

Environmental Transactions and Brownfields Committee Newsletter

Vol. 6, No. 2

July 2004

MESSAGE FROM THE CHAIR

Pamela E. Barker

In this edition of our committee newsletter we review three situations that test the boundaries of liability for contaminated site cleanups. In the first situation, the California courts explore the potential liability of a person who neither owns nor possesses or controls a contaminated property, but who may have “assisted in the creation of a nuisance.” In the second situation, Canadian courts deal with the issue of whether amalgamated companies inherit the environmental liabilities of their pre-merger entities where the amalgamation was governed by a special purpose statute that purports to limit liability. Finally, our third situation takes place in Illinois and examines whether a party complying with the requirements of a state voluntary cleanup program can nevertheless face a RCRA citizen suit action seeking injunctive relief for the same conditions at the same site.

As these cases demonstrate, the law of liability for contaminated sites continues to evolve (and potentially expand) despite efforts to clarify liability issues and provide a level of certainty to potentially responsible parties regarding liability. As the cases also demonstrate, efforts to fix or narrow the scope of liability for contaminated sites will be met by creative and innovative theories designed to

expand that liability and bring more parties into the liability scheme.

As always, the Environmental Transactions and Brownfields Committee appreciates the efforts of those who have contributed to this newsletter and we welcome any ideas for future articles. Remember, this is your committee and you get more out of it when you actively participate.

We hope you will find this newsletter helpful and informative. Enjoy the rest of the summer.

PERCOLATING THEORIES OF LIABILITY IN CALIFORNIA

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In California, one of the most powerful tools to facilitate brownfield redevelopment is the Polanco Redevelopment Act (or “Act,” see, Calif. Health and Safety Code sections 33459 et seq.). This Act was adopted by the state in response to a redevelopment agency that had been named as a responsible party for a historic gas station release under property that it owned for a brief period of time. In reaction,

**Environmental Transactions and
Brownfields Committee Newsletter
Vol. 6, No. 2, July 2004
Richard G. Opper and Kathy Robb,
Co-Editors**

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This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 321 N. Clark St., Chicago, IL 60610.



the legislature created the Act to protect and empower redevelopment agencies. At its essence, the Act provides that redevelopment agencies can undertake clean-ups of blighted property within their project areas, and if they follow certain procedural steps, they then have the right to seek cost recovery under CERCLA-like principles or under theories of liability the state adopted in its Water Code. If a redevelopment agency undertakes environmental work pursuant to an approved plan, concurred in by a state agency, upon successful conclusion of the work it receives immunity for the releases that were identified in the plan. The Act therefore provides a powerful cost recovery tool to redevelopment agencies as well as a mechanism for bestowing state law immunity on appropriately mitigated properties.

The basis for liability under this Act is, as stated earlier, twofold. State law borrows heavily from federal law in California with regard to its definition of “responsible parties” as that term is used in CERCLA. State law also provides an independent basis for liability under the Water Code for people who are deemed to be “dischargers.” Dischargers are defined as being “any person . . . who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the State and creates, or threatens to create, a condition of pollution or nuisance. . . .” (Water Code section 13304(a)).

A ground breaking opinion was filed by the California Court of Appeals in late May of this year – addressing the scope of liability under the Polanco Act as it is encompassed in the Water Code. In the underlying case, the city of Modesto asserted that the Water Code definition of “discharger” was not limited to those defendants who exercised authority or control over onsite activities, but that courts should also apply the traditional tort

“substantial factor” test in determining who has “caused” a discharge and is thereby a “discharger” for purposes of Water Code section 13304. Relying on this theory the city initiated cost recovery litigation for a regional release of perchloroethylene (PERC) and alleged causes of action for cost recovery against defendants that included manufacturers and suppliers of solvents and equipment to dry cleaners.

The trial court initially granted summary adjudication against the city on the Polanco Act cause of action, concluding that most of the defendants neither discharged waste nor caused or permitted waste to be discharged. However, the Court of Appeals, in an issue of first impression, reversed and remanded (*City of Modesto Redevelopment Agency et al v. Dow Chemical Co. et al*, Lexsee 2004 Cal App Lexis 831, May 28, 2004.).

