ENVIRONMENTAL LAW

The Newsletter for the TBA's Environmental Law Section

Tips for the General Practitioner:

State Superfund Buyouts for *De Minimis* Parties

By G. Scott Thomas, *Bass, Berry & Sims, PLC*

By now, with the superfund laws[1] being well over 20 years in existence, many attorneys in the state have represented clients facing liability for environmental clean ups. Attorneys with this experience appreciate that clean ups are very expensive, and can be the bane of their client's existence.[2] Attorneys who regularly practice in the environmental area also have learned that the legal and administrative expenses in "participating" in an environmental clean up can often cost as much or more than the clean up.

In light of these risks, all parties involved in an environmental clean ups seek the earliest opportunity to get out of the process. These situations are usually referred to as "buyouts" because the release or dismissal may involve a cash payment representing the settling party's share of the clean up costs.[3] Most participating parties find buyouts unavailable because of the complexities of determining the party's share of liability and the uncertainties of the ultimate cost of the clean up. And even when a party is presented with a buyout opportunity, many times the buyout amount is too rich to be appealing.[4] However, parties that are recognized as having a smaller share of environmental liability exposure usually have a better chance of reaching a early settlement for a more acceptable buyout amount.

As alluded to above, the federal and state superfund laws both came about in the early 1980's. These laws primarily provide a mechanism for the U.S. Environmental Protection Agency (EPA) and the Tennessee Department of Environment and Conservation (TDEC), respectively, to clean up older releases of hazardous substances. The liability structures of the federal and state laws are generally consistent, and provide that current and most prior property owners, transporters and generators of the hazardous substances present at the site, all share responsibility for the costs of investigation and clean up of the hazardous substances [5].

Under the federal law, the liability among these various parties is strict, joint and several.[6] This means that the EPA can require any one of such parties to do (or pay for) an environmental clean up by itself. The only "bone" the federal law throws liable parties in return is a private right of action, which allows the parties tapped by the EPA to sue the other liable parties for cost recovery or contribution[7].

While the state law generally follows the same strict liability structure as the federal law, state superfund liability is not joint and several, but rather based upon an equitable allocation among the liable parties.[8] The state law specifically authorizes TDEC to conduct an apportionment among the liable parties to establish their respective shares of liability. [9] However, because the facts necessary to make this determination are often developed slowly as the site is being investigated, the apportionment may not happen until the response action at the site is well underway.

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Letter from the Chair

By Jim Wright

On October 10, 2003, I attended a meeting of state Bar representatives at the Fall ABA Meeting. The purpose of this meeting was to share, discuss and learn with members of the American Bar Association and other state representatives. I was provided the opportunity at this meeting to present, on behalf of the Tennessee Bar Association's Environmental Law Section. We have much to be proud of in regard to our Section's activities. Our Section produces four newsletters each year. These newsletters provide, among other things, important substantive law issues, interviews, calendar information of upcoming important events, and news regarding members. The Section has a website at environlaw@tba.org. Additionally, the Section has an e-forum located at www.tba.org/sections/index.html. From this e-forum, one can post information or request information. Additionally, the Section produces substantive CLE programming. The next event scheduled is the December 12, 2003 televideo conference on Ethics and Environmental Law. The speakers for that conference include Professor Carl Pierce of the University of Tennessee College of Law, who was the reporter for the recently adopted model rules. Also speaking will be Professor Irma Russell, who has recently written a book on environmental law and ethics. This book is entitled *Issues of Legal Ethics in the Practice of Environmental Law*.

> ***For a small Section, we are doing a good job. At the same time, however, I am hopeful that we can take up some of these new ideas and make them work for us.***

Based upon the meeting, I was impressed that we can be proud of our activities as gauged against other state's activities. We can, however, learn from other states. The presentation on behalf of the state of Oklahoma revealed that they conduct a "traveling road show." Environmental law practitioners volunteer to go to the more rural counties to present to those Bar associations general issues in relationship to environmental law. They also publish an environmental law handbook. Some of the proceeds from this handbook are used to provide a scholarship at each law school in the amount of $1,000 per year. They also

provide a scholarship to an engineering student who is studying environmental issues. They also attempt, on a periodic basis, to publish in the state's Bar Journal. Oklahoma also sponsors a representative to attend the ABA Fall Meeting. This is generally the incoming chair. Having attended this meeting, I believe this to be a great idea and one that we should encourage.

