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Restoring Inactive and Abandoned Mine Sites: A Guide to Managing Environmental Liabilities

EDITOR'S NOTE: As this article was going to press, the President signed the Small Business Liability Relief and Brownfields Revitalization Act into law.¹ This Act amends portions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to promote the cleanup and reuse of Brownfields sites. The Act also authorizes federal funding for the restoration and preservation of certain "mine-scarred land." Since this legislation may significantly affect some of the conclusions set forth in this article, the author has agreed to write an addendum to the article addressing the potential impact of the legislation on the restoration and preservation of inactive and abandoned mines. The *Journal of Environmental Law and Litigation* will publish this addendum in the next edition of this journal.

"There can be no purpose more inspiring than to begin the age of restoration, reweaving the wondrous diversity of life that still surrounds us."

—E.O. Wilson

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¹ Small Business Liability Relief and Benefits Revitalization Act, H.R. 2869, 107th Cong. (2001).

People have been engaged in various types of mining activities for centuries. In the past, mining wastes were simply left “wherever they might lie—on steep slopes, across watersheds, and in toxic tailings ponds.”² We have always been aware of adverse environmental impacts from mining activities. In fact, as early as 1556 A.D., Georgius Agricola, known as the founder of geology, wrote: “when the ores are washed, the water which has been used poisons the brooks and streams, and either destroys the fish or drives them away.”³ Since our society has historically viewed land as a disposable commodity, however, little action has been taken to prevent these environmental harms. Only recently have we started to recognize the importance of preserving our land, water, and other natural resources for future generations. Unfortunately, preservation of the remaining healthy portions of our ecosystem is not enough. Inactive and abandoned mines, and other contaminated sites left behind by previous generations, continue to pollute our environment. In order to correct the toxic legacy of our predecessors, we must also restore these sites so that they no longer present a threat to our environment.

In 1872 Congress enacted the primary federal law that governs hardrock mining.⁴ During this period, the federal government had undertaken a program of rapid settlement and development. Consequently, “Congress intended the 1872 General Mining Law to encourage mining and transfer land from government to private ownership rather than to regulate the environmental impacts of mining.”⁵ Indeed, one of the distinctive features of the General Mining Law of 1872 is the lack of any provisions relating to environmental protection. Unfortunately, “[t]he lands and waters have paid dearly, and the legacy continues long after mines have been abandoned.”⁶

² JAMES S. LYON ET AL. *BURDEN OF GILT* 13 (1993).

³ GEORGIUS AGRICOLA, *DE RE METALLICA* 8 (Hoover and Hoover trans., Dover Publications 1950) (1556).

⁴ General Mining Law of 1872, 16 Stat. 91 (1872) now codified in various sections of 30 U.S.C. §§ 21-54. Hardrock mining is the extraction of metals and non-fuel minerals by surface or underground mining methods.

⁵ Susan P. Bass, *Tools for Regulating the Environmental Impact of Mining in the United States*, 26 ELR 10,159, 10,161 (1996).

⁶ CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 49 (1992).

There are over 500,000 inactive and abandoned hardrock mine sites throughout the West,⁷ and approximately fifty billion tons of mining and processing waste have been left behind.⁸ According to the U.S. Bureau of Mines, mining has contaminated more than twelve thousand miles of rivers and streams and 180,000 acres of lakes in the United States.⁹ The cost of cleaning up these abandoned and inactive mines is estimated to be between thirty-two billion dollars and seventy-two billion dollars.¹⁰

The environmental problems associated with abandoned and inactive mines fall within the following four general categories:

(1) ACID MINE DRAINAGE. Acid mine drainage (“AMD”) is caused when excavated rock, which contains sulfide minerals, reacts with water and oxygen to create sulfuric acid. The acid leaches from the excavated rock as long as it is exposed to the air and water and until the sulfides are completely leached out, a process which can take hundreds or even thousands of years. AMD can severely degrade water quality, killing aquatic life and making water virtually unusable.

(2) HEAVY METAL CONTAMINATION. Heavy metal contamination is caused when heavy metals such as arsenic, cobalt, copper, cadmium, chromium lead, silver, or zinc, which are contained in excavated rock or exposed in underground mines, come into contact with water. As the water passes over the rock surface, metals are leached out and carried downstream. AMD can accelerate the leaching process. Heavy metals can be toxic to humans and wildlife and can bio-accumulate, or build up in living tissue, and be passed through the food chain.

(3) PROCESSING CHEMICAL POLLUTION. Processing chemical pollution is caused when chemicals used to separate the target mineral from the ore spill leak, or leach, from the mine site into nearby waterways. These chemicals, which include cyanide, sulfuric acid, and mercury, can be highly toxic to humans and wildlife and can make water unusable.

(4) EROSION AND SEDIMENTATION. Erosion and sedimentation occur when unearthed rock and soil are eroded by water or dumped into waterways. This material can cause serious environmental

⁷ LYON, *supra* note 2, at 13.

⁸ WILKINSON, *supra* note 6, at 49.

⁹ Robert L.P. Kleinmann, *Acid Mine Drainage*, ENGINEERING AND MINING JOURNAL, July 1989, at 161.

¹⁰ LYON, *supra* note 2, at 31.

problems by clogging riverbeds and smothering watershed vegetation, wildlife habitat, and aquatic life.¹¹

In contrast to hardrock mining, coal mining is comprehensively regulated by a more modern federal statute, the Surface Mining Control and Reclamation Act ("SMCRA").¹² SMCRA contains a permitting program that covers all aspects of coal mining activities. As a part of this regulatory program, Congress created a fund to pay for the remediation of abandoned coal mines.¹³ Over the years there have been several legislative efforts to create a similar fund to pay for the reclamation of abandoned and inactive hardrock mines.¹⁴ To date, all of these efforts have failed.

There is a critical need to reclaim abandoned and inactive hardrock mines, particularly ones that could contribute to the environmental health of important riparian habitats. Unfortunately, the fear of liability under federal environmental statutes has inhibited land trusts, conservation groups, and local governments from taking on restoration efforts. The purpose of this paper is to provide these parties, collectively referred to as "conservation organizations," with a road map for analyzing and managing the risks associated with the acquisition, restoration, and preservation of properties degraded by past mining operations. The information set forth in this paper will also assist conservation organizations interested in environmental restoration projects involving other types of contaminated properties.

I

THE FEAR OF LIABILITY

Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") in response to a series of well-publicized hazardous waste problems in the 1970s. The statute, commonly known as "Superfund,"¹⁵ authorizes the United States Environmental Protection Agency ("USEPA") to respond to

¹¹ CARLOS D. DA ROSA ET AL., *GOLDEN DREAMS, POISONED STREAMS* 11 (1997).

¹² 30 U.S.C. §§ 1201-1328 (1994).

¹³ This program is called the Abandoned Mine Land program and is funded by an assessment based upon the tonnage of coal removed from a mine. See 30 U.S.C. § 1231 (1994).

¹⁴ Paul Stokstad, *Structuring a Reclamation Program for Abandoned Noncoal Mines*, 25 *ECOLOGY L.Q.* 121, 144-45 (1998).

¹⁵ 42 U.S.C. §§ 9601-75 (1994). CERCLA is commonly known as "Superfund" because the statute authorized the creation of a large fund to pay for the clean-up of the nation's worst hazardous waste sites.

environmental emergencies involving hazardous substances and contaminants, initiate investigations and clean-ups, and take enforcement actions. In order to achieve the remedial purposes of CERCLA, Congress created an exceptionally broad liability scheme under which people who own property containing hazardous substances can be held liable for enormous clean-up costs even though they were not involved in any hazardous waste disposal activities.¹⁶ In enacting this broad net of liability, Congress intended to place the burden of cleaning up our nation's hazardous waste sites upon the shoulders of those with some connection to the contaminated properties, instead of on taxpayers with no connection to these sites.¹⁷

There is seemingly endless debate regarding the effectiveness, fairness, and efficiency of Superfund.¹⁸ One effect of the statute, however, is virtually undisputed: the fear of being held liable for clean-up costs under Superfund seriously inhibits the purchase and reuse of properties that may be contaminated. As one court noted, "CERCLA liability has been described as 'a black hole that indiscriminately devours all who come near it.'"¹⁹

Although a purchaser of contaminated property may face liabilities under other federal and state statutes, the comprehensive net of liability and the staggering costs of Superfund clean-ups have been the primary deterrent for people otherwise interested in restoring and reusing contaminated properties.

Federal and state regulators have come to realize that the fear of environmental liability has had the unintended effect of inhibiting the clean-up and redevelopment of these properties. In fact, the USEPA has published a *Handbook of Tools for Managing Federal Superfund Liability Risks at Brownfields and Other Sites* (the "Handbook").²⁰ According to the Handbook:

EPA recognizes that private parties may believe federal environmental laws and policies have created roadblocks to reusing property Although potential liability is a valid and serious concern for landowners, it is important to keep this concern within

¹⁶ See Section III, A of this paper for a more detailed explanation of CERCLA liability.

¹⁷ *In re Bell Petroleum Services, Inc.*, 3 F.3d 889, 894 (5th Cir. 1993).

¹⁸ See Lynn M. Kornfeld, Comment, *Reclamation of Inactive and Abandoned Hardrock Mine Sites: Remining and Liability Under CERCLA and the CWA*, 69 U. COLO. L. REV. 597, 609-10 (1998).

