Reauthorization of CERCLA and the redevelopment of brownfields: who will pay the orphan’s share?

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Abstract This paper examines significant and unjustifiable differences arising under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, Pub. L. No. 96-510, 94 Stat. at Large 2767, codified as amended at 42 USC §§ 9601-9675) in the way in which the Superfund may be used to remediate “orphaned” National Priorities List (NPL) sites and “orphaned” brownfield sites. Under both the existing law and numerous proposals for the reauthorization of CERCLA, the Superfund may be used for the remediation of orphaned NPL sites, it may not be used for the remediation of orphaned brownfield sites. In each situation, however, an absent, insolvent, defunct, bankrupt or judgment-proof party has created a situation in which remediation costs must be borne by the public. The study concludes that there is no fundamental policy reason for treating these orphans differently and presents recommendations to facilitate the remediation and redevelopment of both NPL sites and brownfield sites.

Abbreviations


EPA U.S. Environmental Protection Agency

H.R. House of Representatives

NPL National Priorities List

PRP potentially responsible party

S. Senate

SARA Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. at Large 1613, codified with CERCLA at 42 USC §§ 9601-9675

USC United States Code

Introduction

In Charles Dickens’ Oliver Twist, Oliver was forced to leave the orphanage for having the audacity to ask for more food. His request was based on the presumption that he might be treated differently from all of the other orphans. This presumption was incorrect. The orphans, one and all, received the same amount of gruel. As there were no differences, there were no exceptions.

There are significant, unjustifiable differences in the way in which orphans are treated under various provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, Pub. L. No. 96-510, 94 Stat. at Large 2767, codified as amended at 42 USC §§ 9601-9675). With regard to the remediation of sites listed on the National Priorities List (NPL), the “orphan’s share” is that portion of remediation costs that is attributable to a potentially responsible party (PRP) who is insolvent, defunct, bankrupt, judgment-proof or impossible to locate. As discussed in the second section, “The orphan’s share: federal”, this orphan’s share may be paid by other PRPs or from the Superfund.

With regard to the remediation of brownfields, the “orphan’s share” consists of cleanup costs for lands that have come into public ownership through tax foreclosure after the owner of the property has disappeared or has become insolvent, defunct, bankrupt or judgment-proof. Unlike the NPL orphan’s share, however, there is an expectation that state and local governments will pay the cost of remediating these orphaned sites. Unfortunately, as discussed in the third section, “The orphan’s share: state and local”, many (perhaps most) state and local governments do not have the financial resources to fund needed remediation. In most instances, such remediation is a condition precedent to the redevelopment of brownfields.

There is no fundamental policy reason for treating these orphans differently. In each situation, an absent, insolvent, defunct, bankrupt or judgment-proof party has created a situation in which remediation costs must be borne by the public. Nonetheless, the distinction between NPL orphans and brownfield orphans has been maintained in recent legislative proposals to amend and reauthorize CERCLA. These proposals are summarized in the fourth section, “Proposals for CERCLA reform”. The case for treating the orphans the same (for allowing the use of the Superfund to remediate orphaned brownfield sites) is presented in the fifth section, “Who will pay the orphan’s share?” with conclusions being presented in the final section.
The orphan’s share: federal
CERCLA was enacted in 1980 in response to public concern over the disposal of hazardous wastes at sites such as Love Canal. Through the enactment of CERCLA, Congress sought both to remediate hazardous waste disposal sites and to require PRPs to pay for site remediation.

There are different means by which these goals may be achieved. Under § 106(a) of CERCLA, 42 USC § 9606(a), the Environmental Protection Agency (EPA) may compel PRPs to remediate specific sites when “there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility.” Alternatively, under § 107(a) of CERCLA, 42 USC § 9007(a), EPA may use the Superfund to pay for remediation and then may initiate litigation to recover the costs from PRPs.