The Florida Environmental Law Bar Section includes approximately 2,000 members. They also provide a law school program with $1,000 scholarship to each school which is primarily used for the Pace Moot Court Competition. Additionally, there is an annual essay contest for each law school. Interestingly, the Florida Bar Association's Environmental Law Section has an affiliate membership for consultants and experts. These groups pay $50 for each member. Through this, they are able to do programming with the affiliates. A recent program that was discussed that I believe would be of interest to our Bar would be a presentation on ethics of the different areas of professional expertise. Our Section did this in regard to media ethics last spring at the Gatlinburg conference.

Virginia publishes a legislative preview in December and then follows this with a legislative summary after the end of the legislative session. I know that we have done this in the past. This would be a good idea for us to pick up again.

The ABA is in the process of creating a list of contacts for the Environmental Law Section in all 50 states. They are hopeful that they can provide more and better exchanges of ideas between states.

Again, I was encouraged by the presentations as it would relate to our Section in that I believe that our Section is in the forefront. For instance, one state had quit producing a newsletter because it was simply too much work. For a small Section, we are doing a good job. At the same time, however, I am hopeful that we can take up some of these new ideas and make them work for us. ■

James C. Wright
Attorney at Law
JWright@bvblaw.com
(865) 637-3531; (865) 637-3385 - fax

The National Pollutant Discharge Elimination System (NPDES)

By Saya Qualls

The National Pollutant Discharge Elimination System (NPDES) was created by the federal Clean Water Act. It is basically a regulatory program for wastewater discharges to waters of the U.S. The Division of Water Pollution Control received authorization from EPA to administer the NPDES permit program in late 1977. The Tennessee Water Quality Control Act (TWQCA) is the state law authority for the program. The division implements the NPDES permit program as well as the state operating permit program through Chapters 1200-4-1 and 1200-4-5 of Tennessee's Rules. The revisions being proposed by the division represent the first major changes to those chapters in almost 30 years.

The rule revision would remove unnecessary, outdated and/or duplicative provisions. It will reorganize the two chapters so that Chapter 1200-4-1 will contain the duties and authorities of the board and commissioner and Chapter 1200-4-5 will contain the permitting rules as well as new regulations governing the operation of concentrated animal feeding operations or CAFOs.

Revisions to Chapter 1200-4-1 consist of significant changes to board procedures that include wholesale removal of 1200-4-1-.03(4)(f)-(aa), the provisions of which have been superceded by the Uniform Administrative Procedures Act.

The division's action also accumulates and consolidates definitions applicable to permitting in Chapter 1200-4-5.02. At the time of this writing, this section contains approximately 90 definitions that relate to permitting.

The division is also proposing to make changes to the public notice procedures that would promote early public participation for new and/or expanded discharges. The division is also contemplating additional changes to the public notice process to improve effectiveness and efficiency.

The rule revision will also bring Tennessee's regulations in line with federal rules with respect to the definition for, as well as the prohibition of, bypass. Currently Tennessee defines bypass as a discharge from any point in a collection system while federal rules define bypass as an internal diversion around unit operations in a treatment plant. In addition to redefining bypass, the division also intends address discharges from collection systems by adding definitions for and provisions related to, sanitary sewer overflow and dry weather overflow. Both of these terms refer to unpermitted discharges from collection systems, with sanitary sewer overflow describing a discharge that is related to wet weather.

The proposed regulation would also set out the remedies available for affected persons who disagree with permit actions. The rule references the complaint provisions of TCA 69-3-118(a) and the procedures for filing a petition for a declaratory order of TCA 4-5-223 through 225.

The most substantial change to Tennessee's rules is the inclusion of specific provisions related to CAFOs. In 1999, TDEC, responding to statewide concerns about CAFOs, formed a multi-agency, multi-interest advisory group that developed a strategy for permitting CAFOs. That strategy has worked well for Tennessee. In April 2003, EPA promulgated new CAFO rules that addressed many aspects of CAFO operation including nutrient management, waste storage and land application. EPA's rules also require states to modify their permitting programs to accommodate the new federal requirements. In order to do so, the division again formed a multi-agency, multi-interest advisory group that provided input on the CAFO provisions that are included in the rule revision. The proposed rules are consistent with federal CAFO rules, but also contain elements of Tennessee's 1999 CAFO Permitting Strategy. The division's basis for including state-specific requirements is rooted in circumstances particular to Tennessee.

For example, in Tennessee, nutrient inputs from medium-sized animal operations far outweigh those from large-sized operations. From a water quality standpoint, livestock activities contribute to the impairment of approximately 40 % of the water bodies that the division identifies as not fully supporting designated uses. In contrast, human waste directly affects around 20 % of partially or non-supporting water bodies and industrial waste affects less than 10 % of those waters. Therefore, it makes sense to appropriately use regulatory tools to address pollutants coming from both large and medium livestock operations.