The court analyzed the Water Code and its definition of “discharger” in light of traditional common law analysis relating to nuisance. The court stated that where legislation does not expressly purport to depart from or alter the common law, it will be construed in light of common law principles bearing on the same subject, and referred to the opinion in *Leslie Salt Co. v. San Francisco Bay Conservation Commission* (1984) 153 Cal App 3rd 605 for authority. The court went on to note that under the common law, a landowner’s liability for a public nuisance could result from a failure to act as well as from affirmative conduct, and therefore, in the *Leslie Salt* case, the court concluded that a landowner could be liable for illegal or undocumented fill that others may have placed on their property even if the landowner was not actively involved in creating the condition that caused harm, and even if it did not know of or intend to cause such harm.

The court determined, therefore, that the Water Code should be interpreted in a manner

harmonious with the common law of nuisance, and its assignment of liability to those who discharge wastes into the waters of the state. Because such liabilities stem from nuisance, which leads to liability under the Water Code, which leads to an assertion of liability under the Polanco Act, the liability analysis does not hinge on whether defendant owns, possesses or controls the property, nor on whether he or she is in a position to abate the nuisance; the critical question is whether the defendant created *or assisted in the creation* of the nuisance [emphasis added].

Although such a holding has significant implications for brownfield redevelopment in California (at least that brownfield redevelopment which requires cost recovery against parties who may have contributed to conditions of pollution or nuisance), it is not unlimited liability. For example, California law has determined that nuisance liability cannot be found or created merely by asserting a “defective product theory,” noting other state court decisions have held that allowing plaintiffs to recover on a nuisance theory for defective products “would become a monster that would devour in one gulp the entire law of torts” However, the court did conclude that those who create or assist in creating a system that results in the unauthorized disposal of hazardous wastes, or who provide instructions on the disposal of those wastes, can be liable under the law of nuisance. At a minimum, active steps must be taken for the theory to survive demurrer. Allegations that liability flows from having supplied hazardous substance for use likely are insufficient, but if it is at liability alleged to flow from *instructing users* to dispose of hazardous wastes in an unsafe manner *or creating a system* that would result in improper disposal of hazardous wastes, viable cause of action can be stated. In the instant case, the allegations were that certain defendants were liable merely for manufacturing or selling solvents, with knowledge of the hazards of those

substances, without alerting dry cleaners to proper methods of disposal. The court therefore concluded that any “failure to warn” was not an activity directly connected with the disposal of solvents, and decided that while those who took affirmative steps directed toward the discharge of solvent wastes may be liable under the Act, those who merely placed solvents in the stream of commerce without warning of the dangers of improper disposal are not liable under that section of the Water Code.

Where one stands with regard this decision depends, as is so often the case, on where one sits. If one sits before the bar at the plaintiffs table, a decision that broadens the scope of responsible parties is a benefit to the redevelopment of brownfields, which are often stymied for lack of resources from responsible parties to investigate and mitigate on site conditions. Additional potential responsible parties create more potential for successful cost recovery and, ergo, more clean properties. If one sits at the defendant’s side of the table, this opinion gives one a shudder as the growing web of liability in California has grown yet another circle to encompass those who actively participate in “systems or instructions” that may lead to improper disposal of hazardous waste. While many brownfield proponents in California still believe that a no fault fund for addressing PERC releases would be the optimal method to address this problem, in the absence of such a fund counsel are forced to try creative theories under existing law. This is one example of such a creative theory succeeding.

CORPORATE AMALGAMATIONS PURSUANT TO SPECIAL PURPOSE LEGISLATION PURPORTING TO LIMIT LIABILITY: WILL CANADA’S SUPREME COURT PROVIDE A DEFINITIVE ANSWER?

Radha Curpen and Shari Elliott

In agreeing to hear the appeal of a British Columbia case, the Supreme Court could choose to either narrowly focus on interpreting the province’s Waste Management Act or face, head on, the issue of whether amalgamated companies inherit the environmental liabilities of their pre-merger entities where the amalgamation was governed by a special purpose statute that purports to limit liability.

