. -- /John Heltman/



# Home on the (Bombing) Range

Well, it has happened again. Another luxury builder develops residential development on a former bombing range- this time in the Orlando area. This follows a well-publicized development in Dallas and a number of sites with manufactured housing in the south.

The common thread with all of these sites is that the bombing range were to TRAIN world war two bombers and consultants in each case determined that since the properties were ADJACENT to the bombing practice area there was little likelihood of munitions being present.

My question how can these consultants assume that all the bombs landed on the 'x'? They were TRAINING bombers. Do you think it is likely that some of them missed their targets or accidentally dropped their loads prematurely?

Then of course there are my 'favorite' commodity shop environmental consultants who did not know the mobile home parks (MHPs) were located near target fields because they only researched historical use back to the 1960s since that was when the MHPs were first developed!! So now, the home builder in Orlando has three class action lawsuits filed against it. With the Florida real estate market already suffering the worst slump since the Great Depression, you got to believe having the local school children bringing 60 year old bombs to school for show and tell are not going to do much for the local housing prices.