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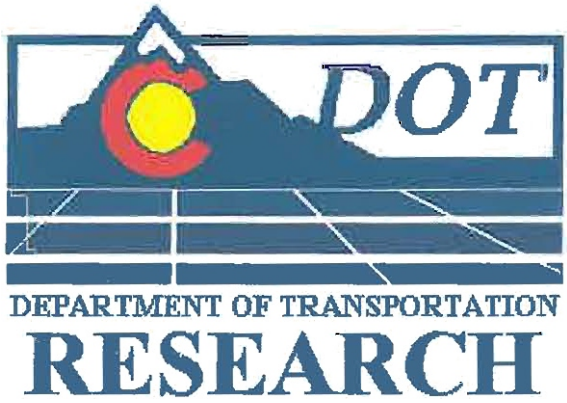
Final Report

Environmental Liability Study

Joshua B. Epel



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COLORADO DEPARTMENT OF TRANSPORTATION
RESEARCH BRANCH

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Environmental Liability Study

by

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16. Abstract

The Study examines different mechanisms by which CDOT can either limit or avoid incurring cleanup costs and liabilities or, if that course is unavailable, recover those cost which must be incurred. The key to this approach is information, obtained as early in the acquisition process as possible. Accurate information about site conditions will allow CDOT to avoid severely contaminated properties, if possible, and to properly value those properties that must be acquired. To this end, the Study recommends that a training program for CDOT appraisers be established where, with the help of trained environmental professionals, CDOT personnel can develop a consistent and defensible methodology to appropriately value contaminated sites to be acquired by the Agency.

Implementation
The recommendation for CDOT personnel training was not deemed significant by department top management. Consequently implementation of the study findings will not be conducted.

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TABLE OF CONTENTS

INTRODUCTION

The Colorado Department of Transportation ("CDOT," the "Department," or the "Agency") is frequently confronted with unanticipated environmental contamination that impacts the cost and timeliness of completion of highway projects. CDOT initiated this Environmental Liability Study to examine methods of limiting the potential liability of the Agency when environmental contamination is encountered, and of expediting cleanups (when necessary) and recovering the costs of those cleanups in the most cost-effective and efficient manner possible.

The Research Approach established three primary areas of study:

A. Research state and federal laws or regulations that would enable CDOT to recover costs incurred for cleanup of distressed properties during and after roadway construction.

B. Research and provide recommendations for an "agreement" or mechanism to establish early contact with owners of contaminated properties within CDOT's proposed project limits.

C. Research and recommend a mechanism with the Office of Oil Inspection and the CDPHE for compelling cleanup of identified contaminated properties.

Findings

Part I summarizes the mechanisms available to CDOT to pursue a cost recovery action against owners of contaminated property when CDOT incurs costs in cleaning up the property. While the cost recovery action is readily available to CDOT, through the office of the Attorney General, the need for the Agency to complete construction of a roadway project within a limited time frame reduces the usefulness of the cost recovery action to those properties where

completion of the project is not time critical. Section D of Part I evaluates and proposes reducing the market value of properties to reflect the diminution of property value caused by contamination as the most cost effective method of recouping the cost of cleanup.

With regard to topic C, noted above, the Study concluded that CDOT does not need to establish a mechanism with either the Oil Inspectors Office or CDPHE to pursue cost recovery actions. The reason for this conclusion is twofold. First, the Oil Inspection Section already has procedures in place for cost reimbursement under which CDOT's primary concern would be making certain that appropriate due diligence is performed prior to the acquisition of property. Second, the recovery of costs for cleanup (via CERCLA or by some other means), while available, is more cumbersome than alternative mechanisms, discussed below, for avoiding incurring costs in the first place. Therefore, while describing the process for pursuing cost recovery under CERCLA when such cost recovery is necessary, attention is devoted to appropriate pre-acquisition evaluation of properties to help ensure that CDOT will be able to avoid severely contaminated properties and to properly value those properties for which acquisition is necessary. The study also identifies methods to ensure that evaluations and cleanups undertaken by CDOT can proceed as quickly and as cost-effectively as possible and protect against actions at contaminated properties that could result in a loss of the limited CERCLA liability protection discussed in Part II.

