



## Chapter VIII

### SUPERFUND LAWS

In the aftermath of Love Canal and other revelations of the improper disposal of hazardous substances, the federal and state governments enacted the “Superfund” laws to address these problems. Generally these laws address remediation of spills and dumps, rather than regulation of current conduct, and hold parties liable to cleanup contamination resulting from activities that may have been legal. They have resulted in extensive litigation, widespread concerns about environmental liabilities, and expensive cleanups.

#### A. CERCLA

The federal Superfund law is entitled the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”), 42 U.S.C. §9601, *et seq.* It was extensively amended by the Superfund Amendments and Reauthorization Act of 1986 (“SARA”), and further amendments were made in 2002 by the Small Business Liability Relief and Brownfields Revitalization Act.

##### 1. Basic Scheme

CERCLA provides a framework for the cleanup of the “release” or threatened release” of hazardous substances into the environment. EPA can take action to clean up hazardous substances using funds from the multi-billion dollar “Superfund” (raised by excise taxes on certain chemical feedstocks and crude oil), and then seek reimbursement from “responsible parties.” Alternatively, it can require responsible parties to clean up a site.

“Hazardous substances” are defined to include hazardous wastes under RCRA, hazardous substances and toxic pollutants under Clean Water Act §§311(b)(2)(A) and 307(a), 33 U.S.C.

§§1321(b)(2)(A) and 1317(a), hazardous air pollutants under Clean Air Act §112, 42 U.S.C. §7412(a), any “imminently hazardous chemical substance or mixture” designated under Toxic Substances Control Act §7, 15 U.S.C. §2606, and substances specifically designated under CERCLA §102, 42 U.S.C. §9602 (relating to release reporting). CERCLA §101(14), 42 U.S.C. §9601(14). The courts have refused to make a *de minimis* exception, so that even minute quantities of hazardous substances can be subjected to CERCLA action. CERCLA also applies to “pollutants or contaminants,” which are defined at §101(33), 42 U.S.C. §9601(33), to parallel the definition of hazardous substances.

Petroleum is specifically excluded from these definitions of “hazardous substances” and “pollutants or contaminants.” CERCLA §101(14), 42 U.S.C. §9601(14). However, the petroleum exclusion has been held by the courts not to exclude petroleum contaminated with other substances that are deemed hazardous.

“Release” is defined to include, among other things, any spill, leak, abandonment, disposal, or other discharge of hazardous substances. CERCLA §101(22), 42 U.S.C. §9601(22). Specific exceptions from this definition include certain exposures “solely within a workplace,” certain releases allowed under the Atomic Energy Act of 1954, motor vehicle exhaust, and “the normal application of fertilizer.”

## **2. Cleanups**

CERCLA §104, 42 U.S.C. §9604 authorizes the federal government, whenever there is a “release” or a “substantial threat of such a release into the environment” to:

act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substances, pollutants, or contaminants at any time (including its removal from any contaminated natural

resource), or take any other response measure consistent with the national contingency plan . . .

CERCLA §104(a)(1), 42 U.S.C. §9604(a)(1). As required by CERCLA §105, EPA has revised the National Contingency Plan (“NCP”), 40 C.F.R. Part 300, originally promulgated to address the cleanup of spills of hazardous substances into the navigable waters under Clean Water Act §311, 33 U.S.C. §§1321, to provide a blueprint for the cleanup of hazardous substances under CERCLA.

Under the NCP and CERCLA §104, 42 U.S.C. §9604, EPA can either take immediate “removal action” to eliminate immediate risks to health and the environment, or conduct a longer term “remedial action” to fully cleanup a site. Before remedial action is undertaken, a remedial investigation/feasibility study (“RI/FS”) must be completed. This work is done with moneys supplied by the federal Superfund. CERCLA §111, 42 U.S.C. §9611. However, EPA can later recover its response costs from responsible parties in federal district court. CERCLA §107, 42 U.S.C. §9607.