Canadian companies constituted under special purpose legislation, especially those contemplating a merger or acquisition in the foreseeable future, will be interested in the outcome of a British Columbia case that is heading to the Supreme Court of Canada. *North Fraser Harbour Commission v. Environmental Appeal Board* involves the reach of the “polluter pays” principle in the context of amalgamations under special statutory schemes.

On one level, the case deals with interpreting a provision of B.C.’s Waste Management Act, but a broader issue is at stake: whether an amalgamated corporation inherits the environmental liabilities of its predecessor companies where the amalgamation occurred under a statute purporting to limit such liabilities. The Supreme Court’s decision will either relieve the amalgamated corporation from the environmental remediation obligations of a predecessor company by allowing reliance on the statute authorizing the amalgamation, or it will lead companies contemplating an amalgamation pursuant to legislation supposedly limiting liability to entertain second thoughts.

12TH SECTION FALL MEETING

*October 6-10, 2004
San Antonio, Texas*

SAVE THE DATE!

For approximately 65 years, a property at 9250 Oak Street, near the Fraser River in Vancouver, was used by various companies to manufacture roofing, paving and building materials. One of the previous owners was supplied with coal tar from B.C. Electric Corporation for several decades. The coal was transported to the site by truck, rail and barge. Over the next 30 years, the Oak Street property changed ownership several times.

During this time, the B.C. government acted to gain control of the generation and sale of electricity in the province. In 1965, the B.C. Hydro and Power Authority (a newly created Crown corporation) was amalgamated with B.C. Electric and the B.C. Power Commission. The amalgamation was authorized under the B.C. Hydro and Power Authority Act, 1964. This Act entitled the corporations to amalgamate “in any manner” and they did so according to an Amalgamation Agreement which was “ratified and confirmed” by the B.C. legislature in subsequent legislation. B.C. Electric was declared to be dissolved. The Amalgamation Agreement contained a clause providing that the amalgamated company would be liable “for all duties, liabilities and obligations” of each of the amalgamating companies which existed “*immediately before the amalgamation.*” [emphasis added]

On May 20, 1998, a B.C. Deputy Director of Waste Management found the property, adjacent lands and waters were severely contaminated as a result of leakage or deposit of coal tar that had been placed on the site by B.C. Electric between 1920 and 1957. The remediation order issued by the Deputy Director was made against the current owner, North Fraser Harbour Commission, and several previous owners who were held to be “responsible persons” under the Waste Management Act. There was no dispute that the property was a contaminated site within the meaning of the act.

Two of the previous owners, Canadian Gypsum Company and General Chemical Canada Ltd., sought to have B.C. Hydro named as a “responsible person” in the order for the role of B.C. Electric in the contamination. Among other things, Section 26.5 of the province’s Waste Management Act states that a “responsible person” is someone who produced or transported a substance and by contract or otherwise “caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site.”

In deciding that B.C. Electric could not be a “responsible person” for depositing coal tar on the site that led to the contamination, the Deputy Director relied on the Amalgamation Agreement which stated that B.C. Hydro would be liable “for all duties, liabilities and obligations” of each of the amalgamating companies, “*immediately before the amalgamation.*” [emphasis added] Accordingly, the Deputy Director decided that the liabilities of B.C. Hydro were limited to a certain point in time; that is, the time immediately before the amalgamation. He found that B.C. Hydro could not be liable for the remediation order as it only inherited liabilities from B.C. Electric that existed immediately before the amalgamation. Since the act did not exist at the time of the amalgamation, the liability could not exist and therefore it was not assumed by the amalgamated corporation.

Environmental Appeal Board – Liability Flows to Amalgamated Entity

In a hearing before the Environmental Appeal Board, the appellants, North Fraser Harbour Commission and General Chemical Canada Ltd., argued that liability for contamination should flow to B.C. Hydro because a leading case based on the former Canada Corporations Act had similar wording to the

Amalgamation Agreement. The appellants further argued that B.C. Electric lived on in B.C. Hydro and that it had assumed all of B.C. Electric's liabilities as a "responsible person" under Section 26.5 of the province's Waste Management Act.