¹⁹ *Long Beach Unified Sch. Dist. v. Godwin Cal. Living Trust*, 32 F.3d 1364-66 (9th Cir. 1994) (quoting Jerry L. Anderson, *The Hazardous Waste Land*, 13 VA. ENVTL. L.J. 1, 6-7 (1993)).

²⁰ A copy of this Handbook may be found at <http://www.epa.gov/swerosps/bf/liob.htm>.

context Even for risks that could be significant, both Congress and EPA have developed tools that can help parties minimize and manage their risks.²¹

The tools set forth in the Handbook have generally been used to clean up and redevelop abandoned industrial and commercial facilities in urban settings. Recently, however, the USEPA has recognized that these same tools can be used to encourage the clean-up of contaminated sites that are or will be used for “greenspace” purposes, including parks, trails, habitat restoration, and open space.²² In fact, in April of 2001 the USEPA took the unprecedented step of funding a brownfields project, with the ultimate goal of restoring and preserving inactive and abandoned mine (“IAM”) sites in the Peru Creek Basin, a remote sub-alpine basin located seventy miles west of Denver.²³ As more fully set forth below, conservation organizations interested in restoring and preserving IAM sites and other contaminated properties can use the same techniques currently being utilized in urban brownfields redevelopment projects to analyze and mitigate the associated risks.

Although there are risks associated with undertaking restoration projects, they can be managed by selecting appropriate sites, obtaining the appropriate scientific and legal guidance from skilled professionals, and working cooperatively with state and federal regulators. Land trusts are particularly well-positioned to take on restoration projects. Whereas traditional environmental advocacy groups may have adversarial relationships with government regulators, the non-confrontational approach adopted by most land trusts makes them well-suited to negotiate agreements limiting potential liabilities associated with restoration projects. Furthermore, most land trusts already possess the skill and knowledge required to successfully negotiate complex real estate transactions.

²¹ See ENVIRONMENTAL PROTECTION AGENCY, HANDBOOK OF TOOLS FOR MANAGING FEDERAL SUPERFUND LIABILITY 2, available at www.epa.gov/swerosps/bf/pdf/9811-4.pdf.

²² For the 2001 fiscal year, the USEPA included funding for brownfields sites that are or will be used for greenspace purposes in its proposal guidelines for Brownfields Assessment Demonstration Pilots. See 65 Fed. Reg. §§ 69,306-69,307 (2000).

²³ See ENVIRONMENTAL PROTECTION AGENCY, BROWNFIELDS ASSESSMENT DEMONSTRATION PILOT—SUMMIT COUNTY, CO at <http://www.epa.gov/swerosps/bf/html-doc/asummit.htm> (last visited Nov. 10, 2001).

II AN OVERVIEW OF THE LAW

The first step to managing risk is to understand the potential consequences of one's actions. The acquisition and restoration of IAM sites and other contaminated properties present risks of liability under several state and federal environmental statutes, as well as under several common-law theories.

Many states have enacted laws and regulations that govern mining and reclamation activities. Colorado, for instance, has enacted the Colorado Mined Land Reclamation Act, which places regulatory controls on the environmental impacts of hard rock mining and sets certain reclamation standards.²⁴ Although these statutes may not apply to all reclamation activities, conservation organizations should carefully analyze the impact of state mining laws and other environmental statutes on potential liabilities associated with the acquisition and restoration of IAM sites.²⁵ While an analysis of potential liabilities associated with possible common-law theories and state environmental statutes is beyond the scope of this paper, an overview of some of the most common federal environmental statutes presenting risks of liability for purchasers of contaminated properties is set forth below.

A. Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")

CERCLA's broad, remedial purpose is to facilitate the prompt clean-up of hazardous waste sites and shift the cost of environmental response from taxpayers to the parties who benefited from the activities that caused the harm.²⁶ Unfortunately, Congress enacted CERCLA in a hurried compromise, leaving the statute with confusing language and a confusing legislative history. In fact, a number of

²⁴ Colo. Rev. Stat. §§ 34-32-101-127 (2000).

²⁵ The reclamation requirements of the Colorado Mined Land Reclamation Act only apply to "mining operations," defined as "the development or extraction of a mineral from its natural occurrences on affected land. The term includes, but is not limited to, open mining and surface operation and the disposal of refuse from underground and *in situ* mining. The term includes the following operations on affected lands: Transposition; concentrating; milling; evaporation; and other processing." Colo. Rev. Stat. §§ 34-32-103(8) (2000). The regulations implementing this Act provide a mechanism whereby a party may obtain a declaratory order from the Mined Land Reclamation Board determining whether or not a reclamation permit is required for a particular project.

²⁶ *In re Bell Petroleum Services, Inc.*, 3 F.3d 889, 894 (5th Cir. 1993).

courts have criticized the statute as vague and contradictory. When attempting to interpret the statute's mandate, one court even complained of the "difficulty of being left compassless on the trackless wastes of CERCLA."²⁷

Although a complete analysis of CERCLA is beyond the scope of this paper, an overview of the Act's provisions imposing liability for the clean-up of contaminated sites is essential for understanding and evaluating the risks associated with the acquisition, restoration and preservation of IAM sites.

1. An Overview of CERCLA Liability

CERCLA authorizes the USEPA to clean up sites contaminated with hazardous substances, either by arranging for the clean-up itself or by ordering a potentially responsible party ("PRP") to do so. If the USEPA arranges for the clean-up, it uses money from the Superfund to pay for it, and may recover the costs from PRPs in a subsequent lawsuit. CERCLA also provides a mechanism whereby the targeted party can seek contribution from other PRPs.²⁸ These lawsuits are commonly referred to as "contribution" or "cost recovery" actions.

One of the most controversial and dramatic aspects of CERCLA is the imposition of strict, joint and several, and retroactive liability.²⁹ Strict liability means that a PRP can be held liable for clean-up costs regardless of fault. Joint and several liability means that each PRP at a CERCLA site is liable for the entire cost of the clean-up unless the harm is divisible, which is rarely the case when commingled hazardous substances have been disposed of at a site. Joint and several liability also allows the USEPA to sue for recovery of its clean-up costs from any one of the liable parties. Retroactive liability means that a party can be held liable even if the disposal of hazardous substances occurred before CERCLA was enacted in 1980. CERCLA's liability scheme has resulted in the frequent observation that the only thing fair about Superfund is that it is unfair to everybody.

All CERCLA sites are not created equally. When the USEPA becomes aware of a hazardous waste site, it places the site on a

²⁷ *In re Acushnet River & New Bedford Harbor*, 716 F. Supp. 676, 681 n.6 (D. Mass. 1989).

²⁸ 42 U.S.C. § 9613(f)(1) (1994).

²⁹ *Long Beach Unified Sch. Dist. v. Godwin Cal. Living Trust*, 32 F.3d 1364, 1366 (9th Cir. 1994).

tracking system called the Comprehensive Environmental Response Compensation & Liability Information System (“CERCLIS”). The agency conducts a preliminary study of these sites and assigns a hazard ranking to each site to determine its priority for clean-up. Depending on a site’s hazard ranking it is 1) eliminated because its hazard ranking is too low; 2) marked “No Further Response Action Planned”; or 3) placed on the National Priority List (“NPL”). Sites that have been placed on the NPL generally pose a more serious threat to human health and the environment than unlisted sites.

CERCLA creates the following four categories of PRPs who are subject to strict, joint and several, and retroactive liability for cleanup costs under the Act: 1) Current owners or operators of a facility; 2) owners or operators of a facility at the time of disposal of hazardous substances; 3) persons who generated or arranged for the disposal or treatment of hazardous substances; and 4) transporters of the hazardous substances, if the transporter selected the disposal or treatment site.³⁰

Persons in the first two categories of PRPs are commonly referred to as “owners or operators.” Those in the third category are commonly referred to as “generators,” and those in the fourth category are commonly referred to as “transporters.” Although a person involved in the acquisition and restoration of contaminated property could potentially fall within any of these categories, the first two present the most significant risk of liability.³¹

a. Current Owners

Current owners of facilities are clearly subject to CERCLA liability for clean-up costs even though they did not cause or contribute to the disposal or release of hazardous substances on the property.³² The word “owner” under CERCLA has its ordinary meaning and does not require further elaboration, except with respect to issues arising in the context of easements as addressed below.

³⁰ 42 U.S.C. § 9607(a)(1)-(4) (1994).

³¹ A person who purchases and restores an abandoned or inactive mine could face liability as a “generator” under the third category of PRPs. Earthmoving activities which expose hazardous substances could be considered as arranging for the “disposal” of hazardous substances. A person who acquires and restores an abandoned or inactive mine could also face CERCLA liability as a “transporter” if the site that hazardous substances are sent to ends up as a site subject to CERCLA clean-up.

³² Although there are limited statutory defenses to the liability of current owners, these defenses will generally be inapplicable to conservation organizations involved in the acquisition, restoration, and preservation of IAMs.

In order for a purchaser of contaminated property to face CERCLA liability as a current “owner,” the property must be a “facility.”³³ Although the statutory definition may not be a model of clarity, the courts have interpreted the word “facility” very broadly. As one court noted, “[s]imply put, the term ‘facility’ includes anyplace where hazardous substances come to be located.”³⁴

CERCLA further defines “hazardous substance” to include substances designated as hazardous waste, toxic pollutants and hazardous substances under the Clean Water Act, hazardous air pollutants under the Clean Air Act, and hazardous waste regulated under the Resource Conservation and Recovery Act, as well as asbestos and other wastes.³⁵

The courts have consistently interpreted these definitions broadly. One author has noted that “the bulk of CERCLA’s most important provisions can be applied without difficulty to any property that has been contaminated by the products of human action or design.”³⁶ It is certainly possible, however, that there are degraded, abandoned mine sites that do not contain contaminants falling within CERCLA’s definition of a “hazardous substance.” The purchase and restoration of these sites could be accomplished with little risk of CERCLA liability.