CERCLA §121, 42 U.S.C. §9621, added by SARA in 1986, requires that cleanups be “cost effective,” and should prefer “remedial action in which treatment which permanently and significantly reduces the volume, toxicity or mobility of the hazardous substances, pollutants, and contaminants is a principal element,” while least favored is “offsite transport and disposal.” CERCLA §121(b), 42 U.S.C. §9621(b). Further, the degree of cleanup” should attain “relevant and appropriate” standards under other federal and state environmental laws. CERCLA §121(d), 42 U.S.C. §9621(d). Generally, a specific remedial action is selected by EPA upon filing a formal “record of decision.”

CERCLA §104(d)(1), 42 U.S.C. §9604(d)(1) allows states to enter into cooperative agreements to carry out a Superfund cleanup on behalf of EPA. A responsible party may also be allowed to carry out an RI/FS and cleanup. CERCLA §104(a)(1), 42 U.S.C. §9604(a)(1).

CERCLA requires EPA to develop a “National Priorities List” (“NPL”) of sites slated for cleanup, using a “hazard ranking system.” CERCLA §105(c), 42 U.S.C. §9605(c). However, listing on the NPL is not a prerequisite to action or liability under CERCLA.

CERCLA §106(a), 42 U.S.C. §9606(a), permits the United States to make an administrative order directing a responsible party to take “abatement action,” or to seek an injunction in federal district court to require such action. Further, CERCLA §104(e), 42 U.S.C. §9604(e) grants EPA access to sites and necessary information, as well as the authority to enter administrative orders directing such access. Any person who fails to comply with such an administrative order is subject to a fine of \$25,000 per day. CERCLA §§104(c)(5), 106(b), 42 U.S.C. §9604(c)(5), 9606(b). Further, if EPA then completes the cleanup and sues the responsible party, it can recover triple its costs as punitive damages, unless there was “sufficient cause” for the failure to comply with the administrative order. §107(c)(3), 42 U.S.C. §9607(c)(3).

CERCLA also contains numerous other provisions, including public participation requirements, §117, 42 U.S.C. §9617, application of CERCLA to federal facilities, CERCLA §120, 42 U.S.C. §9620, civil penalties and awards, CERCLA §109, 42 U.S.C. §9609, and requirements for the Agency for Toxic Substances and Disease Registry (“ATSDR”) to investigate hazardous substances, prepare toxicological profiles, and conduct health assessment and health effects studies. CERCLA §104(i), 42 U.S.C. §9604(i).

### 3. Liability

Given this comprehensive statutory scheme, the key question often is who is responsible for CERCLA cleanup costs. CERCLA §107(a), 42 U.S.C. §9607(a), specifically provides that the following persons are liable:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.

These “potentially responsible parties” (“PRPs”) are liable for (A) “all costs of removal or remedial action” incurred by the federal or state government “not inconsistent with” the NCP, (B) “other necessary costs of response incurred by any other persons consistent with” the NCP, (C) natural resource damages, and (D) costs of health assessments or health effects studies conducted pursuant to §104(i), 42 U.S.C. §9604(i). CERCLA §107(a), 42 U.S.C. §9607(a). The courts have allowed CERCLA actions to be brought by all levels of governments, as well as

private persons with sufficient standing. However, liability has generally not been found to include responsibility for personal injuries, property damages, or medical monitoring costs.

A cleanup is consistent with the National Contingency Plan, so that costs may be recovered, if it is carried out under supervision by a state environmental agency, even if the public notice provisions in the NCP are not strictly satisfied. *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998). Generally, attorney's fees are not response costs, except when incurred to identify other responsible parties, *Keytronic Corp. v. United States*, 511 U.S. 809, 114 S.Ct. 1960 (1994), or as a part of cleanup efforts. *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998).

Natural resource damages are only recoverable by the United States or a state, and do not include "irreversible and irretrievable commitments of natural resources" identified in an environmental impact statement, if allowed pursuant to a federal permit or license. §107(f)(1), 42 U.S.C. §9607(f)(1). The determination of natural resource damages by the appropriate federal or state official designated as trustee for the public pursuant to CERCLA and Clean Water Act §311, 33 U.S.C. §§1321, is a rebuttable presumption of the damages assessed.

