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***1081 REOPENER LIABILITY UNDER SECTION 122 OR CERCLA: "FROM HERE TO ETERNITY"**

Frederick W. Addison, III [FNa]

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FINALITY: the end of litigation, the certainty of settlement. It is the goal of every client who finds himself in the unhappy arena of litigation. Long recognized as a necessary component of the judicial system, Webster defines "finality" as "the character or condition of being final, . . . conclusive, irrevocable or complete: conclusion." [FN1]

A dismissal with prejudice, a specific yet comprehensive release, the performance of tasks, the exchange of consideration, liability and responsibility are established and finalized. No admissions are made. Certainty replaces uncertainty. Business continues. Life continues.

No such finality or certainty exists when resolving [FN2] liability with the United States Environmental Protection Agency (EPA) under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). [FN3] Rather, settlement for cleanup at a Superfund [FN4] site is subject to both the narrow terms of the EPA's release, called a covenant not to sue, and by the application of several exceptions to covenants not to sue which further diminish the salutary benefits normally associated with settlement. [FN5] ***1082** These exceptions, or "reopeners," can be triggered by, inter alia, the discovery of unknown conditions, or a determination by the EPA that the remedy at the site has failed. [FN6]

When the scientific uncertainty still surrounding the impacts of hundreds of hazardous sub-

stances is coupled with the difficulty of measuring the effectiveness of responses at hazardous waste sites, the reasonable conclusion is that a significant percentage of those Superfund sites remediated will be reopened. In the same manner, as health-based performance standards [FN7] are relied upon to protect public health and the environment at CERCLA cleanups, and, as has historically been the case, those performance standards are made more stringent and utilized more frequently, it will be difficult to persuade the EPA that ten and fifteen year old remedies still protect public health and that further response action is not needed to prevent threats to the environment. With the forward march of technology, remediation methods and detection capabilities will each improve, advancing to greater levels of precision. As public awareness and understanding of the health effects of hazardous substances grow, pressure will mount to achieve levels of remediation consistent with criteria of then established parameters. In such a setting, reopening Superfund settlements for further remediation becomes more a likelihood than a possibility.

The Superfund Amendments and Reauthorization Act of 1986 [FN8] (SARA) codified the authority of the EPA to enter into settlement agreements and permitted it to release responsible parties from liability under CERCLA. SARA incorporated many of the features contained in the EPA's interim CERCLA settlement policy, [FN9] and adopted the EPA's preference for issuing ***1083** so-called releases in the form of covenants not to sue. [FN10] In addition to establishing the EPA's authority to grant covenants not to sue, section 122(f) of SARA also establishes specific requirements and guidelines governing the context in which the EPA may issue covenants. [FN11] SARA also empowers the EPA to further restrict the scope and extent of the covenants. [FN12]

This Article addresses the legal principles governing the interpretation and application of those provisions of section 122 of CERCLA which contain reopener provisions, the EPA Guidance,

[FN13] the EPA Model Consent Decree, [FN14] and the sparse related case law interpreting them. After analyzing the EPA's use and interpretation of reopeners, the Article considers those specific areas where the EPA Guidance or the Model Consent Decree have established special policies involving reopeners, specifically: de minimis settlements, natural resource damages, mixed funding settlements, and SARA's five year review requirements. The Article concludes with an evaluation of the effectiveness of the Superfund reopener provisions as settlement tools, their extension of liability at Superfund sites, and their consequences for business.

I. SUMMARY OF SECTION 122 OF SARA

Section 122(f)(1) of SARA authorizes the EPA, at its discretion, to "provide any person with a covenant not to sue concerning any liability to the United States under this chapter, including future liability, resulting from a release or threatened release of a hazardous substance addressed by a remedial action, whether that action is onsite or offsite." [FN15] The EPA, however, may only provide a covenant if it is in the public interest, if it would expedite responses consistent with the National Contingency Plan (NCP), if the person responding is in full compliance with a consent decree under 42 U.S.C. § 9606 for response to the release or threatened release, and if the response has been approved by the EPA. [FN16] Before entering into a covenant not to sue, the EPA must assess, and, presumably, establish in the administrative record, the appropriateness of a covenant by reviewing seven public interest factors set forth in section 122(f)(4). [FN17] Section 122(f) requires the EPA to ***1084** provide settlers at CERCLA sites with covenants not to sue for future liability in two specific instances. These special covenants not to sue are found in section 122(f)(2). This section provides that if the four conditions of section 122(f)(1) are met, the EPA "shall provide settlers with a covenant not to sue with respect to future liability to the United States" if (1) the EPA rejects an onsite response which complies fully with the NCP and requires a remedial action involving off site disposal of hazardous substances, or (2) the selected re-