Many conservation organizations protect environmentally significant properties by acquiring conservation easements. An easement is the right to use someone else’s land for a specified purpose.³⁷ A conservation easement is a legal agreement between a landowner and a land trust or government agency permanently limiting uses of the land in order to protect its conservation values. It allows landowners to continue to own and use their land and to sell or

³³ 42 U.S.C. § 9601(9) defines “facility” as “(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.”

³⁴ *United States v. Bliss*, 677 F. Supp. 1298, 1305 (E.D. Mo. 1987).

³⁵ 42 U.S.C. § 9601(14) (1994).

³⁶ MACHLIN AND YOUNG, *MANAGING ENVIRONMENTAL RISK* § 4:57 (1988) (updated in 1999). The bulk of CERCLA’s most important provisions can be applied without difficulty to any property that has been contaminated by the products of human action or design.

³⁷ *Long Beach Unified Sch. v. Godwin Cal. Living Trust*, 32 F.3d 1364, 1367 (9th Cir. 1994).

pass it to their heirs subject to limits set forth in the conservation easement.

Although there are no reported cases specifically addressing CERCLA liability for holders of conservation easements, there are cases addressing the liability of people who hold other types of easements. These cases have found that people who simply hold an easement will not be held liable as “owners” under CERCLA. If a person holds an easement and conducts certain activities on the property, however, they may be subject to CERCLA liability as an “operator.”³⁸

In *Long Beach Unified School District v. Dorothy B. Godwin California Living Trust*, the Long Beach Unified School District (“School District”) purchased property known to be contaminated. As part of the transaction, the seller was required to deposit \$250,000 into an escrow account to cover the estimated clean-up costs. Unfortunately, the escrow money was not nearly enough to cover these costs. In fact, it only covered the cost of an expert evaluation of the site. The School District instituted a CERCLA cost recovery action against the seller of the contaminated property, the person that actually caused the contamination, and two companies that held pipeline easements across the property. The seller and the person that caused the contamination agreed to settle the lawsuit by making significant additional payments toward the clean-up costs, and the case continued against the companies that held the pipeline easements.

The *Long Beach* Court examined whether a company that holds a pipeline easement can be subject to CERCLA liability as either an “owner” or “operator.” First, the Court noted that “the holder of an easement can clearly be an operator under CERCLA.”³⁹ To qualify as an “operator” under CERCLA, however, the easement holder must have actively participated in the action that caused the contamination of the property. As an example, the Court explained that if an easement holder uses an easement to operate a pipeline that releases hazardous materials, the easement holder could be liable as an

³⁸ In *Toledo v. Beazer Materials and Serv.*, 923 F. Supp. 1013 (N.D. Ohio 1996), the district court rendered a confusing opinion in which it stated, without significant analysis, that the city could be a potentially responsible party as a result of its ownership of a “Right-of-Way.” The Court also held that the city was liable under CERCLA as an “operator” because it exerted actual control over the contaminated property by erecting a fence and taking other actions.

³⁹ *Long Beach Unified Sch. Dist. V. Godwin Cal. Living Trust*, 32 F.3d 1364 (9th Cir. 1994).

operator under CERCLA.⁴⁰ In the *Long Beach* case, however, there was no allegation that an easement holder caused the release of hazardous materials. Instead, the companies simply exercised their rights to pass a pipeline over the contaminated property. The Court concluded that “[t]his is much less than the active control we require before someone will be held liable as an ‘operator’ under CERCLA.”⁴¹

The Court next evaluated whether the companies that held the easement could be held liable as owners under CERCLA. Since CERCLA’s definition of “owner” provided no assistance, the Court applied the ordinary meaning of the word and determined that the easement holder was not an “owner” of property as the term is ordinarily used.⁴² The Court explained:

The common law does not regard an easement holder as the owner of the property burdened by it. Rather, an easement is merely the right to use someone’s land for a specified purpose, such as a driveway . . . or even a pipeline. . . . Common Law courts have consistently distinguished between ownership of an easement and ownership of the burdened land.⁴³

The Court then explained that “[s]ound public policy supports this reading of the statute. Vast numbers of easements encumber land title records throughout the United States, establishing . . . diverse rights.”⁴⁴ The court even mentioned “‘scenic’ easements, which preserve the ‘scenic and historical attractiveness’ of dominant estates” as one of the many types of easements that encumber land throughout the country.⁴⁵ The Court then explained that “[s]ubjecting holders of these interests to CERCLA liability would . . . disserve the statute’s purpose – which is to make polluters pay for the damage they cause.”⁴⁶ The *Long Beach* Court concluded: “Having an easement does not make one an ‘owner’ for purposes of CERCLA liability. Moreover, though an easement holder can be an ‘operator,’ the [easement holders in this case] do not qualify as such.”⁴⁷

⁴⁰ *Id.* at 1367.

⁴¹ *Id.* at 1368.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1368.

⁴⁵ *Id.* at 1369.

⁴⁶ *Id.*

⁴⁷ *Long Beach*, 32 F.3d at 1370.

Two other courts have reached the same conclusion. In *Grand Trunk Western R.R. Co. v. Acme Belt Recoating, Inc.*, the Court held that the holder of an easement for ingress and egress is not an “owner,” and would not be held liable under CERCLA.⁴⁸ In *Acme Printing Ink Co. v. Menard, Inc.*, the Court came to the same conclusion, finding that the holder of an easement is not an actual owner of an estate in land, but merely the owner of a right to use the land of another.⁴⁹

Although some commentators have suggested that easement holders should be held liable as owners under CERCLA,⁵⁰ the cases that have addressed this issue provide some assurance that mere ownership of a conservation easement will not subject the easement holder to liability. Since an easement holder can still be considered an “operator,” however, conservation organizations that acquire easements on contaminated property must exercise caution to ensure that any activities on the contaminated property do not subject them to operator liability.

b. Owner or Operator at Time of Disposal

In order to fall within the second category of PRPs, a purchaser of contaminated property must be an owner or operator “at the time of disposal.” CERCLA defines “disposal” to include “the discharge, deposit, injection, dumping, spilling, leaking or placing of any . . . hazardous waste into or on any land, or water so that [it] or any constituent thereof may enter the environment.”⁵¹

“This definition has been interpreted to include the dispersal of contaminated soil during the excavation and grading of a development site.”⁵² The fact that the contamination was already

⁴⁸ *Grand Trunk Western R.R. Co. v. Acme Belt Recoating, Inc.*, 859 F. Supp. 1125, 1131 (W.D. Mich. 1994).

⁴⁹ *Acme Printing Ink Co. v. Menard, Inc.*, 870 F. Supp. 1465, 1484 (E.D. Wis. 1994).

⁵⁰ Jill D. Neiman, Note, *Easement Holder Liability Under CERCLA: The Right Way to Deal with Rights-of-Way*, 89 MICH. L. REV. 1233 (1991); Melissa A. McGonigal, Comment, *Extended Liability Under CERCLA: Easement Holders and the Scope of Control*, 87 NW. U. L. REV. 992, 1022 (1992); E. Peyton Whitener, Comment, *Cleaning up the Confusion: Long Beach, Grand Trunk, and the Scope of Control—Easement Holder Liability Under CERCLA*, 45 EMORY L.J. 805 (1996).

⁵¹ 42 U.S.C. § 9601(29) (1994) (incorporating the definition of hazardous waste used in section 1004 of the Solid Waste Disposal Act, 42 U.S.C. § 6903).

⁵² *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1342 (9th Cir. 1992). The Court also found that the person who excavated the hazardous substances was liable under CERCLA as a “transporter.” *Id.* at 1343.

present at a site is not a defense to CERCLA liability; “Congress did not limit the term to the initial introduction of hazardous material onto property.”⁵³ Since the restoration of an abandoned mine could certainly involve the dispersal of contaminated soil and the placing of hazardous waste into or on land, persons involved in the purchase and restoration of these properties could easily fall within the second category of PRPs.

2. *An Overview of CERCLA’s Statutory Defenses and Exemptions*

Since CERCLA creates a comprehensive statutory scheme for imposing liability, traditional common law affirmative defenses are generally not available to defendants in CERCLA cases.⁵⁴ Furthermore, although CERCLA does create several specific statutory defenses and exceptions, most of them are not relevant to land trusts and other organizations involved in the acquisition and restoration of contaminated properties.⁵⁵ Four of CERCLA’s statutory defenses or exemptions do, however, warrant further explanation: 1) the third party defenses; 2) the “good samaritan” provision; 3) the provisions that protects government entities that acquire properties involuntarily or by eminent domain; and 4) the provision that prohibits the recovery of response costs resulting from a federally permitted release.

a. *Third Party Defense*

CERCLA creates a defense for landowners who would otherwise be liable if they can prove that another person, who does not have a direct or indirect contractual relationship with the landowner, was responsible for the contamination.⁵⁶ Since the legal instrument used to convey property creates a contractual relationship, the third party defense is not generally available to a purchaser of contaminated property. Under the innocent landowner provision of the third party defense, however, a landowner who acquires a property without reason to know that hazardous substances have been disposed of at the property will not be held liable as an owner.

In order to establish that a purchaser did not have reason to know of the contamination, the purchaser must have undertaken, at the time

⁵³ *Id.*

⁵⁴ *United States v. Kramer*, 757 F. Supp. 397, 424-28 (D. N.J. 1991); *Versatile Metals, Inc. v. Union Corp.*, 693 F.Supp. 1563, 1572 (E.D. Pa. 1988).

⁵⁵ CERCLA’s statutory defenses are set forth at 42 U.S.C. 9607(b).

⁵⁶ 42 U.S.C. § 9607(b)(3) (1994).

of acquisition, all appropriate inquiries into the previous ownership and uses of the property, consistent with good commercial or customary practices in an effort to minimize liability. This is commonly accomplished by conducting a Phase I Environmental Assessment. If this inquiry reveals the presence of hazardous substances, it is unlikely that the courts will allow a purchaser to assert an innocent landowner defense. Since conservation organizations involved in the acquisition and restoration of degraded land that have conducted the appropriate inquiries will almost always know of the existence of hazardous substances, it will typically be difficult for these organizations to assert the innocent landowner defense in any CERCLA action.

Another provision of the third party defense section of CERCLA may, however, be an important tool for conservation organizations involved in the acquisition and restoration of contaminated sites. Under the inheritance provision, a landowner who acquires a property “by inheritance or bequest” will not be considered to be in a contractual relationship with the person that caused the contamination, and may be protected from liability by CERCLA’s third party defense.⁵⁷ Thus, a conservation organization that acquires contaminated property by inheritance or bequest may be protected from liability as a result of CERCLA’s third party defense.

b. Good Samaritan Provisions

The good samaritan provision provides protection from CERCLA’s strict liability for “those who act in a remedial capacity, and who are otherwise not liable as owners or operators.”⁵⁸ This section of the statute provides:

no person shall be liable under this [title] for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan (“NCP”) or at the direction of an onscene coordinator. . . . This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.⁵⁹

Unfortunately, the good samaritan provision contains a savings clause that significantly limits the usefulness of this exception for

⁵⁷ 42 U.S.C. § 9601(35)(A)(iii) (1994).

⁵⁸ *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1443 (E.D. Cal. 1995).

⁵⁹ 42 U.S.C. § 9607(d)(1) (1994).

land trusts wishing to acquire and restore contaminated properties. The savings provision states: “This subsection shall not alter the liability of any person covered by the [portion of CERCLA that identifies potentially responsible parties] with respect to the release or threatened release concerned.”⁶⁰ The effect of this language is to limit the liability protection of the good samaritan provision to people who do not fall within any of the four categories of PRPs. Since a conservation organization that acquires IAM sites with the intent to restore and preserve the land will fall within the “current owner and operator” category of PRPs, the savings clause prohibits them from invoking the liability shield contained in CERCLA’s good samaritan provision.

This exception does, however, create opportunities for conservation organizations to relatively safely clean up, restore, and preserve contaminated land owned by others by negotiating agreements with the EPA and the property owner invoking the good samaritan provision, and placing a deed restriction on the property, or obtaining a conservation easement.⁶¹

c. Protection of Government Entities that Involuntarily Acquire Properties or Acquire Properties by Eminent Domain

CERCLA also provides special protections for government entities that acquire properties involuntarily or by eminent domain. Under these protections, a government entity will be exempt from owner/operator liability under CERCLA if:

- 1) The contamination occurred before the government entity acquired the property;
- 2) The government entity did not cause or contribute to, or exacerbate the contamination; and
- 3) The government entity took precautions against certain acts of the party that caused the contamination and against the consequences of those acts.⁶²

Conservation organizations may be able to achieve their restoration and preservation goals at these sites by entering into an agreement

⁶⁰ 42 U.S.C. § 9607(d)(3).

⁶¹ A copy of an Administrative Order of Consent using the Good Samaritan provision of CERCLA to clean up an IAM site in Clear Creek County, Colorado is set forth in Appendix 2.

⁶² 42 U.S.C. § 9601(20)(D), (35)(A) (1994).

with the EPA that invokes the “Good Samaritan” provision of CERCLA to obtain liability protection for cleanup work, and by encouraging the government entities that own the sites to place deed restrictions on the land or to convey a conservation easement that will ensure that conservation values are maintained.

d. Federally Permitted Releases

Finally, CERCLA contains a provision limiting liability for certain federally permitted releases. Section 107(j) of the Act prohibits the EPA, or others, from recovering response costs resulting from federally permitted releases: “Recovery by any person (including the United States or any State or Indian tribe) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section.”⁶³ Section 101(10) of the Act defines “federally permitted release” to include certain discharges made pursuant to permits issued under the Clean Water Act, and certain releases in compliance with permits issued under the Resource Conservation and Recovery Act.⁶⁴

Under some circumstances, conservation organizations involved in the acquisition and restoration of IAM sites may be able to utilize the liability protections in this provision of the Act by obtaining a permit authorizing the release or discharges associated with the reclamation activities. There are, however, significant limitations to the application of this provision. As one Court noted, “[e]ven where releases may have been permitted, response costs may be recovered for any releases that (1) were not expressly permitted, (2) exceeded the limitations of the permit, or (3) occurred at a time when there was no permit.”⁶⁵

3. An Overview of the USEPA’s Statutory Settlement Authority under CERCLA

CERCLA contains a specific statutory provision addressing the USEPA’s authority to enter into settlement agreements.⁶⁶ In 1989, Congress amended CERCLA to authorize the USEPA to enter into *de minimis* settlement agreements with certain PRPs who were not

⁶³ 42 U.S.C. § 9607(j).

⁶⁴ 42 U.S.C. § 9601(10).

⁶⁵ *U.S. v. Iron Mountain Mines, Inc.*, 812 F.Supp. 1528, 1541 (E.D. Cal. 1992) (citing *Idaho v. Bunker Hill*, 635 F.Supp 665, 673-74 (D. Idaho 1986)).

⁶⁶ 42 U.S.C. § 9622 (1994).

involved in the disposal of hazardous substances or whose contribution of hazardous substances was minimal. Under these *de minimis* settlements, the United States provides the PRP with a covenant not to sue and contribution protection. Thus, the settling party is protected from future CERCLA actions by the USEPA and by other parties seeking contribution for clean-up costs. In exchange for the covenant not to sue and the contribution protection, the PRP agrees to pay money toward clean-up costs, or to undertake some of the actual work associated with cleaning up the site.

Unfortunately, the *de minimis* settlement provisions of CERCLA are not directly available to prospective purchasers of contaminated properties, but are only available to PRPs. Since a prospective purchaser is not an “owner or operator,” CERCLA does not provide the USEPA with the authority to enter into *de minimis* settlements directly. The *de minimis* settlement provision may, however, have an indirect benefit for conservation organizations. Because the sale of contaminated property will not relieve the person who owned or operated a site at the time of disposal of liability, many owners will be reluctant to transfer IAM sites to conservation organizations interested in restoring and preserving the properties. Sellers who have not significantly contributed to contamination at the site, however, may be able to enter a *de minimis* settlement with the USEPA before transferring the property to a conservation organization.

B. Resource Conservation and Recovery Act (“RCRA”)

In addition to CERCLA liability, people involved in the purchase and restoration of contaminated properties face potential liabilities under the RCRA. The RCRA was enacted to create a “cradle to grave” system for regulating hazardous wastes.⁶⁷ The centerpiece of the RCRA is Subtitle C, which addresses hazardous waste management concerns. Subtitle C creates separate standards to cover generators, transporters, and those involved in the treatment, storage, and disposal of hazardous waste. Like many federal environmental laws, the RCRA provides the USEPA with authority to enforce the Act, and authorizes the agency to delegate this authority to states whose regulatory programs are at least as strict as the federal program.

⁶⁷ U.S. v. Power Engineering Co., 191 F.3d 1224, 1227 (10th Cir. 1999).

The RCRA's permitting system requires facilities engaged in the treatment, storage, and disposal of hazardous waste to comply with complex and rigorous performance standards. "RCRA is basically a prospective act designed to prevent improper disposal of hazardous waste in the future."⁶⁸ Unlike CERCLA, the "RCRA is not principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards."⁶⁹

There are, however, two sections of the RCRA that authorize the Court to compel the clean-up of past disposal sites. One of these sections authorizes aggrieved citizens to file suit, while the other authorizes the USEPA to file suit. These sections are known as the "imminent and substantial endangerment provisions."

In order to prevail in an imminent and substantial endangerment case, the plaintiffs must establish: 1) that the conditions at the site may present an imminent and substantial endangerment to health or the environment; 2) that the endangerment stems from the past or present handling, treatment or disposal of hazardous waste; and 3) that the defendant contributed to the handling, treatment or disposal of hazardous waste.⁷⁰

The courts have held that the leaking of existing hazardous waste constitutes "disposal," and that if a purchaser knows of the existence of the hazardous waste but fails to stop the continued leaking the purchaser has "contributed" to the disposal.⁷¹ If the plaintiffs prevail in an imminent and substantial endangerment case, the court can order the defendants to remediate the site and take such other action as may be necessary.

The RCRA's universe of regulated substances is somewhat narrower than CERCLA's, as the onerous provisions of Subtitle C only apply to "hazardous wastes." There are two broad categories of hazardous wastes regulated under the RCRA: "listed" hazardous wastes and "characteristic" hazardous wastes. All listed hazardous wastes are set forth in Subpart D of the RCRA regulations, making it relatively easy to determine whether a particular substance is a listed hazardous waste. Determining whether or not a hazardous waste is

⁶⁸ United States v. Waste Industries, Inc., 734 F.2d 159, 166 (C.A. N.C. 1984) (citing H.R. Comm. Print No. 96-IFC 31, 96th Cong., 1st Sess. 32 (1979)).

⁶⁹ Meghriq v. KFC Western, Inc., 516 U.S. 479, 483 (1996).

⁷⁰ Acme Printing Ink Co. v. Menard, 870 F. Supp. 1465, 1478 (E.D. Wis. 1994).

⁷¹ United States v. Price, 523 F. Supp. 1055, 1073 (D. N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982).

“characteristic” is a much more complex task, requiring tests to determine the waste’s ignitability, corrosivity, reactivity, or toxicity, and a decision regarding whether the waste fits within other complex regulatory definitions.

Although the universe of regulated wastes under Subtitle C is vast, there are some important limitations that directly impact those persons involved in the acquisition and restoration of IAM sites. In 1980, Congress amended the RCRA to exempt several classes of low-hazard, high-volume wastes from regulation under the hazardous waste provisions of Subtitle C. This amendment, known as the “Bevill Amendment,” excludes wastes produced in the extraction, beneficiation (recovery), and processing stages of mining from regulation under Subtitle C until the USEPA conducts further studies to determine whether these wastes should be regulated as hazardous wastes.⁷²

In 1986, the USEPA determined that certain extraction and beneficiation wastes (mostly waste rock and tailings), should continue to be exempt from regulation under Subtitle C. In 1991, however, the USEPA limited the scope of the Bevill Amendments and extended Subtitle C regulation to some additional types of mineral processing wastes. Although certain mining wastes may be exempt from regulation under the RCRA, the courts have held that this exemption does not relieve a person from potential CERCLA liability.⁷³

The complete story of the Bevill Amendments has not yet been told. To this day, the USEPA continues to study certain wastes associated with mining operations in order to determine if and how they should be regulated under RCRA. The Bevill Amendments and the USEPA’s regulations may, however, provide some liability protection for persons involved in the acquisition and restoration of certain IAM sites.

C. Clean Water Act

The Clean Water Act (CWA) was enacted to achieve the lofty goal of eliminating the discharge of all pollutants into navigable waters and to make all polluted waters swimmable and fishable.⁷⁴ Like the RCRA, the CWA authorizes the USEPA to delegate its authority to

⁷² 42 U.S.C. § 6921(b)(3)(A)(ii) (1994).

⁷³ *Eagle-Picher Indus. v. EPA*, 759 F.2d 905 (D.C. Cir. 1985).

⁷⁴ *See* 33 U.S.C. § 1251(a)(1)-(2) (1994).

implement and enforce the Act to qualified state programs.⁷⁵ The CWA also has a citizen suit provision allowing adversely affected citizens to bring enforcement actions for certain violations of the Act.⁷⁶

In order to achieve the CWA's ambitious goals, the Act prohibits the discharge of pollutants into navigable waters, unless the discharge is authorized by a permit.⁷⁷ A "discharge" occurs when a pollutant enters a navigable water from a point source.⁷⁸ The courts have interpreted the term "navigable water" very broadly to include virtually any surface water, navigable or not.⁷⁹ The term "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, [or] discrete fissure . . . from which pollutants are or may be discharged."⁸⁰

Although there is a lot of water pollution emanating from active and inactive mines that does not come from point sources, the courts have regularly held that many sources of water pollution from past and present mining operations do fall within the definition of point sources. Since discharges from point sources are subject to the most significant and potentially expensive regulatory requirements under the CWA, it is essential for people involved in the purchase and restoration of contaminated properties to be able to ascertain when there is a point source.

The seminal case on this point is *United States v. Earth Sciences, Inc.*⁸¹ In *Earth Sciences*, the USEPA brought a CWA enforcement action against a mining company. The mining company argued that the CWA exempted mining activities from the enforcement provisions of the CWA. The Court rejected this argument. While acknowledging that discharges from mining operations may often be from non-point sources, the Court held that the discharge at issue in this case was, in fact, from a point source.

The discharge at issue in the *Earth Science* case involved a flaw in the design or construction of a sump pit designed to store and re-

⁷⁵ 33 U.S.C. § 1342(b).

⁷⁶ 33 U.S.C. § 1365.

⁷⁷ 33 U.S.C. § 1311(a).

⁷⁸ See 33 U.S.C. § 1362(12).

⁷⁹ *United States v. Riverside Bayview Homes*, 474 U.S. 121, 123-24 (1985).

⁸⁰ 33 U.S.C. § 1362(14) (1994).

⁸¹ *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (1979).

circulate a cyanide solution used for the extraction of gold. During a heavy spring rain, the cyanide solution in the sump pit either overflowed the dirt berm or traveled through a fissure into a stream. The Court held that the escape of the cyanide solution from a confined system was a discharge from a point source in violation of the CWA.

The amount and types of allowable pollutants that can be discharged under a permit are determined by technology-based limitations and water quality based limitations. To establish water quality limitations for a particular water body, the USEPA or a state regulatory agency must first designate its actual or possible "beneficial uses" (i.e. cold water fishery, swimming, drinking, etc.). The agency then analyzes the body of water to determine how much additional pollution can be added to it without impairing its beneficial use. When the water quality of an existing stream is already degraded, there is less "room" for additional pollutants. Since the water quality in areas where IAM sites are located tends to be degraded from the cumulative effect of runoff, acid mine drainage, erosion, sedimentation, and other pollution from historical mining operations, the Clean Water Act can severely limit the amount of allowable pollution under a permit. These limitations obviously tend to increase treatment costs.

Section 402(p) of the CWA also requires a permit for any stormwater discharge associated with industrial activities. The USEPA has defined "industrial activities" to include abandoned and inactive mines. Under the stormwater program, runoff from mining operations requires a permit if it comes into contact with "any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operation."

Although many IAMs do not contain point sources and will therefore not be subject to regulation under the Act, there are many sites that may be subject to regulation under the CWA. According to one study, more than forty percent of the approximately 500,000 IAMs may meet the criteria to fall under a CWA permit program.⁸²

⁸² LYON, *supra* note 2, at 29-30.

III

EROSION OF THE CORPORATE SHIELD

A fundamental principal of corporate law is that a corporation is a distinct legal “person” with an existence separate from members of its board of directors, shareholders, and employees. As a distinct legal entity, a corporation has the power to own property, make contracts, incur obligations, and otherwise conduct business separate from the individuals who own or act on behalf of the corporation.

Since the corporation is recognized as a distinct legal entity, the courts have traditionally held that directors, officers, shareholders, and employees of corporations (corporate individuals) are not personally responsible for the corporation’s debts. Thus, a shareholder’s liability for claims asserted against the corporation is limited to the amount of capital the shareholder has actually invested. Once the corporation’s assets have been exhausted, there is no recourse against the corporate individuals’ other, separate assets for any deficiency. This protection is commonly referred to as the “corporate veil.”

The corporate veil does not, however, provide absolute liability protection for corporate individuals. In the context of CERCLA and other environmental statutes, courts have employed two distinct theories to hold corporate individuals personally liable for costs associated with environmental clean-ups. The first theory involves the application of the traditional rule that “the corporate veil may be pierced and the shareholder held liable for the corporation’s conduct when . . . the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder’s behalf.”⁸³ In general, the courts use their equitable power to pierce the corporate veil when: 1) the corporation and its principals share such a unity of interest and ownership that the two do not exist as distinct entities; or 2) when a failure to disregard the corporate form would be inequitable.⁸⁴

If a land trust is set up as a corporation and has properly maintained its corporate formalities, it is highly unlikely that a court would hold corporate individuals, engaged in the benevolent act of purchasing and restoring degraded land, personally liable by piercing the corporate veil. The cases in which courts have utilized the

⁸³ *United States v. Bestfoods*, 524 U.S. 51, 62 (1998).

⁸⁴ HENRY HENN & JOHN ALEXANDER, *LAW OF CORPORATIONS* 344-58 (3d ed. 1983).

traditional theory of piercing the corporate veil usually involve situations in which the corporate individuals used the corporate structure as an instrumentality for their own financial benefit.

The second way in which the courts have imposed clean-up liability upon corporate individuals is referred to as “direct” liability. This theory of liability poses more significant risks for directors and officers of land trusts involved in the acquisition and restoration of contaminated properties. Although corporations are generally liable for the acts of agents engaged in corporate activities, no corollary rule serves to immunize the agents for torts or statutory violations that they commit while in the service of a corporation. For instance, if an employee of a corporation runs a red light while making a delivery, the employee cannot claim that he is immune from liability because he was working for the company at the time of the violation.

The courts have built upon this basic concept to impose direct liability upon corporate individuals involved in the operation of hazardous waste facilities. As set forth above, an “operator” of a facility can be held liable for environmental cleanup costs under CERCLA. Under the direct liability theory, courts have held that if a person “operates” a facility they can be held directly liable for environmental clean-up under CERCLA, even though the operator may be a director, officer, or hold another position with a corporation.

In 1998, the United States Supreme Court rendered a decision in the *Bestfoods* case which clarified the concept of direct liability under CERCLA. *Bestfoods* involved a severely contaminated chemical manufacturing plant which eventually became the subject of a CERCLA enforcement action. Although the trail of owners for the facility was long and winding, the essential question presented in the case was when may a parent corporation be held liable under CERCLA for cleanup costs associated with a wholly owned subsidiary’s contaminated facility? Since a parent corporation is essentially a shareholder of its subsidiary, the same basic analysis that the Supreme Court used in *Bestfoods* will apply when evaluating the direct liability of other corporate individuals. The Court explained:

Under the plain language of the statute, any person who operates a polluting facility is directly liable for the costs of cleaning up the pollution. This is so regardless of whether that person is the facility’s owner, the owner’s parent corporation or business partner,

or even a saboteur who sneaks into the facility at night to discharge its poisons out of malice.⁸⁵

The Court then explained that “CERCLA prevents individuals from hiding behind the corporate shield when, as ‘operators,’ they themselves actually participate in the wrongful conduct prohibited by the Act.”⁸⁶

Under the Supreme Court’s liability analysis in *Bestfoods*, the critical question is what actions will cause a corporate individual to become an “operator” under CERCLA? Determining when the actions of a corporate individual will cause the person to become an operator involves a difficult and fact specific inquiry. The statutory definition of “operator” provides little guidance regarding these questions. In *Bestfoods*, the Supreme Court attempted to provide some clarification regarding the definition:

To sharpen the definition [of operator] for purposes of CERCLA’s concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.⁸⁷

For small conservation organizations in which all board members and staff actively participate in the acquisition and restoration of contaminated properties, the Supreme Court’s message is clear. Unless corporate individuals who are actively involved in making decisions regarding restoration efforts at contaminated sites use the appropriate liability management tools, they can be held directly liable as “operators” under CERCLA. Although the directors and officers of larger conservation organizations may be insulated from liability under the *Bestfoods* analysis if they do not make decisions regarding restoration efforts, the people that actually make the decisions regarding restoration efforts will not benefit from the protection of the corporate veil. If they qualify as “operators,” they may face direct liability for cleanup costs under CERCLA.

It is important to note that the direct liability theory set forth in the *Bestfoods* case only applies to “operators.” Under the *Bestfoods* analysis, corporate individuals who are not involved in the operation of a contaminated facility cannot be held personally liable simply

⁸⁵ *Bestfoods*, 524 U.S. at 65.

⁸⁶ *Id.* (citing *Riverside Market Dev. Corp. v. Int’l Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir. 1991)).

⁸⁷ *Id.* at 66-67.

because the corporation that they are affiliated with owns the contaminated facility. Since the corporation is a distinct legal entity which is perfectly capable of owning property, the traditional rules relating to the liability of corporate individuals apply to situations in which a corporation owns, but is not involved in the operation of, contaminated sites.

In 1996, Congress amended CERCLA to add special protections for fiduciaries, such as trustees, who typically hold title to property of an estate or trust in their own name and are charged with managing or controlling the property for a beneficiary. These amendments limit the liability of certain fiduciaries to the assets held in a fiduciary capacity, and allow the fiduciary to take specified actions to clean up the property without incurring personal liability.⁸⁸ Under certain circumstances, a conservation organization may be able to take advantage of the safe harbor provisions of these amendments to add an additional layer of protection for the personal assets of directors and officers of the organization.

In some states, the legislatures have enacted statutes providing additional liability protection for officers and directors of non-profit corporations. Colorado, for instance, has enacted a law which provides that officers and directors of non-profits that do not receive compensation from the non-profit are immune from civil liability for any damages or injury unless they were caused by the willful and wanton act or omission of the director or officer.⁸⁹ Since a CERCLA enforcement action would seek to enforce rights created by a specific federal statutory provision, the courts would probably not apply this statute as a shield against liability. Under the preemption doctrine, Courts will defer to a federal statute that is in direct conflict with a state statute.

VI

TOOLS FOR MANAGING THE RISK OF ENVIRONMENTAL LIABILITY

After reviewing the potential statutory liabilities associated with acquiring and restoring contaminated properties, it is easy to understand why traditional land trusts and other conservation organizations are reluctant to become involved in these types of restoration projects. The regulatory landscape in this arena is treacherous, and the potential liability is significant. Over the past

⁸⁸ 42 U.S.C. § 9607(n).

⁸⁹ COLO. REV. STAT. § 13-21-115.7 (2000); COLO. REV. STAT. § 13-21-116 (2000).

decade, however, federal and state legislatures and regulators have come to recognize that the fear of liability associated with the acquisition of contaminated sites has had the unintended consequence of discouraging real estate developers from cleaning up and reusing these properties. This has caused contaminated properties, referred to as “brownfields,” to remain idle while development expands into previously undisturbed areas.

Federal and state lawmakers and regulators have started to address the brownfields problem by developing a suite of tools that can help parties minimize and manage risks associated with the clean-up and redevelopment of contaminated properties. Legislative efforts to remedy some of the unintended effects of federal environmental statutes is ongoing. In fact, Congress is currently considering new legislation that would provide even more liability protection for conservation organizations involved in the acquisition and restoration of IAM sites.⁹⁰

The insurance industry has also responded to this phenomenon, creating a variety of products designed to insure against the risks associated with cleaning up contaminated properties. Conservation organizations interested in restoring and preserving contaminated properties can thus use the same techniques currently being utilized in urban brownfields redevelopment projects to mitigate the risks associated with these projects. By using a combination of the tools set forth below, conservation organizations should be able to manage the potential risks associated with the acquisition, restoration, and preservation of IAM sites.

A. USEPA’s Brownfields Initiative

The USEPA has implemented several policies to encourage people to clean-up and redevelop contaminated sites. A comprehensive explanation of these policies are set forth in the USEPA’s *Handbook of Tools for Managing Federal Superfund Liability Risks at Brownfields and Other Sites*.⁹¹ The Prospective Purchaser Agreement

⁹⁰ Senate Bill 1787, which is entitled the “Good Samaritan Abandoned or Inactive Mine Waste Remediation Act,” is designed to allow state and local governments to lead clean-up efforts at IAM sites under a special permit that would not be as strict as typical NPDES permits. Senate Bill 2700 would amend CERCLA to encourage the clean-up of brownfields and provide funding for these efforts.

⁹¹ See ENVIRONMENTAL PROTECTION AGENCY, BROWNFIELDS LIABILITY AND CLEANUP ISSUES, available at <http://www.epa.gov/swerosps/bf/liab.htm> (last modified Sept. 10, 2001).

and the USEPA's policy regarding comfort/status letters are the most important components of the Brownfields initiative for conservation organizations interested in acquiring, restoring, and preserving contaminated properties. An overview of these two tools is set forth below.

1. Prospective Purchaser Agreements

The Prospective Purchaser Agreement ("PPA") is a key component of the USEPA's Brownfields Initiative. Under certain circumstances, the USEPA will enter into PPAs in order to facilitate the clean-up and reuse of contaminated properties. The basic concept of the PPA is that the USEPA will agree to refrain from suing a person who is interested in purchasing a contaminated property, in exchange for that person's agreement to clean up the property or provide some other environmental benefit. As set forth above, CERCLA allows PRPs to file contribution actions against other parties who may have contributed to the contamination at a particular site. A critical component of the PPA, which sets it apart from most other federal and state programs designed to encourage the clean-up of contaminated properties, is the ability of these agreements to provide contribution protection.

Section 113(f)(2) of CERCLA provides:

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. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.⁹²

The USEPA's model PPA invokes this provision of CERCLA to provide contribution protection for qualifying prospective purchasers. Whereas the other tools commonly used to manage liabilities associated with cleaning up contaminated sites provide some level of assurance that government regulators will not pursue actions against the prospective purchasers, the PPA has the additional benefit of protecting prospective purchasers from contribution actions by other parties.

CERCLA contains specific statutory provisions that authorize the USEPA to enter into settlement agreements with PRPs.

⁹² 42 U.S.C. § 9613(f)(2).

Unfortunately, this statutory authority only authorizes the agency to settle cases with people who fall within one of the four categories of PRPs. Since prospective purchasers are not yet owners or operators of the contaminated properties, the statutory settlement provisions of CERCLA do not authorize the agency to enter into settlement agreements with them.

The USEPA has addressed this problem by using the United States Department of Justice's ("DOJ") inherent authority to settle matters for the federal government. Since PPAs are based upon this authority, any agreement negotiated between the USEPA and a prospective purchaser requires the DOJ's express approval.⁹³

While the primary purpose of most PPAs is to limit CERCLA liability, because the USEPA's authority to enter into PPAs is derived from the DOJ's inherent authority to settle matters for the federal government, the agreements can also provide protection from other statutory liabilities. For example, the USEPA has entered into some PPAs that have provided protection from RCRA liability.⁹⁴

The USEPA's *Guidance on Settlements with Prospective Purchases of Contaminated Property* outlines the five criteria the USEPA will consider in deciding whether or not to enter into a PPA. According to the agency, "[t]hese criteria are intended to reflect USEPA's commitment to removing the barriers imposed by potential CERCLA liability while ensuring protection of human health and the environment."⁹⁵ The five criteria that the agency will consider are discussed below.

a. An EPA Action at the Facility has been Taken, is Ongoing, or is Anticipated to be Undertaken by the Agency.

This criterion is designed to ensure that the USEPA does not become unnecessarily involved in purely private real estate transactions, or expend its limited resources in negotiations which are

⁹³ In 1995, the USEPA issued its most recent guidance document on PPAs which may be found at <http://www.epa.gov/swerosps/bf/html-doc/purchase.htm>.

⁹⁴ See Proposed Administrative Settlement Under CERCLA and the Solid Waste Disposal Act; *In re: Raymark Industries, Inc.* Superfund Site, 61 Fed. Reg. 43,056 (Aug. 20, 1996); Proposed Prospective Purchaser Agreement Pursuant to the CERCLA for the D.C. Franche Site in Chicago Ill., 61 Fed. Reg. 15,802 (Apr. 9, 1996).

⁹⁵ See ENVIRONMENTAL PROTECTION AGENCY, GUIDANCE ON SETTLEMENTS WITH PROSPECTIVE PURCHASERS OF CONTAMINATED PROPERTY, available at http://www.epa.gov/swerosps/bf/html_doc/purchase.htm (last visited Nov. 1, 2001).

unlikely to produce a sufficient public benefit. The USEPA's guidance policy explains:

If the agency receives a request for a prospective purchaser agreement at a site where EPA has not yet become involved, Regions should first evaluate the realistic possibility that a prospective purchaser may incur Superfund liability when determining the appropriateness of entering into a prospective purchaser agreement. This evaluation should clearly show that EPA's covenant not to sue is essential to remove Superfund liability barriers and allow the private party cleanup and productive use, reuse, or redevelopment of the site.⁹⁶

This criterion requires the USEPA to engage in a balancing test when determining whether or not to enter into a Prospective Purchase Agreement (PPA) at sites where there is no ongoing USEPA action. The agency must weigh the likelihood of potential agency involvement against the public benefit that would be derived from the PPA. Thus, the USEPA's guidance policy explains that even at sites which the agency has designated as "No Further Response Action Planned," the agency "may, in extremely unusual circumstances, consider a PPA if it is in the public interest and the agreement is essential to achieve a very significant public benefit."⁹⁷

b. The Agency Should Receive a Substantial Benefit Either in the Form of a Direct Benefit for Cleanup, or as an Indirect Public Benefit in Combination with a Reduced Direct Benefit to EPA

The USEPA's guidance document refers to this criterion as a "cornerstone" of the agency's evaluation process.⁹⁸ The guidance document encourages the agency to make a balanced evaluation of both the direct and indirect benefits of a PPA. Direct benefits include cleaning up the property, or providing the USEPA with funding to clean up the property. Examples of indirect benefits include the creation of conservation or recreation areas, and measures that substantially reduce the risk posed by the site. The acquisition and restoration of contaminated property, along with the utilization of traditional conservation tools like deed restrictions and conservation easements, should easily satisfy this criterion.

c. The Continued Operation of the Facility or New Site

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

Development, with the Exercise of Due Care, Will Not Aggravate or Contribute to the Existing Contamination or Interfere with EPA's Response Action

In order for the USEPA to make a reasoned determination of whether the activities proposed at a site will aggravate or contribute to the existing contamination, the prospective purchaser must provide the agency with a sufficient analysis of the problems at the site, as well as proposed remedies. As long as a prospective purchaser provides the agency with sufficient information and an analysis which concludes that the proposed activity at the site will not aggravate or contribute to the existing contamination, or interfere with the USEPA's response action, it should be relatively easy for a conservation organization interested in acquiring, restoring, and preserving contaminated property to satisfy this criterion.

d. The Continued Operation of the Facility or New Development of the Property Will Not Pose Health Risks to the Community and Those Persons Likely to be Present at the Site

In evaluating a PPA, the USEPA will consider the potential health and environmental impacts that the proposed use of the contaminated property will have on the community, and on those likely to be present or have access to the site. Since conservation organizations will likely place deed restrictions or conservation easements on the sites to ensure that the restored properties will not be used for residential development, or other uses that would result in prolonged exposure to contaminants still present after the restoration efforts are completed, this criterion should be relatively easy for most conservation organization involved in the acquisition and restoration of contaminated properties to satisfy.

e. The Prospective Purchaser is Financially Viable

The purpose of this criterion is to ensure that the prospective purchaser possesses the ability to carry through with its commitments under the PPA. Thus, a conservation organization interested in acquiring and restoring contaminated properties will have to demonstrate that they have the financial ability to complete the proposed restoration project and to adequately manage the site after remediation is completed.

2. *Comfort/Status Letters*

The USEPA's *Policy on the Issuance of Comfort/Status Letters* is designed to provide information to people who want to clean up and reuse brownfields, allowing them to make informed decisions regarding the purchase and/or development of such properties. The USEPA's policy is designed to provide a measure of comfort by helping an interested party better understand the potential for, or actual, USEPA involvement at a brownfields property. The policy describes the most common situations about which parties inquire, and the type of information or comfort the USEPA may provide to assist parties in assessing the probability of incurring CERCLA liability.

The comfort/status letters are intended solely for informational purposes, and relate only to USEPA's plans to exercise its authorities under CERCLA. Unlike the PPAs, the comfort/status letters do not provide a release from CERCLA liability, and are not considered to be assurances that the agency will not take action. The USEPA believes that the information provided in the comfort/status letter will enable "the party inquiring about the property [to] decide whether the risk of USEPA action is enough to forego involvement, whether to proceed as planned, whether additional investigation into site conditions is necessary, or whether further information from EPA or other agencies is needed."⁹⁹

The USEPA's policy includes four sample letters, and allows the regions to combine and modify the letters to fit the particular situation. The four sample comfort/status letters are:

- 1) A "No Previous Federal Superfund Interest Letter," which may be provided when there is no historical evidence of federal Superfund program involvement with the property in question;
- 2) A "No Current Federal Superfund Interest Letter," which may be provided when the property either has been archived and is no longer part of the CERCLIS inventory of sites, has been deleted from the National Priorities List, or is situated near, but not within, the defined boundaries of a CERCLIS site;
- 3) A "Federal Interest Letter," which may be provided at sites where the EPA either plans to respond in some manner or already is responding at the site. This letter is intended to inform the recipient

⁹⁹ See ENVIRONMENTAL PROTECTION AGENCY, POLICY ON THE ISSUANCE OF COMFORT/STATUS LETTERS (1996), available at <http://www.epa.gov/swerosps/bf/html-doc/comfact.htm>.

of the status of the EPA's involvement at the property. Additionally, language is included to respond to requests regarding the applicability of Agency Superfund policy, application of CERCLA statutory provision to a party, or particular set of circumstances; and,

4) A "State Action Letter," which may be provided when the state has responsibility for day-to-day activities and oversight of a response action.

The USEPA's policy on comfort/status letters provides regional offices with the discretion to issue comfort/status letters "where there is a realistic perception or probability of incurring Superfund liability and where there is no other mechanism available to adequately address the party's concerns."¹⁰⁰

Since the agency's policy on PPAs only allows the agency to enter into these agreements when an action at the facility has been taken, is ongoing, or is anticipated to be undertaken by the agency, there are situations in which the USPEA may issue a comfort/status letter, but will not enter into a PPA. Although comfort/status letters do not provide any assurance of liability protection, they can provide valuable information that will assist in assessing the potential liabilities associated with a proposed transaction.

B. State Voluntary Clean-Up Agreements

More than thirty states have started programs to encourage the clean-up and reuse of contaminated properties.¹⁰¹ These state programs are commonly referred to as "voluntary" clean-up programs. In general, these programs create a mechanism whereby participants voluntarily clean-up contaminated sites in exchange for various types of liability protections and assurances from state regulators, such as no further action letters, certificates of completion, or formal covenants not to sue. Most of these voluntary clean-up programs only apply to sites not listed on the National Priority List or state hazardous waste remediation priority lists. In other words, the state voluntary clean-up programs may not be available for those interested in acquiring and cleaning up the most contaminated sites.

¹⁰⁰ *Id.*

¹⁰¹ An overview of state voluntary clean-up programs is set forth in MARK S. DENNISON, *BROWNFIELDS REDEVELOPMENT: PROGRAMS AND STRATEGIES FOR REHABILITATION OF CONTAMINATED REAL ESTATE* (1997), and TODD S. DAVIS AND KEVIN D. MARGOLIS, *BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY* (1997).

Colorado's Voluntary Clean-up program is an example of a state program designed to facilitate the clean-up and reuse of contaminated properties. In 1994, Colorado enacted the Voluntary Clean-up and Redevelopment Act.¹⁰² The program encourages voluntary clean-ups of contaminated properties by providing a framework for determining clean-up responsibilities, and providing assurances that the state will not take further action against a property owner if the owner takes specified actions to clean up contaminated properties. The program has two major components: 1) the approval of voluntary clean-up plans; and 2) the issuance of no-action determinations.¹⁰³

Under the Act, a property owner may obtain streamlined approval for a voluntary clean-up plan by submitting an application to the Colorado Department of Public Health and Environment ("CDPHE").¹⁰⁴ The applicant can obtain an advisory opinion from the CDPHE regarding the adequacy of its proposal. If the CDPHE approves the proposed clean-up plan, the agency must inform the applicant that "it is the opinion of the Colorado Department of Public Health and Environment that upon completion of the voluntary clean-up plan . . ." no further action is required.¹⁰⁵

The Voluntary Clean-up and Redevelopment Act also provides a mechanism whereby a property owner may seek a determination that the property, as it exists, will not require further regulatory action.¹⁰⁶ In order for a property owner to obtain a no action determination under this provision, they must submit an environmental assessment demonstrating that any contamination on the property does not exceed applicable state standards, or that the contamination does not pose an unacceptable risk to human health and the environment. The statute also authorizes the issuance of no action determinations for contaminants that originated from adjacent properties, if the person responsible for causing the contamination is or will be taking appropriate action to address the contamination.¹⁰⁷

Since states and the USEPA have overlapping and independent authority to direct and oversee clean-up activities at contaminated sites, the effectiveness of state voluntary clean-up programs is seriously limited unless the roles and authorities of the state and

¹⁰² COLO. REV. STAT. §§ 25-16-301 to -310 (2000).