PART I - RECOVERING THE COSTS OF CLEANUP

Part I of this report discusses practical considerations for the use the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§9601, *et seq.* as a tool to obtain cost recovery for cleanups on contaminated properties and explores an alternative mechanism for recovering those costs. CERCLA can impact CDOT in two distinct ways. CERCLA provides a means of recovering cleanup costs from present and past owners of contaminated property, present and past operators of facilities causing contamination, and generators, transporters, and other parties who arranged for the disposal of hazardous wastes at the contaminated property. The requirements for recovering cleanup costs under CERCLA are discussed in Section B, below. This aspect of CERCLA can be a two-edged sword, however, since it can also potentially expose CDOT to liability for cleanup costs. CERCLA does contains some liability protections for CDOT when it acquires contaminated property "involuntarily," provided that the property is appropriately managed. Potential CERCLA liability and how it can be minimized is discussed in Part II, Section A, below.

A. Compelling Cleanups under CERCLA

Neither CDPHE, acting through the office of the Attorney General, nor CDOT can compel a property owner to clean up contaminated property through CERCLA. The power to order a cleanup or to seek injunctive relief pursuant to CERCLA Section 106, 42 U.S.C. §9606, is reserved exclusively to the United States. *State of Colorado v. Idarado Min. Co.*, 916 F.2d 1486, 1494ff (10th Cir. 1990). There are no CERCLA powers under which the State (either CDOT or CDPHE) can seek injunctive relief in such a case.

Although CDOT cannot compel a cleanup, it can minimize or eliminate its costs with

respect to such a cleanup. First, the Department can make a demand on the prior owner, giving them the option of cleaning up the property themselves or of facing a cost recovery action. If this demand is rejected, CDOT can then either seek a declaratory judgment against the owner for future costs of response at the site or can clean up the site and then seek recovery of its response costs under CERCLA Section 107, 42 U.S.C. §9607. The most common scenario would be a combination of the two.

CDOT would probably desire to begin cleanup immediately, since the Department would need to move forward with whatever project led to the condemnation in the first place. Further, as the current owner, CDOT would be under an obligation to prevent any releases from taking place from the site, which might also require that they begin cleanup if ongoing releases are evident. While cleanup is in progress, CDOT can pursue the prior owner(s) and other responsible parties for recovery of all response costs to date, and for a declaration of liability for future response costs by means of a CERCLA Section 107 cost recovery action.

B. The Elements of a CERCLA Cost Recovery Action

In order to successfully bring an action pursuant to CERCLA Section 107, 42 U.S.C. §9607, the following elements must be pled to state a prima facie case for liability. First, the contaminated property in question must be a "facility," as that term is defined in Section 101(9), 42 U.S.C. §9601(9). "Facility" is very broadly defined under CERCLA, essentially referring to any place where hazardous materials are located.

> The term "facility" means (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.

This requirement is generally quite easily satisfied when dealing with most contaminated properties.

Second, there must be a "release" or a "threat of release" of hazardous substances from the facility. "Hazardous substance" is defined to include all wastes designated as hazardous under CERCLA, RCRA, the Clean Water Act, and the Clean Air Act. 42 U.S.C. §9601(14). Aside from a few notable exceptions (e.g. petroleum products suitable for use) this definition will generally include all hazardous materials likely to be found on a site. "Release" is defined in a similarly broad fashion, to include

> any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant). 42 U.S.C. §9601(22).

Third, the "release" or "threat of release" must cause CDOT to incur necessary costs of response. These costs may include investigatory costs, sampling, consultant's fees, limited attorney's fees (non-litigation fees; e.g., costs associated with the identification of parties responsible for the contamination) and actual clean-up costs. Some actual costs *must* have been incurred as a result of the release prior to bringing a CERCLA Section 107 action. The costs at first may be very small (perhaps only the costs associated with preliminary environmental assessment) but may not be merely the anticipation of some future costs down the road.

In connection with costs, it should be pointed out that in order for costs to be recoverable, they must be incurred "not inconsistent with the National Contingency Plan" ("NCP"). 42 U.S.C.

§107(a)(4)(A). When federal and state governments conduct cleanups, a rebuttable presumption exists that the costs are "not inconsistent" with the NCP and the party fighting liability for such costs must show, by a preponderance of the evidence, that the costs are not consistent with the NCP.[1] *United States v. Hardage*, 982 F.2d 1436 (10th Cir. 1992), *cert. den.*, 510 U.S. 913.

Despite this presumption, it is important that CDOT substantially comply with the NCP in order to ensure that their costs may be recovered. Especially important are the NCP requirements for public review and comment on remedy selection and implementation. NCP requirements can apply to all phases of a response action, even before litigation is contemplated. As an example, where responsible parties are known, the NCP requires that the agency determine if they are willing and capable of conducting a cleanup before any agency-led cleanup is begun. 40 C.F.R. §300.415(a)(2). The requirements for NCP consistency are addressed in Section C below.

Finally, the party against whom recovery of response costs is sought must fall within one of the four categories of "potentially responsible persons," ("PRPs") as set forth in Section 107(a):

> (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 such 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

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[1]Although the statute only refers to costs incurred "by the United States Government or a State or an Indian Tribe," 42 U.S.C. §9607(a)(4)(A), the presumption should extend to State agencies so long as the agency is acting in a governmental role and rather than as a market participant. The presumption does not apply, however, to other political subdivisions such as municipalities. *See, e.g., Sherwin-Williams Co. v. City of Hamtramck*, 840 F.Supp. 470 (E.D. Mich 1993).

> 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. 42 U.S.C. §9607(a).

There are only three recognized grounds upon which a party may deny its liability as a PRP·

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by -
>
> (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. 42 U.S.C. §9607(b).

Therefore, the current landowner (including current lessees) of a contaminated property is generally liable under CERCLA unless they can show, by a preponderance of the evidence, that the release of hazardous substances was caused *solely* by an unrelated third party with whom they have no direct or indirect contractual relationship, or that they purchased the property without any reasonable knowledge (after commercially-reasonable due diligence) of the existence of contamination at the site and, since acquiring the site, has taken no action to cause or exacerbate

any release of hazardous substances. Previous landowners (and lessees) are also liable under CERCLA, if hazardous materials were disposed of on the site during the period of their ownership. In addition, parties other than current or previous owners may also have potential liability, including waste transporters and generators if they caused hazardous substances to be disposed of at the site. Therefore, if current landowners do not have the resources to reimburse CDOT for cleanup costs, other parties may be available to fill in that gap.

C. Consistency with the National Contingency Plan

The ability of a state agency to recover cleanup costs depends in large part on whether or not those costs are "not inconsistent with" the National Contingency Plan ("NCP"). Although the burden of demonstrating inconsistency lies with the party challenging the costs (when those costs are incurred by federal or state governments or their political subdivisions), adequate procedures should be put in place to assure that the agency "substantially complies" with the provisions of the NCP found at 40 CFR §300.

Following the procedures set out in the NCP can be a time-consuming process. For instance, the NCP requires that the present owner of the property be notified of CDOT's intention to clean up the process and be given an opportunity to conduct the cleanup themselves if they are capable (monetarily and technically) of doing so. 40 C.F.R. §300.415(a)(2). These delays make the option of cleaning up the property and then pursuing cost recovery less attractive where the project for which the property is required demands immediate action.

Other examples of the requirements under the NCP include conducting the cleanup in accordance with state worker health and safety requirements (40 CFR §300.150), maintaining adequate records to document cleanup costs (40 CFR §300.160), and following guidelines for

properly evaluating sites where removal or remedial actions are to take place (40 CFR §§300.410, 420). The Agency must identify the Applicable or Relevant and Appropriate Requirements ("ARARs") which will govern a particular cleanup (40 CFR §300.400(g)) and conduct an appropriate Remedial Investigation/Feasibility Study ("RI/FS") as part of the selection of a remedy for a particular site (40 CFR §300.430). If off-site disposal of hazardous substances is required as part of the cleanup, the Agency must follow the NCP procedures for planning and implementing such an off-site response (40 CFR §300.440).

Perhaps most importantly, the NCP requires a high degree of community involvement in cleanup activities. This involves supplying information on the nature of the site, conducting interviews with local political, community, and public interest groups to ascertain local concerns and information needs, and formulating a community relations plan for the site (40 CFR 300.430(c)(2)). In addition, opportunity must be afforded to the community for involvement in site related activities such as characterization and selection of remedy (40 CFR 300.430(c)(2)). This is not an exhaustive list and a standardized procedure should be put in place to guarantee that all cleanups substantially comply with the regulatory requirements.

These examples demonstrate that, while CERCLA can be a very useful mechanism for recouping cleanup costs, attempting to recover such costs under the Act can also be very expensive, time-consuming, and cumbersome. Under certain circumstances (e.g. where the cost of cleanup exceeds the value of the property as clean), a CERCLA Section 107 action may be the Agency's only available method for cost recovery. When possible, however, alternative mechanisms for recovering cleanup costs may be more attractive. One such alternative allows the department to offset anticipate cleanup costs through the proper valuation of contaminated

properties.

D. Valuation of Contaminated Properties

Colorado case law supports the proposition that the contaminated state of a site can be considered in determining the fair market value of the property for purposes of condemnation. In *State Dept. of Highways v. Copper Mountain, Inc.*, 624 P.2d 936 (Colo.App. 1981) the court held that the fair market value of land must be determined by the "price the property could be sold for on the open market." 624 P.2d at 938-39. Since environmental conditions do impact the open market price for property, the existence of contamination must be taken into account. Colorado Jury Instruction 36:3 ("Ascertainment of Value of Property Taken") states further that the value to be determined for property taken in an eminent domain action is:

> the reasonable market value for such property on [the valuation date]. "Reasonable market value" means the fair, actual, cash market value of the property. It is the price the property could have been sold for on the open market under the usual and ordinary circumstances, that is, under those circumstances where the owner was willing to sell and the purchaser was willing to buy, but neither was under an obligation to do so.

See also, Denver Urban Renewal Auth. v. Pogzeba, 558 P.2d 442, 443 (Colo.App. 1976). Such a view of fair market value has also been adopted by courts in other jurisdictions. *See, e.g., City of Olathe v. Stott*, 861 P.2d 1287 (Kan. 1993)(underground petroleum contamination necessarily affects the market value of real property and evidence of such contamination must be considered in an eminent domain action). Fair market value must be determined at the time of the taking. *Department of Health v. Hecla Mining Co.*, 781 P.2d 122, 126 (Colo.App. 1989).[2]

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[2]Section 38-1-114(2)(a), C.R.S. provides that, for purposes of highway acquisitions, the amount of compensation "shall remain subject to adjustment for one year after the date of the initial determination to provide for additional damages or benefits not reasonably foreseeable at the time of the initial determination." This provides another opportunity to adjust the market

With proper valuation of the property, therefore, the costs of remediation can be offset to some extent through a reduction in the compensation paid to the property owner. This approach is particularly valuable because the valuation can take into account not only contaminated properties that might fall under the CERCLA statute but also the much more prevalent petroleum contamination affecting properties with leaking above and underground storage tanks. It is imperative, however, that a clear distinction be made between the diminished value of a property due to contamination and the costs necessary to remediate contamination. Certainly cleanup costs factor into any determination of a contaminated property's fair market value to some extent, but the two figures are not necessarily the same (remediation costs may exceed diminution in value). Most importantly, while evidence of diminished value can be introduced in eminent domain actions, evidence relating to the costs of cleaning up the property faces greater uncertainty. *See, e.g., Department of Transportation v. Parr*, 633 N.E. 2d 19 (Il.App. 3 Dist. 1994) (remediation costs not admissible in eminent domain proceeding).

E. Recommendations

- The practical constraints of complying with the National Contingency Plan restrict the usefulness of CERCLA cost recovery actions to those situations where cleanup is not a time critical consideration or it represents the only viable mechanism for recovering cleanup

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value of the property if contamination is more severe than originally projected, provided that the existence of the additional contamination was not reasonably foreseeable. Remediation activities should not cause an upward adjustment to the fair market value of the property during this period due to the "rule against enhanced value," although the applicability of the rule to remediation costs ancillary to a highway project is uncertain. *See, e.g., Colorado Department of Health v. The Mill*, 887 P.2d 993 (Colo. 1994); *Department of Health v. Hecla Mining Co.*, 781 P.2d 122, 126 (Colo.App. 1989)(*citing Williams v. City and County of Denver*, 363 P.2d 171 (Colo. 1961)); *see also*, CJI 36:3; §24-56-117(1)(c), C.R.S.

costs.

- Acquisition of contaminated property is a sufficiently matured area that a properly educated appraiser could determine the fair market value of contaminated property. The first step in implementing this recommendation would be to identify environmental professionals with experience in assessing contaminated properties. A training program should be established which, with the assistance of the environmental professionals identified above, would give CDOT appraisers the necessary information to understand the complexities of environmental regulations, how those regulations affect the valuation of contaminated properties. A long-term relationship with such environmental professionals should also be established to develop a consistent and defensible methodology to appropriately value contaminated sites to be acquired by the Agency.
- The Transportation Commission may want evaluate the potential political consequences of reducing the value of contaminated property in eminent domain actions. The public and affected property owners may challenge the fairness of eliminating the value of contaminated property, especially in circumstances where the current landowner may not have caused the contamination.

PART II - LIMITING LIABILITY RISKS AND COSTS

A. Limiting Liability Through Appropriate Management

When contaminated properties must be acquired, regardless of contamination that may be present, the liability of the Agency for the cleanup of that contamination can be limited. This Section focuses on the potential liability of government entities that acquire contaminated properties involuntarily and what steps the Agency may take to maintain that limited liability. The emphasis here is on potential CERCLA liability to the federal government. It does not address state law liability and the protections that might be afforded by the Eleventh Amendment or the Colorado Governmental Immunity Act.

The are two "safe havens" for government entities in CERCLA. First, there is an explicit exemption at 42 U.S.C. §9601(20)(D):

> The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign.

In such a case, the "owner" of the property is deemed to be person owning or operating the property immediately before title was involuntarily acquired by government. 42 U.S.C. §9601(20)(A).

Second, there is the broader and more general "third party" defense, which provides a defense to liability where the release was caused solely by:

> 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 . 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 the 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. 42 U.S.C. §9607(b)(3).

The phrase "contractual relationship" does include "land contract, deed or other instruments transferring title or possession," but 42 U.S.C. §9601(35)(A) excludes from this definition certain instruments where

> [t]he defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

In determining which of the two "safe harbor" provisions might apply to the Agency, the central question becomes whether the exercise of eminent domain results in an "involuntary" acquisition. EPA has issued regulations, a policy statement, and a memorandum which shed some limited light on this question. 40 C.F.R. §300.1105(a)(1) states that "involuntary acquisitions or involuntary transfers" of property include, but are not limited to:

> [a]cquisitions by or transfers to the government in its capacity as a sovereign, including transfers or acquisitions pursuant to abandonment proceedings, or as the result of tax delinquency, or escheat, or other circumstances in which the government involuntarily obtains ownership or control of property by virtue of its function as sovereign.

The phrases "in its capacity as a sovereign" and "by virtue of its function as sovereign" could both be reasonably interpreted to include eminent domain, but this is not explicitly stated anywhere in the regulations or policy statements. The only time eminent domain is explicitly mentioned in the statute is in connection with the definition of "contractual relationship" in 42 U.S.C. §9601(35)(A). Therefore, it appears that the exercise of eminent domain by itself does not entitle a State or local government to the blanket protections of the first "safe harbor" at 42 U.S.C. §9601(20)(D), but only to the "third party" protections at 42 U.S.C. §9607(b)(3). In addition, at

least one court has expressly found that the exercise of eminent domain is not an "involuntary acquisition," *Transportation Leasing Co. v. California*, 861 F.Supp. 931, 960 (C.D.Ca. 1993). This is also supported by the EPA memorandum which speaks of eminent domain only in connection with the "third party" defense.