Congress authorized a third alternative with the enactment of the Superfund Amendments and Reauthorization Act in 1986 (SARA, Pub. L. No. 99-499, 100 Stat. at Large 1613, codified with CERCLA at 42 USC §§ 9601-9675). In order “to encourage and facilitate” the remediation of hazardous waste disposal sites, Congress authorized EPA [CERCLA § 122(a), 42 USC § 9622(a)] to enter into settlement agreements with PRPs “in those situations where negotiations have a realistic chance of success” (White 1998). As an inducement to enter into such settlement agreements, Congress provided that parties to such agreements “shall not be liable for claims for contribution regarding matters addressed in the settlement” [CERCLA § 113(f), 42 USC § 9613(f)]. In essence, PRPs entering into a settlement agreement have the right to seek contribution from those PRPs that have chosen not to enter into the agreement. Conversely, those PRPs that do not enter into the settlement agreement, do not have the right to seek contribution from the settling parties (McCory 1999).

In terms of payment of the orphan’s share, it is important to understand the differences between § 107 and § 113 liability.

Section 107 liability
Under § 107, PRPs are strictly liable. In *State of New York v. Shore Realty Corporation*, 759 F.2d 1032, 1044 (2d.Cir. 1985), the court interpreted § 107 liability to mean that liability is imposed “without regard to causation.” As noted by the Senate Committee on Environment and Public Works in its report on the proposed Superfund Cleanup Acceleration Act of 1998, Sen. Rept. No. 105-192 (1998), “the courts have unanimously held that Section 107 liability is strict in that it applies without regard to fault on the part of the responsible party.”

Furthermore, PRPs are jointly and severally liable for the costs of remediation (Auxer 1998; Lee 1993; McCory 1999). This issue was also addressed by the Senate Committee in Sen. Rept. No. 105-192:

[The courts have developed a uniform rule applying joint and several liability to Section 107 in cases where the harm caused by the release of a hazardous substance is indivisible. Under this principle, a single party could theoretically be held liable for all the cleanup costs at a site.]

As a result, because of SARA’s “reiteration of CERCLA’s intent to create a broad liability scheme, a popular saying evolved that SARA has been misnamed and that her name was really RACHEL, the Reauthorization Act Confirms How Everyone’s Liable” (Abrams 1997). In essence, in a § 107 cost recovery action, “a party that performs a cleanup sues (other PRPs), each of whom faces potential exposure for the entire cleanup including ‘orphan share’ liability” (Jenner & Block 1997b). The result is that the full cost of site remediation will be borne by the PRPs (Hernandez 1997; Man 1997; McCory 1999). If this cost includes an orphan’s share, payment of that share will be the obligation of the PRPs and the cost may be apportioned accordingly (Bedig 1996).

Section 113 liability
Under § 113, PRPs are severally (but not jointly) liable. (McCory 1999) The language of § 113(f) authorizing the court to “allocate response costs among liable parties using such equitable factors as the court determines are appropriate” has resulted in inconsistent decisions regarding the scope of liability. In general, however, the emerging rule appears to be that each party will be responsible only for the cost of remediation that is directly attributable to the actions of that specific party. This would be the specific party’s equitable share (McCory 1999).

Consequently, in a contribution action initiated by a PRP following settlement with EPA, contribution from other PRPs would be limited to costs that are attributable to specific PRPs (Axsne 1998). If there is an orphan’s share, it may become the responsibility of the PRP that settled with EPA and initiated the contribution action. As noted by Jenner & Block (1997b), “[t]he liability of a contribution defendant may be limited in accordance with the defendant’s fair share of the contamination in question, and orphan shares may remain with the plaintiffs.”

This possibility may have had the effect of discouraging negotiated settlements. As noted by the Senate Committee in Sen. Rept. No. 105-192, “there have been repeated examples where PRPs have declined to settle with the Justice Department and EPA because they refuse to assume the liability of defunct and insolvent parties.” It has also been argued that the absence of joint and several liability may have the effect of encouraging § 107 cost recovery actions (Poulter 1998).

Two judicial opinions are illustrative of the uncertainty that surrounds the scope of § 113 liability. The first, *Gould, Inc. v. A & M Battery and Tire Service*, 901 F.Supp. 906, 913 (M.D.Pa. 1995), is illustrative of what appears to be the emerging majority interpretation of § 113. Among the issues before the court was payment of the orphan’s share. The plaintiff had settled with EPA. Thereafter, the plaintiff initiated both a cost recovery action under § 107 and a contribution action under § 113 against other PRPs. In ruling that the plaintiff could proceed against the defendants only under § 113, the court addressed the provisions of the statute: