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V. LEGAL RESPONSIBILITY OF PARTIES FOR EPA COSTS AND CLEANUP ACTIVITIES

Statement by
Jamie W. Katz

Good morning. My name is Jamie W. Katz. I am an attorney with the EPA Region I Office of Regional Counsel in Boston. I am the lead federal attorney working on the Davis Liquid Waste Site case. I have already spoken with many of you, and I appreciate the cooperation you have shown. I look forward to working with you to resolve the issues ahead of us concerning the involvement of potentially responsible parties in the treatment and disposal of drums at the Site, as well as the remedial effort which will occur later.

In this segment of the presentation, I will discuss five legal matters. Initially, I want to describe how Superfund became engaged legally on the Davis Liquid Waste Site. Next, I will discuss the liability of responsible parties under CERCLA for costs incurred by EPA in the cleanup process on the Site. Third, I will address EPA's legal position concerning the nature of the liability of responsible parties under CERCLA. Fourth, I will discuss the theories of liability other than CERCLA that define responsible parties with respect to the Davis Liquid Waste Site. Finally, I will discuss the involvement of responsible parties in any further site remedial activities that may be required.

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SUPERFUND INVOLVEMENT AT DAVIS LIQUID WASTE SITE

As most of you know, the Superfund law, CERCLA, was passed in 1980 to provide the funds and the legal authority for EPA to become involved in the cleanup of deteriorating or abandoned hazardous wste facilities. As a first step in deciding which sites to clean up, EPA, in October 1981, issued an interim list of 115 priority hazardous waste sites for Superfund assistance, pursuant to CERCLA §105 (8). That section requires the Agency to determine which releases or threatened releases of contaminants are occurring.

CERCLA requires the priority of the sites to be based upon the relative risk or danger to the public health or welfare or to the environment. This risk assessment takes into account the population at risk, the hazard potential of the hazardous substances, the potential for contamination of drinking water supplies, and certain other factors. The Davis Liquid Waste Site was placed on the interim National Priority List in June, 1982. As a result, the Site became eligible for EPA Superfund involvement in the site cleanup activities. A Cooperative Agreement with the State of Rhode Island to perform an RI/FS was signed in June, 1982. In October of 1984, EPA's involvement with the Site continued when the Agency became the lead agency in the cleanup operation. John Gallagher has described the background and the status of the cleanup effort.

RESPONSIBLE PARTIES UNDER CERCLA

For all aspects of the Site investigation and cleanup, § 107 of CERCLA provides for recovery from responsible parties of all response costs incurred by the U.S. Government or a State that are not inconsistent with the National Contingency Plan.

As some of you know, the Superfund is a rotating fund, intially funded by a combination of general tax revenues and a special tax on certain chemical manufacturers. The amount of money that the Superfund is initially authorized to accumulate, $1.6 billion, is far less than the cleanup costs for the many hazardous waste sites throughout the country. Therefore, Congress provided that the Superfund could be replenished through cost recovery actions against responsible parties under § 107 of CERCLA, thereby minimizing the burden on the taxpayers of cleaning up these sites. As a result, EPA considers that a necessary legal corollary to any Superfund cleanup expenditures is an action to replenish the fund by recovering costs from responsible parties.

Section 107 of CERCLA defines the four classes of responsible parties who are eligible for costs associated with governmental responses to hazards on Superfund sites. The four statutory classes of responsible parties at the Davis Liquid Waste Site give rise to the following parties to a cost recovery action:

(1) The present owner or operator of the site; William Davis, Eleanor Davis, William Davis, Jr., and Nancy Davis are the present owners of the Site. The Site is currently operating as a tire disposal and chipping business.

(2) All operators, or owners in the chain of title since hazardous waste activities were initiated on the site who maintained ownership or operation at a time when disposal occurred; William Davis and/or members of his family have owned the Site for the entire period when hazardous waste disposal activity occurred, operated the activities at the Site during that period.

(3) All persons who arranged for disposal or treatment of hazardous substances or who arranged with a transporter for disposal or treatment of hazardous substances at the Davis Liquid Waste Site.

(4) All persons who accepted hazardous substances for transport to the site.

To date we have issued mailings to approximately 18 parties including generators and transporters and the persons, identified above, who owned and operated the Site at the time when hazardous waste disposal occurred. In identifying potentially responsible parties, EPA has relied upon drums found at the Site, and upon

information provided by the Site owner either in the context of state court litigation or in EPA information request responses.

As new parties have been identified, letters notifying them of their potential liability have been sent out by EPA. When new information becomes available to the Agency, we will continue to contact those new parties whose involvement with the Site is reliably indicated. As of this date, EPA has not prepared any ranking of potentially responsible generators and transporters based on volumetric contribution of wastes to the Davis Liquid Waste Site.