The Appeal Board (Board) considered case law on the meaning of "amalgamation" and refused to accept that B.C. Electric effectively ceased to exist when it amalgamated with B.C. Hydro. Therefore, it ruled that the company could not avoid liability for the past acts of a part of itself. The Board also looked to the Amalgamation Agreement to ascertain whether it included a relevant statutory limitation of liability. The Board determined that the phrase "immediately before the amalgamation" did not bar liability in this case. Since the liabilities of B.C. Electric simply flowed through to B.C. Hydro, the latter could be a "responsible person" under the Waste Management Act.

B.C. Supreme Court Agrees

B.C. Hydro filed an application for judicial review with the B.C. Supreme Court seeking an order to quash the Board's decision. Justice Low reviewed the circumstances surrounding the amalgamation and essentially agreed with the Appeal Board that the phrase "immediately before the amalgamation" did not limit legal responsibility. Consequently, the entities were found to live on in B.C. Hydro and, accordingly, it could be a "responsible person" and liable for remediation costs.

B.C. Court of Appeal Disagrees

B.C. Hydro appealed the B.C. Supreme Court's decision to dismiss its application for judicial review of the Environmental Appeal Board's decision. Again, the main issue was whether the Amalgamation Agreement prevented the obligations of the "polluter pays" principle from attaching obligations to B.C. Electric that flowed through to B.C. Hydro.

The Court of Appeal allowed the appeal, reinstating the original decision of the Deputy Director that B.C. Hydro could not be liable for the historical contamination. Justice Newbury noted that "this was no ordinary amalgamation". Writing for the majority, she gave the words "immediately before the amalgamation" their plain and literal meaning, and concluded that B.C. Hydro could not have inherited any obligations other than those appearing on the balance sheet prior to amalgamation. Furthermore, she concluded that it would have been in B.C. Hydro's interest, and in the public interest, not to have the amalgamated corporation assume more obligations than intended. The amalgamation was not carried out under the former B.C. Companies Act, presumably so that the provisions which would have caused the environmental liability of B.C. Electric to flow to B.C. Hydro would not apply. Justice Newbury also concluded that the categories of "responsible persons" under Section 26.5 of the Waste Management Act, did not include corporate bodies that had ceased to exist.

Justice Rowles, in a dissenting opinion, found "nothing particularly unusual about the words 'immediately before the amalgamation'" and found liability for remediation could attach to B.C. Electric and flow through to B.C. Hydro. One of the previous owners, General Chemical Canada Ltd., and the current owner, North Fraser Harbour Commission, sought leave to appeal to the Supreme Court of Canada.

Implications

The Supreme Court of Canada decided on March 25, 2004 to grant leave to appeal. It will be interesting to see whether Canada's top court chooses to narrowly focus on the proper interpretation of the Waste Management Act or if it will confront the issue of whether companies who amalgamate under special purpose legislation necessarily inherit the

environmental liabilities of the corporation with which they amalgamate even in the face of legislative intent to the contrary set out in the provisions governing the amalgamation.

The authors would like to thank Marie-Eve Rehayem, an articling student, and Benjamin Perrin, a summer law student, for their research assistance. This article originally appeared in Osler Updates, a publication of Osler, Hoskin & Harcourt LLP. This memorandum is a general overview of the subject matter and cannot be regarded as legal advice.

LIKE TO WRITE?

The Environmental Transactions and Brownfields Committee welcomes the participation of members who are interested in preparing this Newsletter. If you would like to lend a hand by writing, editing, identifying authors, or identifying issues please contact the one of the co-editors:

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SPILLANE V. COMMONWEALTH EDISON COMPANY: EXPOSING THE LIMITATIONS OF LIABILITY PROTECTION UNDER STATE VOLUNTARY CLEANUP PROGRAMS

Harry Weiss

No good deed goes unpunished. That is one of the messages contained in the recent ruling in *Spillane v. Commonwealth Edison Co.*, 291 F.Supp. 728 (N.D. Ill. 2003). In *Spillane*, the court ruled that a party currently complying with the requirements of a state voluntary cleanup program can nevertheless face a Resources Conservation and Recovery Act (RCRA) citizen suit seeking injunctive relief for the same conditions at the same site..