With exception of the new CAFO rules, the majority of the rule revisions do not include significant new requirements. For that reason, any additional costs associated by these regulations that would be borne by most permittees are considered minimal.

The division noticed the proposed rule revisions as well as a series of 9 public hearings in the June 2003 issue of the Tennessee Administrative Register. Hearings were held in Memphis, Jackson, Nashville, Shelbyville, Knoxville, Chattanooga, Greeneville, Cleveland and Cookeville. The comment period for the new rules ended in September. During the comment period, the division has received a considerable amount of input from municipalities, industries, citizen interest groups and the agricultural community. The division's proposal to the Water Quality Control Board, set for its November 2003 meeting, will be reflective of the comments received.

Following board adoption, the rules must be approved by the Attorney General, the Government Operations Committee and the EPA. The division anticipates that the new rules will become effective in early 2004. ■

Saya Qualls is the Environmental Program Manager, NPDES Permitting Section with the Tennessee Department of Environment and Conservation, Division of Water Pollution Control.

New DOT HazMat regulations cover more than just transporters

by LeAnn Mynatt

A new Department of Transportation (DOT) rule, promulgated as part of the Homeland Security Act, is catching some non-transportation companies off guard. According to DOT, even companies who merely offer certain items for transportation into commerce must comply. These items include waste shipments for offsite disposal. Compliance with the new regulation, finalized on March 25, 2003, takes two forms: training and a security plan.

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Training

HazMat employees (defined elsewhere in the DOT regulations) must be trained on the security risks associated with HazMat transportation; methods to enhance security; recognizing and responding to security threats; reviewing the [new] security plan; company security objectives and procedures; employee responsibilities; how to respond to a security breach; and the organization's security structure (49 CFR 172.704). Companies have until March 24, 2006, to train current employees.

The security plan regulations, found at 49 CFR 172.800, require that each person who "offers for transportation in commerce or transports in commerce one or more of the following hazardous materials must develop and adhere to a security plan" (Emphasis added).

There are seven categories of HazMat listed:

1. A Class 7 (radioactive) material
2. More than 55 pounds of an explosive material
3. More than one liter per package of a material that is poisonous by inhalation
4. A bulk HazMat shipment greater than 3,500 gallons of liquid/gas or 468 cubic feet of solid
5. A non-bulk shipment weighing 5,000 pounds or more of a Subpart F HazMat placarded material for a vehicle, rail, car, or freight container
6. A CDC-regulated agent or toxin, or
7. HazMat that requires placarding under Subpart F.

Security Plan Contents

The security plan must include an assessment of the security risks of the HazMat and the measures available to address these risks. The plan must state how employers will verify information provided by applicants for jobs involving the handling of HazMat. The plan must also include measures designed to address the risk that unauthorized persons may access the HazMat or the method of its conveyance. Third, the plan must address the security risks associated with the transportation of HazMat from origin to destination. The plan must be in writing, be available to affected employees with a need to know, must be revised and updated as needed, and must be retained for as long as it is in effect.

In addition to developing their own security plans, companies should confirm that their contracted transportation companies also have compliant security plans.

Penalties for Noncompliance

Civil penalties for noncompliance may accrue up to $32,500 per day, per violation. ■

Mary LeAnn Mynatt is an attorney with Baker, Donelson, Bearman, Caldwell & Berkowitz. Her practice includes regulatory compliance in environmental, safety & health, and transportation law, as well as environmental M&A transactional issues and environmental litigation. Ms. Mynatt received her Bachelor of Arts and Juris Doctor from the University of Tennessee. Ms. Mynatt is a member of the Environmental Sections of the Knoxville (co-chair, Environmental Section), Tennessee, and American Bar Associations.

Sixth Circuit Reverses Lenient Sentence in Environmental Crimes Case

By Gary Shockley

The public often dismisses white collar criminal sentences as little more than a few weeks in a "country club" prison, suitable for tuning up one's backhand. The reality is often far different. Under the United States Sentencing Guidelines (U.S.S.G.), the discretion allowed to federal judges in sentencing convicted felons is carefully circumscribed and sentences generally result in significant incarceration. A recent decision by the U.S. Court of Appeals for the Sixth Circuit in an environmental crimes case, United States v. Kuhn, No. 02-1031 (6th Cir. October 1, 2003), demonstrates the substantial stakes in such cases.