Persons who incur "response costs" may also file administrative claims which may be paid by the Superfund, §112(a), 42 U.S.C. §9612(a), provided they do so within 6 years of the completion of all response actions, §112(d)(1), 42 U.S.C. §9612(d)(1). However, they can only make a claim if they first present the claim to the owner or operator, and it is not satisfied within 60 days.

Liability applies retroactively, so that pre-1980 releases which were legal at the time are covered, as well as pre-1980 response costs. *See, e.g., U.S. v. Hooker Chemicals & Plastics Corp.*, 680 F.Supp. 546 (W.D.N.Y. 1988). CERCLA can be applied retroactively, *U.S. v. Olin*

*Corp.*, 107 F.3d 1506 (11<sup>th</sup> Cir. 1997). Liability is strict, so that it does not matter whether a responsible party exercised all due care in his dealing with hazardous substances. *Id.*

Liability is generally considered “joint and several,” so that each responsible party is liable for the entire cost of a response, even if he only bears a small percentage of relative responsibility. *See, e.g., U.S. v. Hooker Chemicals & Plastics Corp.*, 680 F. Supp. 546 (W.D.N.Y. 1988). However, the courts have been willing to entertain arguments that liability for response costs might not be joint in cases where a reasonable basis for allocation can be found. *Burlington Northern & Santa Fe Railway Co. v. United States*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1870 (May 4, 2009); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1992).

Furthermore, CERCLA §113(f)(1), 42 U.S.C. §9613(f)(1) allows responsible parties to sue other responsible parties for contribution based upon their relative responsibility. However, in *Cooper Industries v. Aviall Services, Inc.*, 543 U.S. 157, 125 S.Ct. 577 (2004), the Supreme Court held that a contribution claim under this provision only lies in the limited circumstances set forth in the statute, including “during or following” an initial cost recovery action under CERCLA §106 or §107, or after an “administratively or judicially approved settlement.” CERCLA §113(f)(1) has been held to preempt common law claims for restitution and indemnification for costs recoverable under the contribution provisions of CERCLA. *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998).

While some courts had held that a PRP cannot bring a cost recovery action, the Second Circuit has held that if a contribution claim is not available, a claim may still lie for even a PRP liable under CERCLA §107(a), 42 U.S.C. §9607(a). *Consolidated Edison Co. of NY, Inc. v. UGI Utilities*, 423 F.3d 90 (2d Cir. 2005). In *United States v. Atlantic Research Corp.*, 551 U.S. 128,

127 S. Ct. 2331 (2007), the U.S. Supreme Court resolved the issue, and held that “the plain terms of §107(a)(4)(B) allow a PRP to recover costs from other PRPs.” The Supreme Court distinguished between contribution under CERCLA §113, and cost recovery under CERCLA §107:

Section 113(f)(1) authorizes a contribution action to PRPs with common liability stemming from an action instituted under §106 or §107(a). And §107(a) permits cost recovery (as distinct from contribution) by a private party that has itself incurred cleanup costs. Hence, a PRP that pays money to satisfy a settlement agreement or a court judgment may pursue §113(f) contribution. But by reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under §107(a). As a result, though eligible to seek contribution under §113(f)(1), the PRP cannot simultaneously seek to recover the same expenses under §107(a).

*United States v. Atlantic Research Corp.*, 551 U.S. 128, 127 S. Ct. 2331, 2338 (2007).

CERCLA §113(g)(2) provides that actions under CERCLA §107 to recover costs of a removal action must be brought “within 3 years after completion of the removal action,” while for remedial actions, suit must be filed “within 6 years after initiation of physical on-site construction of the remedial action.” 42 U.S.C. §9613(g)(2). Further, CERCLA §113(g)(3), 42 U.S.C. §9613(g)(3) provides that no contribution action may be brought more than three years after either “(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or (B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.”



CERCLA §122, 42 U.S.C. §9622, encourages EPA to enter into settlements to allocate responsibility and release responsible parties from further liability, and provides special incentives for settlements with “*de minimis*” contributors.

Both the present “owner” or “operator,” as well as the “owner” or “operator” at the time of disposal, are responsible parties. *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985). However, an owner or operator probably will not be held liable for mere “passive migration” of hazardous chemicals disposed of or released by prior owners or operators, and which the later owner or operator did not contribute to. *ABB Industrial v. Prime Technology*, 120 F.3d 351 (2d Cir. 1997).

A stockholder or responsible corporate officer could be deemed to be an “owner or operator” subject to liability under §107(a)(1,2), 42 U.S.C. §9607(a)(1,2), provided he or she exercised sufficient control over a corporation's operations. *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985). Similarly, in some circumstances, parent corporations, as well as their officers and directors, may be liable for actions at their subsidiaries’ facilities despite the traditional common law tradition of immunity of corporate officers to corporate liability. The Supreme Court has held that directors and officers of a parent corporation may be liable only if they “made policy decisions and supervised activities” at the subsidiary facility. *United States v. Bestfoods*, 524 U.S. 51, 118 S.Ct. 1876 (1998).

While most of the caselaw has surrounded the issue of liability as an owner or operator paragraphs (1) and (2) of CERCLA §107(a), 42 U.S.C. §9607(a), in *Burlington Northern & Santa Fe Railway Co. v. United States*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1870 (May 4, 2009), the Supreme Court considered liability as an “arranger” under paragraph (3). In *Burlington*

*Northern* the manufacturer of a chemical product was not liable as an arranger for disposal, even though it was aware of frequent spills in the delivery process. While this decision may not have much impact on those who handle wastes, it may limit liability for accidental spills of useful products.

#### **4. Defenses**

CERCLA allows very limited affirmative defenses, which include:

- (1) an act of God;
- (2) an act of war;
- (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
- (4) any combination of the foregoing paragraphs.

CERCLA §107, 42 U.S.C. §9607.

Further, government officials acting pursuant to the NCP, §107(d), 42 U.S.C. §9607(d), and cleanup contractors, §119, 42 U.S.C. §9619, are not liable provided they were not negligent. An “indemnification, hold harmless or similar agreement” is not effective to absolve a responsible party from liability, although such arrangements are still enforceable between the

parties. §107(e), 42 U.S.C. §9607(e); *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10 (2d Cir. 1993). Moreover, even bankruptcy may not provide complete discharge from CERCLA liability.

An exception from liability is provided under §101(20)(A), 42 U.S.C. §9601(20)(A), for persons who hold “indicia of ownership principally to protect his security interest.” Furthermore, a lender who does not “participate in management” of the facility is not even considered an owner. CERCLA §101(20)(E)(i), 42 U.S.C. §9601(20)(E)(I). Moreover, lenders who take title after foreclosure may also be protected if they seek to sell “at the earliest practicable, commercially reasonable time.” CERCLA §101(20)(E)(ii), 42 U.S.C. §9601(20)(E)(ii).vv). CERCLA §101(20)(D), 42 U.S.C. §9601(20)(D), also provides relief for governments which acquire title involuntarily by “bankruptcy, tax delinquency, abandonment, or other circumstances,” provided they did not cause or contribute to the problem.

The courts have sparingly allowed the “third party” defense. For example, the purchaser of contaminated property has been held to have a contractual relationship with the wrongdoer that bars the defense. However, in *New York v. Lashins Arcade Co.*, 91 F.3d 353 (2d Cir. 1996), a purchaser was able to use the defense when the contamination was caused by a prior owner’s tenant.

While the courts generally found that purchasers were not eligible for the “third party” defense because they had a “contractual relationship” with the prior owner, in 1996 Congress made “innocent purchasers” eligible for the defense if they acquired a facility “by inheritance or bequest,” government entities which acquired property by involuntary transfer or condemnation, and persons who “did not know and had no reason to know” about hazardous substances at the

site, as long as such persons do not cause or contribute to the release or threatened release. CERCLA §101(35)(A,D), 42 U.S.C. §9601(35)(A,D).