The other less obvious, but no less important, message is that there continues to be more than a theoretical risk of residual liability regardless of the protections offered by state Brownfield voluntary cleanup programs. The reminder comes as states continue to address the residual risk of federal liability at voluntary cleanup sites through negotiated understandings with the Environmental Protection Agency (EPA). One example comes from Pennsylvania, where the EPA and Pennsylvania Department of Environmental Protection (Department) recently entered into a Memorandum of Agreement (MOA), under which participants in Pennsylvania's voluntary cleanup program can enjoy, in some situations, a release not only from further liability under the state cleanup regime, but also from federal cleanup requirements.

Of course, the *Spillane* decision should not be interpreted as a blueprint for circumventing the liability protections of state voluntary cleanup programs; and, thus, as an end to state voluntary cleanup programs as we know them. Instead, the *Spillane* case probably will be the exception to the rule. After all, aside from the fact that *Spillane* involved the cleanup of a high profile site, not many citizens are looking

to turn a run of the mill cleanup of an urban brownfield into a RCRA/federal law referendum on the quality of the cleanup effort. Moreover, *Spillane* could very well be limited to its particular facts, where citizens unhappy with the progress of a voluntary cleanup can use the citizen suit vehicle to remedy inadequate cleanup efforts.

Indeed, the decision in *Spillane* has not appeared to have created a national cry for voluntary cleanup program reform. Most participants in such programs continue to get significant relief with relatively modest downstream risk. And even that risk appears to be diminishing through state/federal cooperative efforts, with the Region 3/Pennsylvania effort leading the way.

The *Spillane* Decision

In *Spillane*, the court refused to dismiss a private RCRA action against two utility companies engaged in the self-funded, voluntary cleanup of the Barrie Park site in Cook County, Illinois, pursuant to the Illinois Site Remediation Program (ISRP). There was no dispute over the necessity of the cleanup. Instead, plaintiffs claimed that the utilities underrepresented the area needing remediation and that the cleanup was exacerbating the contamination at the site. Defendants moved to dismiss on several grounds. Defendants raised a host of abstention arguments, primarily based upon the existence of a parallel state court proceeding, in which the plaintiffs brought tort and nuisance claims against the utilities and others. The court refused to dismiss the case upon any of the abstention arguments, in large part because of the federal courts' exclusive jurisdiction over RCRA citizens' suits.

The utilities also sought to dismiss the case on the ground that defendants' participation in the ISRP precluded a finding that conditions at the site constituted an "imminent and substantial

endangerment," a key component of a citizen suit under RCRA. Interestingly, it is not clear whether the utilities asserted that Illinois' jurisdiction over the site pursuant to the ISRP constituted diligent prosecution. In any event, the court rejected the utilities' argument and ruled that participating in the ISRP did not preclude a simultaneous federal suit. The court emphasized that the existence of an ongoing cleanup does not as a factual matter moot the issue of whether there existed an "endangerment," as "part of the harm alleged arises directly from the cleanup activities."

A Solution?

One could ask whether the decision in *Spillane* might have been different had the utilities already exited the state remediation program, or had the Illinois Environmental Protection Agency ordered the cleanup. Would citizens nevertheless have a second shot to critique the cleanup? Perhaps even more intriguing would be a situation where the state voluntary cleanup program's standards were recognized by the federal government as satisfying federal cleanup standards? That situation is unfolding in Pennsylvania, where EPA Region 3 and the Commonwealth of Pennsylvania recently reached a MOA concerning cleanups under Pennsylvania's highly successful Land Recycling and Remediation Standards Act (known as "Act 2"). The text of the MOA, entitled the "One Cleanup Program," can be found at the Pennsylvania Department of Environmental Protection Web site at <http://www.dep.state.pa.us/dep/deputate/airwaste/wm/landrecy/facts/EPAMOA.htm>.

The MOA generally provides, with some notable exceptions, that volunteers who successfully complete the Act 2 process may have also been deemed to satisfy federal regulatory cleanup standards. To create a unified regime of liability, and of liability protection, the EPA has agreed to take a more

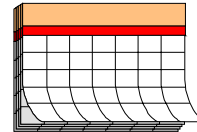
active and supervisory role in the remediation process under the Act 2 program. What this enhanced degree of state/federal coordination means, practically speaking, is that successful completion of a cleanup under Act 2 should theoretically insulate the parties undertaking the remediation from further cleanup liability under federal cleanup statutes, such as the Comprehensive Environmental Compensation and Liability Act, the PCB and asbestos cleanup provisions of the Toxic Substances Control Act, and RCRA.