In Kuhn, the defendant was the Supervisor of a public wastewater treatment plant in Michigan. According to testimony at his three-week federal trial, during a maintenance shutdown, he directed plant employees to discharge sludge from the plant directly to a ditch leading to the Saginaw River, in violation of the plant's National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act, 33 U.S.C. § 1342. In addition, Kuhn directed plant employees to change sampling results submitted on a monthly discharge monitoring report (DMR) and later submitted the altered report to regulatory authorities. He was charged in a four-count indictment with illegal disposal of sewage sludge, discharge of a pollutant in violation of a permit, falsification of test results, and submission of a false report--all federal felonies under the Clean Water Act. 33 U.S.C. §§ 1345, 1311, 1319(c)(4). A United States District Court jury returned a verdict of guilty on all counts, although one count was later dismissed on double jeopardy grounds as overlapping one of the remaining offenses.

At sentencing, the Probation Office calculated a sentencing range of 30-37 months under the U.S.S.G. The calculation in the presentence report (PSR) began with USSG § 2Q1.3, the applicable guideline for Count One of the indictment, the 33 U.S.C. § 1345(a) sludge discharge offense. The PSR calculated a base offense level of 6 and then added specific offense characteristic increases for discharge or release of a pollutant (+4) and discharge without or in violation of a permit (+4). U.S.S.G. § 2Q1.3(b)(1)(B) & (b)(4). Turning next to adjustments for the defendant's role in the offense, the PSR added increases for his role as an organizer, leader, manager, or supervisor in the activity (+2) and for abuse of a position of public trust (+2). U.S.S.G. § 3B1.1(c) and .3. This resulted in an adjusted offense level of 18 for Count One. After calculating adjusted offense levels for Counts Three and Four (both of which yielded a level of 10) and applying multiple conviction grouping rules, see U.S.S.G. § 3D1.4, the PSR calculated a final combined adjusted offense level of 19. With a criminal history category of I, this would yield a sentencing range of 30 to 37 months imprisonment. U.S.S.G. § 5A.

The Defendant objected to some upward adjustments and the government objected to the PSR's failure to apply other upward adjustments. The District Court applied two-two level downward adjustments based on the lack of risk under U.S.S.G. § 2Q1.3, Application Notes 4 and 7--a so-called "guided departure" envisioned by guideline § 2Q1.3. With this four-level guided departure, the District Court judge recalculated a sentencing range of 21-27 months imprisonment. He then applied an "unguided" four-level downward departure, finding that application of certain specific offense characteristic and role in the offense adjustments, while not strictly double-counting, tended to overstate the seriousness of the offense. He also concluded that the defendant's motive in ordering discharge of the sludge was to ensure more efficient operation of the treatment plant, which took the case out of the "heartland" of cases considered by the Sentencing Commission in setting the applicable guidelines. See U.S.S.G. § 5K2.0. Based on these findings, the court sentenced Kuhn to six months in a halfway house, six months of supervised release, and the minimum fine of $6,000. The United States appealed the sentence.

On appeal, the Sixth Circuit held that the District Court abused its discretion in applying the unguided four-level downward departure, which reduced the

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Sixth Circuit Reverses Lenient Sentence in Environmental Crimes Case (*continued from page 5*)

offense level from 16, with a sentencing range from 21 to 27 months, to 12, allowing for a sentence other than incarceration. As an initial matter, the court failed to give notice to the government of its consideration of such an unguided departure, which was mandated by the Federal Rules of Criminal Procedure and prior decisions of the Sixth Circuit. In addition, the grounds given by the District Court for the reductions were not valid under the U.S.S.G. The § 3B1.1 and .3 upward adjustments for abuse of a position of public trust and for a leadership role in the offense were both applicable and, even when combined, did not overstate the gravity of the offense. Likewise, the § 2Q1.3 adjustments for discharge of a pollutant and for discharge in violation of a permit were designed to be applied independently and did not overstate the offense. The Court of Appeals concluded that the real reason for the trial court's action was "dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines," neither of which is an acceptable ground for deviation from the Guidelines. Finally, the Court of Appeals expressed some skepticism as to the District Court's reliance on the Defendant's purported motive in committing the offense, noting that "we are unable to find any authorization in the guidelines for a downward departure based on a defendant's good motive for committing a crime." Based on these holdings, the Sixth Circuit reversed and remanded the case to the District Court for resentencing.