In 2002, the Small Business Liability Relief and Brownfields Revitalization Act amended CERCLA §101(35), 42 U.S.C. §9601(35), to provide the following standards to determine whether a purchaser made “all appropriate inquiry” in order to qualify under the innocent purchaser defense, which generally requires at least a Phase I environmental site assessment (“ESA”) for non-residential properties:

- For residential properties “purchased by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation.”
- For purchases prior to May 31, 1997, the following must be considered: “any specialized knowledge or experience on the part of the defendant,” “the relationship of the purchase price to the value of the property, if the property was not contaminated,” “commonly known or reasonably ascertainable information about the property,” “the obviousness of the presence or likely presence of contamination at the property,” and “the ability of the defendant to detect the contamination by appropriate inspection.”
- For purchases between May 31, 1997 and November 1, 2005, when EPA promulgated a new standard, ASTM Standard E1527-97, entitled “Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process,” is sufficient to meet due diligence requirements under the defense.
- EPA promulgated a new standard on November 1, 2005, effective November 1, 2006, which is set forth at 40 CFR Part 312 setting standards for Phase 1 ESAs. Until November 1, 2006, either ASTM Standard E1527-00 or ASTM Standard E1527-05 can be utilized. Beginning on November 1, 2006, either ASTM Standard E1527-05, or the new “All Appropriate Inquiry” standards set forth in the regulations, must be used.

In addition, four new CERCLA defenses were added by Congress in 2002. They are as follows:

- ***De Micromis Exemption.*** A PRP that is otherwise liable for contamination at a NPL site as a generator or transporter can qualify for this defense if it contributed hazardous

substances that were “less than 110 gallons of liquid materials or less than 200 pounds of solid materials,” and the disposal, treatment or transport that it arranged for occurred before April 1, 2001. CERCLA §107(o), 42 U.S.C. §9607(o).

- **Municipal Solid Waste Exemption.** This new exception may apply for municipal solid waste at National Priority List sites if the PRP is a “an owner, operator, or lessee of residential property” from which the waste came, and is either a small business concern that employs less than 100 persons, or a charitable organization qualified under Internal Revenue Code §501(c)(3). CERCLA §107(p), 42 U.S.C. §9607(p).
- **Contiguous Property Defense.** Under this exemption, a landowner is not liable if its land is contaminated by another property that is “contiguous to or otherwise similarly situated with respect to” the property, and they (1) “did not cause, contribute, or consent to the release or threatened release,” (2) are not related to or affiliated with the owner of the source property; (3) “take reasonable steps” to respond to the release, including stopping any “continuing release” or “threatened future release” and limit “human, environmental or natural resource” exposure, which for properties above contaminated aquifers need not include “ground water investigations” or installation of “ground water remediation systems”; (4) fully cooperate with response efforts; (5) comply with land use and institutional controls; (6) make all required spill or release reports or notices; (7) qualified as an “innocent purchaser” to the extent it conducted “all appropriate inquiry” under CERCLA §101(35)(B), 42 U.S.C. §9601(35)(B), and did not know the property was contaminated from an off-site source. CERCLA §107(q), 42 U.S.C. §9607(q). However, if the owner did know the property was contaminated, the owner can still

qualify for the *bona fide* prospective purchaser defense described below. CERCLA §107(q)(1)(C), 42 U.S.C. §9607(q)(1)(C)