Complicating this apparent panacea, in addition to the somewhat vague terms of the MOA, are facts like EPA's retention of primacy in Pennsylvania for the RCRA corrective action program. Additionally, it is a fair reading of the MOA that it does not offer protection against the situation presented in *Spillane*: when parties have not completed remediation efforts and exited the state voluntary cleanup program. Also, there is no language in the MOA to suggest that citizens would be barred from instituting a suit after a cleanup is completed. As a practical matter, how such plaintiffs would establish the existence of a imminent and substantial endangerment after not one, but two, agencies okayed the work could be difficult. Finally, the MOA contains a host of exceptions, and does not apply to, for example, sites that are on, or proposed for listing on, the National Priorities List, or sites that are subject to RCRA enforcement orders.

Obviously, time will demonstrate the impact of the Pennsylvania/EPA MOA. At a minimum, a few sites must be run through the MOA process to determine the scope and efficacy of the MOA. In the meantime, it is fairly certain that while voluntary cleanup programs continue to thrive, they may always have limitations, as the decision in *Spillane* clearly demonstrates.

AMERICAN BAR ASSOCIATION SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

Calendar of Section Events



ABA Annual Meeting

Aug. 5-11, 2004
Atlanta

12th Section Fall Meeting

Oct. 6-10, 2004
San Antonio

Environmental Sciences

Nov. 4-5, 2004
Dallas

ABA Midyear Meeting

Feb. 9-15, 2005
Salt Lake City

23rd Annual Water Law Conference

Feb. 24-25, 2005
San Diego

34th Annual Conference on Environmental Law

March 10-13, 2005
Keystone, Colorado

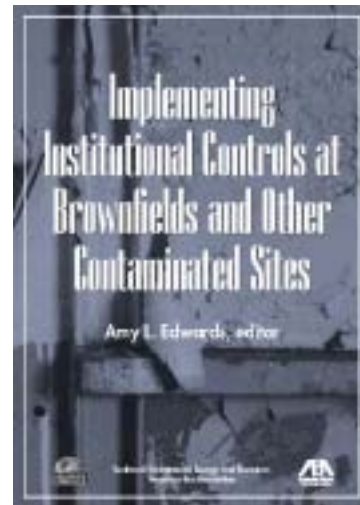
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Implementing Institutional Controls at Brownfields and Other Contaminated Sites

Amy L. Edwards, editor

The critical role of institutional controls in brownfields cleanups has recently been highlighted by the 2001 Brownfields Amendments, and as a result a key element in the future success of brownfields redevelopment will rest on understanding and using risk-based corrective action, including institutional and engineering controls. ***Implementing Institutional Controls at Brownfields and Other Contaminated Sites***, the first book on this important and evolving topic, provides a grounding in the history and current use of institutional controls. Emphasizing federal, state and public perspectives, this compendium of articles written by over 43 experts in the field offers real estate and environmental practitioners a state-of-the-art review of a subject that is integral to the success and growth of brownfields redevelopment projects.



Beginning with an overview of institutional controls, Part I examines some of the emerging tools that can be used in brownfields redevelopment, including custodial trusts, one-call systems, and web-based tracking systems, and discusses the benefits of the proposed uniform model law on environmental covenants (UECA). Part II addresses the federal perspective, including the statutory and regulatory framework for the use of institutional controls in CERCLA and RCRA. The state perspective is covered in Part III, looking at the varying use of these controls in several states. "Experience in the Field" is the focus of Part IV, which reviews how these controls have been used, highlights recent case studies, and draws conclusions on what can be learned from these successes and failures. The appendices provides quick, one-source access to relevant documents and forms, including the flow chart from the ASTM *Standard Guide on the Use of Activity and Use Limitations, Including Institutional and Engineering Controls* (E 2091), final fact sheets from the EPA for site managers at Superfund and RCRA sites, guidance from the Dept. of Defense, and state documents referenced in the text.

2003 7 x 10 803 pages

Product Code: 5350098

Price: Section of Environment, Energy, and Resources members \$135.95; Regular \$149.95

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