Stripped of its sentencing guidelines jargon, Kuhn is a prime example of the impact of the U.S. Sentencing Guidelines in environmental crimes and other white collar cases. Here, the Defendant ordered a discharge of sludge into a ditch in violation of a permit. There is no evidence in the Court of Appeals opinion that the sludge caused significant environmental harm, placed life or property at risk, or required extensive remediation. (The trial court judge even noted that he was doubtful that the sludge ever reached the river.) The defendant also ordered test results altered on one report and then submitted that falsified report to the state. The trial court found that, at least with respect to the discharge of sludge, he was motivated by a desire to ensure the proper operation of the plant. Based on these events, Kuhn was convicted of three federal felonies, each carrying potential penalties of two to three years imprisonment. The Probation Office calculated a sentence range of 30-37 months. Applying unchallenged guided departures, the District Court lowered this range to 21-27 months. The sentencing court's additional unguided departures--allowing for a sentence other than incarceration--were rejected on appeal. Thus, on remand, it seems likely that the defendant will face a sentence of approximately two years incarceration for one sludge discharge and one false report. Whatever the comforts or discomforts of the federal prison system, this is hardly the proverbial slap on the wrist of popular imagination. ■ Gary C. Shockley © 2003

Gary Shockley practices in the Nashville office of Baker, Donelson, Bearman, Caldwell & Berkowitz, where he concentrates on environmental and other complex litigation. He is a former chair of the TBA Environmental Law Section (1994-95) and a current member of the TBA Litigation Section Executive Council.

Transitions

Wolf River Conservancy Executive Director Accepts Environmental Post in Shelby County Government

Larry Smith won national and regional awards for volunteer leadership and environmental education

MEMPHIS – (August 25, 2003) – Larry J. Smith, executive director of the Wolf River Conservancy, has stepped down to become director of the Shelby County Environmental Improvement Commission.

In 1985, Smith was among the small but fast-growing group of concerned citizens who helped to form the WRC as an advocacy group for the Wolf River and its environs. He remained an active volunteer leader until 1996, when the board of directors selected him as its first full-time executive director.

The mission of the Wolf River Conservancy is to protect and enhance the Wolf River and its environs as a natural resource for public education and low impact recreation. The 90-mile Wolf River flows from its source springs in the Benton County, Miss., section of the Holly Springs National Forest to the northern tip of Mud Island in downtown Memphis where it meets the Mississippi River. Much of the "Memphis Sands" aquifer, the Mid-South's source of artesian drinking water, is recharged by the Wolf River's watershed.

Tips for the General Practitioner *(continued from page 1)*

Excusing parties from further participation in an environmental clean up presents a unique challenge to regulators. On one hand, the regulators recognize the inequities of the harsh liability structure of the superfund laws. An entire class of properties known as "brownfields" have arose as a direct result of the superfund liability risks[10]. On the other hand, it can be very difficult to determine a party's share of liability for settlement purposes in a typical superfund scenario and the regulators are cautious about excusing a party for less than its fair share. Some sites such as landfills and recycling facilities often have hundreds of liable parties, all with different levels of involvement in the hazardous substances, and all with different degrees of financial wherewithal. Perhaps the biggest challenge to regulators in offering a fair settlement to a liable party is trying to determine the ultimate cost of the clean up, since it often takes years just to figure out the environmental impact and how much clean up is necessary.

The EPA encourages de minimis and de micromis [11] buyouts at federal sites, and has issued specific guidance on these small party buyouts.[12] However, settlements with the federal government tend to be hard to obtain. Federally-led superfund sites are usually the larger, high-profile sites, involving lots of liable parties. Typically, you will see buyouts with the federal government only in situations when there is a large group of small parties petitioning for a settlement at the same time. And, more often than not, these settlements come too far into the clean up process to save many the expenses of the clean up process.

Parties in Tennessee are much more likely to be involved in an environmental clean up being overseen by TDEC. While less publicized by TDEC, de minimis and de micromis parties in Tennessee also have an opportunity to pursue buyouts under the state superfund statute, known as the Hazardous Waste Management Act of 1983.[13] Section 207 of the Act provides a mechanism for TDEC to apportion a party's "share of liability for all costs expended or to be expended." [emphasis added], which permits TDEC to apportion for future expenditures and therefore settle early in the process.

In assessing a party's apportioned share, the state law prescribes that TDEC consider equitable factors including, but not limited to, the following:

1. Any monetary or other benefit accruing to the party from the disposal of the hazardous substances released at the site;
2. The culpability of that party in placing in chemicals that have caused the environmental release;
3. Efforts of the party to restore the environment to its natural condition;
4. Expenditures for investigation and remediation that the liable party has incurred;
5. The portion of the total amount of hazardous substances released at the site for which the party is responsible; and
6. The monetary benefit accruing to the party as a result of the clean up of the site if that party is an owner of the property.