- ***Bona Fide Prospective Purchasers.*** This defense applies to purchasers or their tenants who acquired a facility after the law was enacted on January 11, 2002, and they meet the following requirements: (A) all disposal of hazardous substances occurred prior to acquisition; (B) conduct “all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards” prior to acquisition under CERCLA §101(35)(B)(ii,iv), 42 U.S.C. §9601(35)(B)(ii, iv), or in the case of residential property “a facility inspection and title search that reveal no basis for further investigation,” (C) make all required spill or release reports or notices; (D) “take reasonable steps” to respond to the release, including stopping any “continuing release” or “threatened future release” and limit “human, environmental or natural resource” exposure; (E) fully cooperate with response efforts; (F) comply with land use and institutional controls; (G) comply with any EPA “request for information or administrative subpoena”; and (H) are not related to or affiliated with a PRP. CERCLA §107(r), 42 U.S.C. §9607(r). There is no requirement that the *bona fide* purchaser not know about the contamination. However, a *bona fide* purchaser maybe subject to a “windfall lien” for “unrecovered response costs” of the United States that increase the property value, which is payable at the time of eventual sale by the purchaser, but cannot “exceed the increase in fair market value of the property attributable to the response action.” *Id.*

## **B. NEW YORK STATE SUPERFUND**

New York's "Inactive Hazardous Waste Disposal Sites" laws, commonly referred to as "State Superfund," are set forth at ECL Article 27, Title 13 and Public Health Law §§1389-a, *et seq.* Many other states have similar statutes. Significant changes were made to the law in 2003, including inclusion of "hazardous substances" defined pursuant to ECL Article 37 within the definition of "hazardous waste" subject to the program. ECL §27-1301(1).

Under the New York State Superfund Law, if DEC finds, after a hearing, that an inactive hazardous waste disposal site presents a "significant threat to the environment," it can order and implement cleanup efforts at the site, using money from the State Superfund, and later seek recovery of its costs from responsible parties. ECL §27-1313(3,4,5). Regulations set forth at 6 N.Y.C.R.R Part 375 govern this program, and were amended in late 2006. The regulations provide guidance for determination of what poses a significant threat, 6 N.Y.C.R.R §375-2.7, and remedial measures, 6 N.Y.C.R.R §§375-1.8, 375-2.8, and soil cleanup objectives. 6 N.Y.C.R.R Subpart 375-6.

Generally, if it believes a site may pose a "significant threat," DEC will require a Preliminary Site Assessment. If this indicates the need for further investigation, a further investigation may be done, and if necessary, an RI/FS and remedial work. While this work may be accomplished by DEC, often it enters into consent order by which a responsible party promises to do the work.

DEC annually publishes a Registry of Inactive Hazardous Waste Disposal Sites. *See* ECL §27-1305. By law, sites are ranked from 1 (imminent danger) to 5 (no further action required), ECL §27-1305(4)(b). The New York State Department of Health is also involved in

the program, and has primary authority for sites that present “a condition dangerous to life or health.” Public Health Law §1389-b(2). There is a process for filing petitions to delist or reclassify a site. 6 N.Y.C.R.R. §375-2.7(f).

While the statute does not define “responsible parties,” 6 N.Y.C.R.R. §375-2.2(i) identifies the persons who can be held responsible in an administrative proceeding brought by DEC, generally being the past and present owners and operators, waste generators and transporters liable under CERCLA. While there is no provision for a private right of action under the State Superfund Law, indemnification and contribution claims may be available under common law theories. *Volunteers of America of Western New York v. Heinrich*, 90 F.Supp.2d 252 (W.D.N.Y. 2000).

ECL §27-1313(4) allows “statutory or common law defenses.” ECL §27-1323, added in 2003, provides defenses that generally parallel the pre-2002 CERCLA defenses, including defenses for acts of God or war, acts of third parties, and innocent purchasers, and exemptions for lenders, fiduciaries, and municipalities that involuntarily acquire ownership or control and do not participate in development unless they caused or contributed to the release.

The 2003 amendments to the ECL also added the Brownfield Cleanup Program, set forth in Title 14 to ECL Article 27. The law provides a process for voluntary cleanup of sites contaminated with hazardous waste or petroleum, rewarding the volunteer with a liability release and tax credits. Furthermore, extensive funding through the Clean Air/Clean Water Bond Act of 1996 and liability releases are available for municipal “environmental restoration projects,” pursuant to Title 5 of ECL Article 56.