The "Third Party" defense does not provide a blanket defense to liability but is, rather, a qualified defense. In addition to showing that the release was due solely to the acts or omissions of an unrelated third party, the defendant must also prove, by a preponderance of the evidence that it exercised due care with respect to the hazardous substance and took precautions against foreseeable acts or omissions of the third party and the consequences that could foreseeably result from such acts or omissions.[3] In other words, the government entity, after taking possession of the property, can take no action which would cause or contribute to a release or exacerbate existing conditions. Further, if the third party has taken actions which would cause a release, the governmental entity has a duty to take what steps are necessary to prevent or remedy the release.

It is imperative, therefore, if the agency is forced to take contaminated property through condemnation, that no actions be taken that would cause a release of hazardous substances or would exacerbate an existing problem. This will help to assure that CDOT will not be held liable for pre-existing conditions on the site.[4] Once the government is in possession of the facility, it will

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[3]The third party defense does not speak directly to the issue of the State's knowledge of contamination prior to the exercise of eminent domain, although the statute does draw a distinction between a defense based upon due diligence and one based upon the exercise of eminent domain. 42 U.S.C. §9601(35)(A). One court has explicitly held that knowledge of contamination and "due diligence" are irrelevant to situations involving eminent domain. *United States v. Petersen Sand and Gravel, Inc.*, 806 F.Supp. 1346, 1359 (N.D.Ill. 1992).

[4]It should be noted that if a facility presents a threat to public health the Agency, as the current owner of the property, can be ordered to remediate the contamination. The "third party"

be treated as any other party should its actions lead to a release of hazardous substances. 42 U.S.C. §9601(20)(D).

The Agency has already incorporated Section 250, Environmental, Health and Safety Management into the "*Standard Specifications for Road and Bridge Construction*" to provide uniform methods for identification and management of contaminated properties. Both CDOT and the CDPHE have considerable experience with managing contaminated properties. However, CDOT currently develops individual Materials Management Plans and Health and Safety Plans for every project involving contaminated properties. Development of these plans is both time-intensive and costly.

Incorporation of a uniform Materials Management Plan and Health and Safety Plan into the *Standard Specifications for Road and Bridge Construction* would help to assure that CDOT not incur liability due to improper management of a contaminated site. A uniform plan would also expedite cleanups because soils management requirements and groundwater disposal requirements would be clearly established, and not evaluated on a case by case basis. More importantly, CDOT personnel and contractors would have a consistent and effective template for management of contaminated soils and groundwater. Appendix A contains a Materials Management Plan approved for RTD's development along the Santa Fe Corridor.

CDOT has the opportunity to improve upon the method of managing contaminated groundwater in the RTD Plan. The RTD Plan requires placing contaminated groundwater in DOT approved drums and disposing off-site. This is both cumbersome and costly. CDOT may want to

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defense is not extinguished in such a case but rather provides a defense in an action to recover the costs of remediation from the prior owner.

explore with the CDPHE utilizing the RCRA Section 3020(B) exemption for reinjection of contaminated groundwater. The section 3020(B) exemption would allow reinjection of the groundwater if the groundwater is treated prior to reinjection.

B. Limiting Liability Through Better Information

One of the primary methods CDOT can employ to limit potential liability for contaminated sites is to conduct, where possible, careful and thorough evaluations of the properties prior to acquisition. The information obtained through such evaluations helps both to avoid severely contaminated properties through the redesign of highway projects and provides a foundation for assigning appropriate market values to properties for use in eminent domain proceedings. *See*, Part I, Section D, above. Often the ability to conduct a thorough evaluation of a property depends primarily upon access.

There is no specific statutory authority that would permit CDOT to temporarily condemn an easement for the purpose of conducting environmental sampling or other investigations. The authority granted to CDOT by §43-1-209, C.R.S. does not specifically provide for any access to property prior to filing a petition for condemnation. Therefore, the authority of the Agency to compel the access necessary to conduct a thorough evaluation of environmental conditions prior to proceedings in eminent domain is doubtful.