These apportionments of liability under state law can be made on either a percentage basis or a fixed cash amount, although in practice most settlements have been made a fixed amount basis.[14] If assigned a percentage of responsibility, the liable party pays that percentage of clean up costs incurred by the state until the clean up action concludes, which in many cases takes years. Some clean ups take decades to complete. While a percentage apportionment is the easier method at a site where the total cost remains uncertain,[15] it may be less attractive to a party pursuing a

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buyout because that party does not know the total cost of its settlement until the clean up is complete.

As the total clean up cost becomes more readily ascertainable, a fixed amount as the apportionment is more easily calculated. Under this method, a buyout party can determine a cash-out amount to pay and get immediately released from further participation. In many situations, however, the "sweet spot" for determining this cash-out amount comes about too late in the process and the interest of an early settlement has waned. However, in those certain cases where the facts show the party seeking buyout has de minimis liability and the state can make a ballpark determination of costs, a good opportunity for buyout exists.

For example, consider the following set of circumstances in a superfund case:

> Party A is the current owner of a site that, unknown to it at the time of purchase, contains drums of cleaning solvent buried below ground. Party A paid fair market value for the property and has cooperated fully with the state in the investigation of the situation. TDEC has identified the previous owner, Party B, as the generator of the drums from its historic operations at the site. Party B is still a viable company. The drums have not leaked yet, but are a significant threat to the groundwater and need to be removed.

In this example case, settlement with Party A should be easy for the state. The clean up expenses are easily determined, because the cost of drum removal can be determined ahead of time. Party A appears to be a victim of circumstance, has no culpability with respect to the drum burial, and has earned some "brownie points" by cooperating with the state. Party B is alive and well, and capable of performing the clean up or at least paying for it. Party A should be able to obtain a release from TDEC for little or nothing more than a commitment to continued cooperation.[16]

However, a twist or two in the scenario complicates things pretty quickly. For instance, what if Party A knew about the drums before it purchased the site? Knowledge of such a condition is many times considered evidence that the party assumed some of the risk of clean up, and could affect the amount of liability allocated to Party A. Even more complicated is the scenario where Party A may not have had actual knowledge or the drums, but should have known about them. The superfund laws put some duty on prospective buyers to investigate properties before purchase, but these duties are on a sliding scale depending on the type of property involved and the sophistication of the buyer.[18]

There are several other factors that can change the example case. What if Party A not only knew about the drums, but got a discount from the purchase price because of them? What if the tanks had leaked and contaminated the groundwater? What if Party B was bankrupt? Any one or a combination of these factors could complicate the situation and change the attitude of TDEC towards a settlement with Party A or the amount needed to settle.

A buyout or settlement for a de minimis party in state superfund situations is something worth pursuing under the right circumstances…

Even if a de minimis party successfully negotiates a settlement with TDEC, several exposure risks remain. First, and foremost, the scope of the settlement needs to be sufficiently broad to cover the clean up at the site. Too narrow a description of the matters covered by the settlement could unintentionally expose the settling party to other clean up costs arising at the site. While this is sage advise for any settlement, it is especially true in environmental clean ups. It is too easy to fail to identify a necessary hazardous substances, or be too restrictive in the location covered by the settlement.[19]

Another risk is from EPA. The federal government is not bound by a state settlement and could continue to pursue a settling party for clean up costs.[20]

Unlike most environmental programs that are delegated to the states, the federal superfund program is concurrent with the state's, which means that they operate independently of each other, at least from a jurisdictional perspective.[21] In practice, however, EPA intervention at a site in Tennessee that is already being addressed by the state is a rare scenario. If the site is state-led and the state desires it to remain so, then it is unlikely that the EPA would need to pursue liable parties because EPA would not be incurring costs in clean up the site.

Perhaps the most likely risk is that other the liable parties that continue to participate in the clean up will turn around and sue the settling party that has entered

into the buyout. All parties that incur clean up costs have a right under the federal superfund law to pursue equitable contribution from other parties that should share in those costs.[22] Therefore, if a "de maximus" party is successful in convincing the federal district court that the share paid by the de minimis party is not its equitable share under a federal superfund allocation of liability, then it is possible that the de maximus party could receive a reward against the de minimis party for the difference.

The state counteracts this risk in its settlements by utilizing a provision of the federal superfund law that authorizes a state to enter into approved settlements with liable parties and endow those parties with protection against statutory contribution under the federal superfund statute.[23] The scope and effectiveness of this contribution protection has not been tested in the courts, and has been clouded further by a recent state case that suggests there is also a state common law right of contribution.[24] Regardless of the potential risks of suits from other participating parties, if a de minimis party has settled its liability with the state on an equitable basis, a court (federal or state) should agree in a subsequent action with the allocation and not award additional amounts to the other liable parties.