NATURE OF LIABILITY UNDER CERCLA

Next, I would like to discuss EPA's legal position on the nature of liability under CERCLA. There are two important components to EPA's position--strict liability and joint and several liability.

Section 101 (32) of CERCLA reads as follows:

> "liable" or "liability" under this title shall be construed to be the standard of liability which obtains under Section 311 of the Federal Water Pollution Control Act.

Without going into a detailed analysis, let me state that the Water Act imposes strict liability and so, therefore, does CERCLA. What this means is that liability is imposed under both Acts without regard to the fault or negligence or culpability or lack thereof of the responsible parties. Thus, although a party may have behaved in accordance with the highest standards of behavior

of responsible parties that I just outlined, the statute will impose liability without regard to any "good faith" defenses the party might raise.

An important corollary to the strict liability feature of CERCLA is the fact that the Act provides no quantity threshold to trigger liability. Therefore, under CERCLA, if a party shipped hazardous substances to the site in any amount, strict liability will be triggered. This is very important when viewed in combination with the joint and several character of responsible party liability under CERCLA.

It is EPA's position that CERCLA supports the imposition of joint and several liability. This is certainly a subject on which those of you who are not lawyers will want to be advised by counsel. The doctrine of joint and several liability treats those damages or hazards for which liability cannot reasonably be allocated to particular responsible parties as the legal responsibility of all responsible parties. Groundwater contamination presents such an indivisible harm where allocation of responsibility may be impossible. This is particularly so in a situation such as Davis Liquid Waste Site where wastes were co-mingled in open disposal pits and where all wastes ultimately leached into the same groundwater acquifer. Because legal responsibility may be impossible to allocate among responsible parties with respect to the Davis Liquid Waste Site, any court

judgment for the entire amount of damages might be enforced against any individual responsible party. Of course, the party against whom a judgment enters could seek contributions from other appropriate parties. But EPA could satisfy its judgment initially against any of the parties which it proved were jointly and severally liable.

The doctrine of joint and several liability shifts the burden of allocating responsibility for the hazards on the site from the injured party to the responsible parties. However, the Agency does not seek unjust results. The purpose of joint and several liability is to place on the identifiable responsible parties the twin burdens of paying the entire cost and of finding an apportionment formula for dividing the liability among responsible parties. Our initial goal in settlement negotiations will be to have responsible parties come up with an agreement among themselves as to apportionment. If EPA has to litigate to recover the costs of cleaning up unallocable hazards on the site, EPA's legal position will be that joint and several liability will apply to the defendants in order to transfer these costs onto the responsible parties.

ADDITIONAL THEORIES OF LIABILITY

Some parties who may have disposed of wastes at the Davis Liquid Waste Site may take the position that their wastes do not fall within the definition of "hazardous substance" under CERCLA and

that they are therefore not legally responsible for past and future remedial actions. EPA has made no determinations regarding whether the specific wastes sent by a party are "hazardous substances." As will be discussed later, all parties complying with EPA's information requests will have access to the Agency's waste records relating to that party. Each party, therefore, will be able to determine on its own whether it believes that its wastes were "hazardous substances," and the party thus believes that it is exempt from CERCLA liability, that party may be legally responsible for the necessary remedial action at the Site under §7003 of the Resource Conservation and Recovery Act ("RCRA") or under the common law of restitution.

RCRA §7003 provides that upon receipt of evidence that the handling, storage, treatment, transportation, or disposal of any hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator of EPA may bring suit in federal district court to take such action as may be necessary to protect public health and the environment. Because there is a sufficient factual basis on which to conclude that the disposal of wastes at the Davis Liquid Waste Site may present an imminent and substantial endangerment to drinking water supplies, the Administrator's authority to order or to sue for the necessary relief may be exercised against parties who contributed to the hazard. The applicability of RCRA depends, of course, upon the disposed wastes meeting the definition of "hazardous waste," a term that may include petroleum and its

derivatives, which are expressly excluded from CERCLA's definition of "hazardous substance."

Furthermore, in the event that EPA itself executes the cleanup, it is the Agency's position that all money expended can be recovered under RCRA §7003 from parties who contributed to the imminent and substantial hazard to the public health or the environment.

It is EPA's position that anyone who has contributed or is contributing to the imminent and substantial hazard that exists at the Davis Liquid Waste Site is a party who: (1) is under a duty pursuant to §7003 to take such action as may be necessary to abate the danger, and (2) will be under a duty to reimburse the government for costs of its remedial activities. This includes any person contributing to the handling, storage, treatment, transportation or disposal of hazardous wastes causally related to groundwater contamination or, with respect to recovery of the past emergency response expenditures, causally related to the threat of release of hazardous substances from the pits at the site. At a minimum this would encompass the owner and operator of the site and persons who generated or transported wastes.

Finally, in addition to any cost-recovery action under RCRA §7003, EPA may seek restitution of its response expenditures under the common law doctrine of emergency assistance.

Under this doctrine, a defendant must reimburse a plaintiff where: (1) the defendant owed a duty; (2) the plaintiff took that duty

upon itself with intent to charge therefore; and (3) the services supplied were immediately necessary to satisfy the requirements of public decency, health or safety.

In sum, EPA intends to hold parties responsible for the contamination problem at the Davis Liquid Waste Site primarily under CERCLA; but if a party contributing to that contamination has disposed of wastes beyond CERCLA's definition of hazardous substance, or if a party is otherwise unamenable to suit under CERCLA, that party may be considered liable for cleanup costs under RCRA §7003 or under the common law of emergency assistance.

RESPONSIBLE PARTY INVOLVEMENT IN SITE CLEANUP

The next topic that I want to discuss is the role of responsible parties in the necessary remaining remedial activities. As you are aware, EPA has staged a large number of drums on the Site which must be treated and disposed of off the Site. EPA seeks to determine whether the responsible parties will undertake this action. In addition, EPA is in the process of completing a Remedial Investigation/Feasibility Study which will recommend the appropriate remedial alternative for the Site. This recommended alternative will receive public comment and, ultimately, a final remedial alternative will be selected. Section 104(a) of CERCLA authorizes EPA to conduct these remedial measures on the Davis Liquid Waste Site, unless it is determined that such action will be done properly by any responsible party. Thus, one of EPA's

major objectives, in time, will be to determine through negotiations whether responsible parties will undertake the design and implementation of the chosen remedial alternative.

It is our hope that whatever negotiating structure is used to address the question of cost recovery liabilities will also be used to structure any involvement that responsible parties might desire in conducting any final remedial activities. It should be emphasized that EPA and Rhode Island have independent claims against responsible parties. However, it should also be emphasized that EPA and Rhode Island will seek a comprehensive settlement involving all governmental and private parties as the preferable means of resolving this matter.

VIII. EPA POLICY ON INFORMATION DISCLOSURES AND REQUESTS

The final areas that I wish to discuss before taking legal questions concern the disclosure of EPA information and the compliance with EPA information requests. One question which has arisen is whether the records on which EPA has relied in identifying responsible parties will be disclosed. EPA will be issuing information requests to all potentially responsible parties. EPA intends to disclose to those parties who fully comply with EPA's information request all records EPA possesses linking those parties to the Davis Liquid Waste Site. To be eligible to receive EPA's documents, a party needs to have: (1) responded to the specific

questions propounded in the information request; (2) submitted to EPA all documents relevant to the propounded questions; and (3) submitted an affidavit from a responsible company official or representative stating that a diligent search of the company's records has been made and that all documents responsive to the information request have been forwarded to the Agency.

Potentially responsible parties should be aware that EPA possesses technical data generated by the Agency during its assessment and investigation of the Davis Liquid Waste Site. A substantial amount of this information has been, and will be, accumulated and is available to the public. Anyone wishing to review this information may do so in the EPA library on the twenty-first floor of the J.F.K. Federal Building in Boston. Those wishing to do so should call in advance to make the necessary arrangements. We will charge the cost of reproduction to anyone requesting copies of this information.

Aside from this information discussed above and any other information released today, no information will be disclosed except in the context of good faith negotiations.

EPA INFORMATION REQUESTS

EPA will request, through written information requests, that parties provide information relating to their involvement with the Davis Liquid Waste Site. It is EPA's position that timely compliance with these requests is enforceable with penalties

under Section 3008 of RCRA, and that if we do find it necessary to take legal action to enforce our request, the administrative cost of that action would be recoverable under CERCLA §107.

If in responding to our requests you are unable to locate any information connecting your company with the Davis Liquid Waste Site, you should inform EPA of that problem in a letter. In response, we will review our files and will determine whether we can identify a representative range of dates and wastes on which to focus further investigations. In addition, we will attempt to provide a sample document from our files that indicates the company's involvement with the Site. We will not, however, disclose all of our information at this time.

In the event that your company is unable to locate any documents even with the assistance just described, you are requested to provide EPA with an affidavit to that effect in order to avoid any enforcement actions that might be taken against parties in noncompliance with forthcoming information requests. Your affidavit should be signed by the company official responsible for the company's response to the information requests, and it should indicate that a diligent search of the company records has been conducted, and that all relevant information discovered in that search, if any, is being presented to EPA.

We will now accept questions on EPA's legal position.

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