CDOT does have the option of filing a petition for condemnation and seeking to inspect the property pursuant to C.R.C.P 34. Rule 34 does provide for entry upon land for the purpose of "inspection and measuring, surveying, photographing, testing, or sampling the property." If severe contamination is discovered, CDOT could then seek to abandon the proceeding. This approach is not ideal in that it involves the costs associated with initiating a proceeding in condemnation and,

more importantly, because the right to abandon the condemnation can be lost. *See, e.g., Piz v. Housing Authority of Denver*, 289 P.2d 905, 908 (1955)(right to abandon lost if landowner changes position in reliance upon actions of condemnor). Further, the procedure does not provide for access prior to filing a petition for condemnation, and it probably would not permit long-term monitoring of conditions on the property, such as the installation of monitoring wells.

Alternatively, CDOT may wish to explore a legislative approach to this problem such as the one pursued by the State of Michigan. The relevant portions of the Michigan condemnation statute may be found at Appendix B of this report. Michigan's condemnation statutes allow access to properties for a far wider range of purposes than those found in the Colorado statute, including "appraising the property," "conducting archaeological studies," and "determining whether the property is suitable to take for public purposes." MCL §213.54(4)(3). Most importantly, the statute specifically grants the authority to conduct "environmental inspections," defined as

> the testing or inspection including the taking of samples of the soil, groundwater, structures, or other materials or substances in, on, or under the property for the purpose of determining whether chemical, bacteriological, radioactive, or other environmental contamination exists and, if it exists, the nature and extent of the contamination. MCL §213.54(4)(6).

The are three primary advantages to this approach. First, it allows for access in a short time-frame. No time-consuming procedure for temporary condemnation is required. Rather, the inspection may be made "upon reasonable notice to the owner and at reasonable hours." MCL §213.54(4)(3). Second, the statute provides a judicial mechanism for obtaining access in the event that access for the environmental inspection is obstructed or denied. MCL §213.54(4)(4). Third, because the inspection does not involve a temporary condemnation, no compensation for the

landowner is required.[5]

Obtaining access to properties for environmental inspections is, therefore, one of the most straightforward and effective methods of limiting the potential liability arising from the acquisition of contaminated properties. However, the Transportation Commission may wish to examine the consequences of seeking legislation to grant the Agency authority to conduct such inspections. Additionally, the Transportation Commission may wish to explore the policy option of providing compensation to property owners when such inspections interfere with the property rights of those owners.

C. Recommendations

- Negotiate a uniform Materials Management Plan for contaminated soil and groundwater with CDPHE that would be incorporated into the *Standard Specifications for Road and Bridge Construction*.
- Identify the types of contaminated groundwater encountered at CDOT sites and develop a standardized approach for treating and reinjecting the groundwater at appropriate sites.
- The Transportation Commission may want to evaluate the policy implications of pursuing the legislative authority similar to the Michigan statute. For example, the Southeast Corridor EIS identified at least 30 properties with possible contamination. Obtaining early access for purposes of characterizing contamination would aid in reducing uncertainties

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[5]The Michigan statute specifically addresses this point by declaring that "an entry made pursuant to this subsection shall not be construed as a taking." MCL §213.54(4)(3). Under most circumstances, this would probably be true. If, however, long-term sampling, such as the installation of monitoring wells is required, such activities would probably still constitute a compensable taking. Of course, the Agency would be responsible for compensating the property owner for any actual damages occurring as a result of the environmental inspection (not including diminished value due to the discovery of contamination).

involved in cleanups and help establish a basis for determining the fair market value of contaminated properties.

CONCLUSION

A CERCLA cost recovery action can be a very effective mechanism for recovering the costs of cleanup for contaminated sites. Such an action is complex, costly, and time-consuming. CDOT may encounter circumstances in which a Section 107 cost recovery action is the only viable mechanism for recovering costs. In most cases, however, a better approach involves obtaining the information necessary to properly valuate potentially contaminated properties and to recover the costs of cleanup on the front end of the condemnation process. Regardless of the mechanism chosen, however, CDOT must always act to preserve its statutory protection from liability through appropriate management of contaminated properties.