In summary, a buyout or settlement for a de minimis party in state superfund situations is something worth pursuing under the right circumstances. It can save the settling party both the time and expense of the extended ordeal of a superfund clean up, and avoid the frustrations caused by being involved in a superfund clean up. The more comfortable TDEC is with its knowledge of the site and its environmental condition, the more likely TDEC will entertain a buyout or settlement. In those circumstances, the key is to convince TDEC of your stature as a de minimis party and take care in crafting the settlement agreement's language.■

[1] Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 et seq.; Tennessee Hazardous Waste Management Act of 1983 (the "Tennessee Superfund Act"), Tenn. Code Ann. 68-212-201 et seq.

[2] Being involved in a liability of indefinite amount can make obtaining and refinancing credit difficult.

[3] There are rare occasions were a party has a full defense to liability (see CERCLA § 107(b), Tennessee Superfund Act § 207(c)) or has already contributed more than its share towards the clean up and can obtain a liability settlement without an additional cash payment.

[4] Buyouts usually involve an estimate of what is going to be spent on the clean up in the future, and because it is an estimate, the regulatory agency giving the buyout often adds a premium to the amount to cover contingencies.

[5] CERCLA §107(a) sets forth four categories of liable parties: 1) current owners and operators of a facility; 2) prior owners and operators of a facility; 3) persons who arranged for disposal or treatment of hazardous substances that they owned or possessed at a facility; and, 4) persons who transported hazardous waste for disposal or treatment at a facility. The Tennessee Superfund Act definition of a "liable party" at T.C.A. 68-212-202(4) essentially mirrors the federal CERCLA.

[6] Courts uniformly endorse CERCLA's strict liability scheme, meaning that claims that a party was not negligent or that its activities were consistent with industry standards provide no defense to liability. See e.g., Levin Metals Corp. v. Parr-Richmond Terminal Co., 799 F.2d 1312 (9th Cir. 1986); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987); United States v. Conservation Chem. Co., 619 F. Supp. 162, 204 (W.D. Mo. 1985). Courts have also readily found joint and several liability in situations where several potentially liable parties' wastes become commingled, resulting in EPA's ability to sue a few liable parties at major Superfund sites and obtain judicial decisions that each liable party is individually responsible for all clean up costs. See e.g., O'Neil v. Picillo, 682 F. Supp. 706 (D.R.I

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1988), aff'd, 883 F.2d 176 (1st Cir. 1989), cert. denied sub nom., American Cyanamid Co. v. O'Neil, 493 U.S. 1071 (1990).

[7] CERCLA §107(a) states that the four categories of liable parties "shall be liable for any other necessary costs of response incurred by any other person consistent with the national contingency plan." CERCLA §113(f) provides that "any person may seek contribution from any other person who is liable or potentially liable under section 9607 [§107] of this title."

[8] Section 207(a) of the Tennessee Superfund Act allows the Commissioner of the Tennessee Department of Environment and Conservation to "issue an order to any liable party assessing that party's apportioned share of all costs expended or to be expended." In assessing a party's apportioned share, the commissioner may consider equable factors such as a party's culpability, efforts to restore the site to its natural environment, potion of the total volume of hazardous waste, and monetary benefit resulting from clean up. T.C.A. § 68-212-207(b).

[9] Id.

[10] In general, "the term 'brownfield site' means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." CERCLA §101(39)(A). For more information about brownfields, see EPA's Brownfields Clean up and Redevelopment web page at http://www.epa.gov/swerosps/bf/index.html, or see information about TDEC's brownfield provision at http://www.state.tn.us/environment/dsf/voap_faq.pdf. The state has a brownfield program that also affords an opportunity to obtain liability protection for site clean ups. See T.C.A § 68-212-224.

[11] CERCLA §122(g) addresses so-called de minimis parties and encourages EPA to reach settlements with potentially liable parties if such settlement involves only a minor portion of the response costs at the Superfund site. Situations where de minimis settlements would be appropriate include: 1) situations where both the amount and toxicity of hazardous substances contributed by a party are minimal compared with other hazardous substances at the site; or, 2) situations where a party is the owner of the site, but did not: a) conduct or permit the generation, handling, or disposal or hazardous substances at the site, b) contribute to the release or threatened release from the site, or c) acquire the site with knowledge it had been used to store handle or dispose of hazardous substances. CERCLA §122(g)(1)(A)&(B).