¹⁰³ COLO. REV. STAT. §§ 25-16-306 to -307 (2000).

¹⁰⁴ COLO. REV. STAT. § 25-16-304 (2000).

¹⁰⁵ COLO. REV. STAT. § 25-16-306(d)(2) (2000).

¹⁰⁶ COLO. REV. STAT. § 25-16-307 (2000).

¹⁰⁷ COLO. REV. STAT. § 25-16-307 (2000).

federal regulators are well defined. The CDPHE has entered into a Memorandum of Agreement (“MOA”) with the USEPA regarding the agencies’ respective roles and responsibilities for activities relating to Colorado’s Voluntary Clean-up Program. Under the MOA, the USEPA has agreed that once a clean-up proposal has been approved by the CDPHE, the USEPA will not initiate a CERCLA enforcement action unless: 1) the site is a NPL caliber site (i.e. a seriously contaminated site) or a site that poses an imminent and substantial endangerment to public health, welfare, or the environment and exceptional circumstances warrant USEPA action; 2) the CDPHE’s approval of the clean-up becomes void; or 3) the applicant fails to complete or comply materially with the clean-up plan.¹⁰⁸

Although Colorado’s Voluntary Clean-up program and the MOA provide some assurances that should facilitate the clean-up and reuse of contaminated properties, there are some significant limitations to the protections offered by the program. First, participation in the program is limited to current owners. Thus, participation in this program is not available to prospective purchasers. Second, the program does not provide for contribution protection. Thus, if the USEPA becomes dissatisfied with the clean-up and pursues a CERCLA action against another party, the program does not prevent the other party from bringing a contribution action against the participant in the program. Finally, the program is only eligible for properties not covered by existing regulatory programs. Properties that have or should have RCRA or CWA permits, or that are covered under the state’s underground storage tank regulations, are ineligible for the program.

C. Private Tools to Manage Liability

In addition to legislative and regulatory reforms, there are two categories of private tools that can be used to manage the risk associated with the acquisition and clean-up of contaminated properties. The first category of tools involves the contractual allocation of risk between the seller of the contaminated property and the buyer of the property. Two common ways in which the parties to a real estate transaction can allocate environmental risks are: 1) indemnification agreements, in which one party agrees to reimburse

¹⁰⁸ A copy of the MOA may be found in Nancy Mangone & John Leonard Watson, *Voluntary Environmental Cleanup: The EPA’s Buy-in to Colorado’s Program*, 25 *COLO. LAW.* 105 app. (1996).

the other party for certain expenditures or liabilities related to the property and clean-up activities; and 2) agreements to remediate, in which one party agrees to perform the required remediation following the sale of the property. The obvious problem with indemnification agreements and agreements to remediate, however, is that they are only as good as the financial positions of the parties making them. Since CERCLA imposes joint and several liability upon PRPs, a purchaser who relies on one of these private risk allocation agreements could easily be held fully liable for clean-up costs if the seller files for bankruptcy or does not have the financial ability to meet its obligations.

The second category of private tools involves the purchase of environmental insurance products. Environmental insurance is a contractual vehicle designed to transfer risks associated with potential environmental problems. Modern environmental insurance originated as a result of the implementation of the RCRA. In order to obtain certain types of operating permits, the RCRA requires the applicants to demonstrate "financial assurance" of the ability to take corrective action and compensate injured parties. The insurance companies responded to this statutory mandate by creating products protecting operators against a wide variety of environmental risks, including many of the risks associated with the acquisition, restoration, and preservation of IAM sites.¹⁰⁹

In 1999, Northern Kentucky University published the results of a survey of insurance products available to transfer risks associated with brownfields clean-up and redevelopment projects. This study, which was funded by the USEPA, was designed to update a similar study conducted by the agency in 1996.¹¹⁰ According to the survey, the most common types of environmental insurance available on the market include Clean-Up Cost Cap, Pollution Liability, and Secured Creditor:

CLEAN-UP COST CAP policies protect against overruns of the estimated cost of a planned clean-up on a brownfield site that occur because of regulatory requirement changes and/or discovery of contaminants not identified when the clean-up was designed.

¹⁰⁹ See DAVIS & MARGOLIS, *supra* note 93, at 144-46.

¹¹⁰ This survey, which is titled Environmental Insurance Products Available for Brownfield Redevelopment, November 1999 may be found at <http://www.epa.gov/swerosps/bf/insurebf.htm>.

POLLUTION LIABILITY policies provide protection for: (a) the costs of third party claims for site remediation, property damage, and bodily injury arising from a pollution condition; (b) the costs of remediating pre-existing or newly released contamination on the insured's property and other expenses related to a pollution problem on the property; and (c) legal defense expenses.

SECURED CREDITOR policies provide reimbursement to financiers for loan payments in the event that a borrower defaults, and compensation to the lender for collateral value-loss caused by a pollution condition. Although the policies are designed to protect lenders, they are important from the viewpoint of redevelopers in that they make lenders more willing to provide capital.¹¹¹

These environmental policies generally include coverage for directors, officers, and employees of the insured. In determining the price of a policy, insurers will evaluate the extent and nature of the contamination, the adequacy of the environmental site characterization, and the intended use of the property, as well as a variety of other factors. As a result, the prices of the policies vary greatly.

Since each project involving the clean-up and reuse of contaminated properties is unique, environmental insurance products must be flexible and tailored to meet the needs of each individual project. As a result of this need for customization, environmental insurance products will not generally be subject to the same level of scrutiny by insurance regulators as other insurance policies. Thus, it is important for conservation organizations considering purchasing one of these policies to consult with a competent and knowledgeable insurance broker or other professional familiar with the industry.

V

CHOOSING THE RIGHT TOOLS

Each project involving the restoration and preservation of an IAM site presents a different set of facts which pose unique challenges for conservation organizations interested in undertaking restoration efforts. The variables associated with these projects are as diverse as the number of sites that need restoration. Each site presents different degrees and types of environmental problems, different ownership interests, different conservation values, different regulatory concerns,

¹¹¹ See ENVIRONMENTAL PROTECTION AGENCY, INSURANCE AND BROWN-FIELDS REDEVELOPMENT, at <http://www.epa.gov/swerosps/bf/insurebf.htm> (last modified Nov. 6, 2001).

different end-uses, and different economic challenges. With so many variables, it is impossible to devise a single formula that can be applied to each restoration effort in order to obtain the maximum practical risk reduction.

The first step in analyzing the risk associated with the restoration and preservation of a particular IAM site is to find out what the property owner's goals and objectives are and, if necessary, to educate the owner about environmental liabilities. If the owner's goals and objectives are consistent with the proposed restoration and preservation of the property, the conservation organization must then obtain sound scientific information and advice regarding the feasibility and costs of restoring the property. Without this fundamental information, it will be impossible to make a reasoned analysis of the potential liabilities. The next step is to start a dialogue with the appropriate state environmental agencies and the USEPA. Since the state and federal regulators have overlapping authority regarding environmental clean-ups, both agencies should be consulted. Finally, the conservation organization must choose which risk management tools are best suited to the particular project.

For IAMs in which there is minimal contamination and a high degree of certainty regarding the costs of restoration, it may be possible to adequately address the environmental risks by participating in a state voluntary clean-up program, obtaining a comfort/status letter from the USEPA, and purchasing an environmental insurance policy.

Some owners of IAM sites may not be willing to relinquish control over the management of the clean-up without first obtaining some form of liability protection from the USEPA. While the transfer of the IAM site to the conservation organization alone may not insulate the seller from CERCLA liability, under certain situations it may be possible to structure a transaction in a way that will provide liability protection for the seller and the purchaser of an IAM site. If the seller is eligible for a *de minimis* settlement, for example, the USEPA may be willing to enter into a covenant not to sue, and to provide contribution protection for the seller under the *de minimis* settlement provisions of CERCLA and for the buyer under a PPA. If the seller does not require additional liability protection from the USEPA, the transaction can proceed without the seller entering into a *de minimis* settlement agreement. Private tools such as purchasing an appropriate environmental insurance policy and entering into an indemnification

or remediation agreement will provide an extra layer of liability protection.

In limited circumstances, conservation organizations may also be able to invoke the “good samaritan” provision of CERCLA to minimize their liability. Since the savings clause of the good samaritan provision limits liability protection to people who do not fall within any of the four categories of PRPs, a conservation organization could not acquire an IAM site and then invoke CERCLA’s good samaritan provision in order to obtain liability protection. On the other hand, if the owner of an IAM site and the conservation organization are willing to use preservation tools that would not transfer ownership of the IAM site to the conservation organization, such as a conservation easement or deed restrictions, CERCLA’s good samaritan provision may be a useful tool. Since the creation of a conservation easement or a deed restriction would not make the conservation organization an “owner,” the conservation organization may be able to negotiate an agreement with the EPA that will allow the organization to avoid the implementation of the savings clause and obtain the protection offered by CERCLA’s good samaritan provision.

CONCLUSION

IAM sites present a wide variety of environmental problems. If properly restored, however, many of these sites have the potential to harbor significant conservation values, including biodiversity, wildlife habitat, and scenic open-space. Unfortunately, the fear of liability has inhibited land trusts, conservation groups, and local governments from undertaking restoration efforts at these sites. By following the suggestions set forth in this paper, conservation organizations can analyze and manage the risks associated with the acquisition, restoration, and preservation of ecologically important properties that have been degraded by past mining operations.