" 'De micromis' settlements are a subset of de minimis settlements which may be available to parties who generated or transported a minuscule amount of waste to a Superfund

TBA ENVIRONMENTAL LAW SECTION REQUESTS ARTICLES FOR SECTION NEWSLETTER

The TBA Environmental Law Section is looking for authors willing to contribute an article or articles to the section newsletter. If you are willing to contribute an article, please send an email to Karen Stachowski at: Karen.Stachowski@state.tn.us explaining the subject matter of the proposed article.

Thank you!

site. EPA, Superfund "De Minimis" and De Micromis" Settlement Procedure Documents,http://cfpub.epa.gov/compliance/resources/policies/clean up/superfund. In addition, Congress recently amended CERCLA to allow a de micromis exception to all liability where a party's total amount of hazardous substances is less that 110 gallons or less than 200 pounds. CERCLA §107(o).

[12] See EPA Memorandum re: Issuance of Revised Model CERCLA Section 122(g)(4) De Minimis Contributor Consent Decree and Administrative Order on Consent and New Model Ability to Pay Provisions for Use in De Minimis Settlements (and Attachments) dated Aug. 12, 2003; and, EPA Memorandum re: Revised Settlement Policy and Contribution Waiver Language Regarding Exempt De Micromis and Non-Exempt De Micromis Parties dated Nov. 6, 2002.

[13] Tenn. Code. Ann. §§68-212-201 et seq.

[14] See Matter Of Celotex Corporation, Case No. 96-0090, Consent Agreement and Order Assessing Apportioned Costs, Tennessee Division of Superfund (April 24, 1997); In The Matter Of: Boone Dry Cleaners, Case No. 93-035, Order Assessing and Apportioning Costs, Tennessee Division of Superfund (April 7, 1995).

[15] The state's concern would be that it releases all or some of the liable parties for an aggregate amount less than it takes to complete the clean up, leaving the state to pick up a part of the tab.

[16] In fact, Party A may have defenses against any liability. See CERCLA §107(b).

[18] In both the federal and state statutes provide a defense against superfund liability for parties that purchase real estate after the hazardous substance release, which is referred to as the "innocent purchase defense." See CERCLA §§ 107(b)(3), 101(35). The defense requires among other things that the defendant demonstrate that it used due diligence in investigating the property for environmental problems before acquisition. The standard of due diligence has been confusing over the years, but has settled down and follows the ASTM Standard E1527-97. See CERCLA § 101(35)(B)(iv). This standard provides a checklist to follow in an investigation of a site, and the checklist is more rigorous as a site's potential risks increase (e.g., an industrial site's checklist is longer than one that would be required on a residential site).

[19] For instance, identifying tetrachloroethylene contamination in the settlement might not cover a related contaminant, trichloroethylene, unless you identify both chemicals. Further, does a settlement for contamination on-site cover the groundwater plume that has migrated across the property line?

[20] See U.S. Const. art. VI. § 2 (Supremacy Clause).

[21] Some environmental programs are "delegated" programs, such as the water and air pollution programs. Delegated programs mean that the state is the only regulatory authority handling your matter. Even though superfund is concurrent, the TDEC and EPA have entered Memorandums of Understanding that establish informal procedures for avoiding duplicate regulation of hazardous substance sites. See CERCLA §§ 107(c), 113(f).

[22] CERCLA § 113(f)(1).

[23] CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2) provides that a "person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement."

[24] Humphreys v. Humphreys, 1996 Tenn. App. LEXIS 415, C.A. No. 02A01-9506-CH-00138 (Tenn. Ct. App. July 10, 1996). While ostensibly a water pollution case, Humphreys suggests that Tennessee has a common law right of contribution independent of the federal contribution right granted under CERCLA. How this right is affected by a TDEC apportionment is unclear.

G. Scott Thomas is a partner with the law firm of Bass, Berry & Sims PLC, and practices full time in the environmental area. He specializes in superfund, hazardous and solid waste, UST, and other environmental remediation matters in the state.

Tennessee Bar Association
221 Fourth Avenue North, Suite 400
Nashville, TN 37219

ENVIRONMENTAL LAW

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TBA Support

Lynn Pointer,
Sections Coordinator
lpointer@tnbar.org

Kate Jankowski,
Publications Coordinator
kjankowski@tnbar.org

221 Fourth Ave. North, Suite 400
Nashville, TN 37219-2198
615.383.7421 • 1.800.899.6993
615.297.8058 (FAX)

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