sponse involves the treatment of hazardous substances so as to destroy, eliminate, or permanently immobilize the hazardous constituents of such substances. [FN18] A section 122(f)(2) covenant not to sue can apply to an entire remedial action or to only that portion of the response which satisfies the requirements of subsections (A) and (B). [FN19] Section 122(f)(3) establishes a covenant not to sue will take effect only after the EPA has certified that the remedial action has been completed properly. [FN20] Similarly, covenants not to sue under section 122 are specifically tied to the satisfactory performance of a settling party's obligation under any consent decree or administrative consent order (ACO). [FN21]

Section 122(f)(6), titled Additional Condition for Future Liability, contains the exceptions to covenants not to sue for future liability. Under section 122(f)(6)(A) the EPA must except from any covenant not to sue for future liability any liability related to a release or threatened release which is the subject of the covenant where such liability arises from conditions unknown at the time the remedial action is certified as complete. [FN22] This provision, known as a reopener for unknown conditions, does not automatically apply to special covenants not to sue mandated under section 122(f)(2) or for de minimis settlements pursuant to section 122(g) of CERCLA. [FN23]

Section 122(f)(6)(B) allows a waiver of the reopener for unknown conditions under "extraordinary circumstances." [FN24] To justify a waiver of the unknown ***1085** conditions reopener for extraordinary circumstances the EPA must demonstrate that its decision to waive the exception included consideration of "relevant factors such as those referred to in paragraph section 122(f) (4) and volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors." [FN25] Notwithstanding the possibility for a waiver for extraordinary circumstances, the reopener for unknown conditions may not be waived if the EPA, in its discretion, determines that without the reopener the remaining terms

of the consent decree or ACO fail “to assure protection of public health, welfare, and the environment.” [FN26]

II. PRE-SARA EPA POLICY

Prior to the passage of SARA, the EPA's settlement philosophy could be found in its interim CERCLA settlement policy (Policy). [FN27] Based on its three years of experience [FN28] with negotiation in litigation of hazardous waste cases, the EPA re-evaluated its settlement policy to encourage voluntary cleanups. [FN29] As one of its general principles, the EPA stated it recognized “the value of some measure of finality in determinations of liability and in settlements generally.” [FN30] The EPA acknowledged in the Policy that potentially responsible parties (PRPs) “want some certainty in return for assuming the costs of cleanup” [FN31] and conceded that certainty and finality were incentives for encouraging private party lead cleanups. [FN32] Its specific policy for implementing these general principles, however, offered very little in the way of certainty and even less in the way of finality.

The Policy, prepared jointly by the United States Department of Justice (DOJ) and the EPA, established several axioms which would later find their way into section 122 of SARA. Underlying the framework for settlement of CERCLA claims was the conclusion that the need for finality in settlements must be balanced against the need to insure that PRPs remain responsible for recurring endangerments and unknown conditions at a CERCLA site. [FN33] Through the Policy, the EPA informed PRPs that “releases from liability will not automatically be granted merely because the Agency has approved the remedy.” [FN34] The Policy set forth the principle that the nature and scope of a release of liability would be directly related to the confidence that the EPA had that the selected remedy would ultimately prove effective and reliable. [FN35] The Policy included a number of provisions specifically addressing the preservation of reopeners and the limited scope of any release or covenant***1086** not to sue. [FN36] The Policy is

also the source of eight other restrictions on covenants not to sue which inevitably found their way into consent decrees and ACOs. [FN37] The Policy, published in response to complaints that resources were being expended on litigation rather than cleanup because of the government's inflexible attitude towards settlement, formalized the EPA's intractability rather than comforting settling parties that they would receive some real measure of finality and certainty in settlement. One other point about the Policy must be noted: reopeners were limited to previously unknown conditions or receipt of additional information which indicated an imminent and substantial endangerment to public health, welfare, and the environment. [FN38] SARA eliminated this self-imposed restriction on the use of reopeners. [FN39]

III. PRESENT LIABILITY AND FUTURE LIABILITY

Section 122(f)(1) empowers the EPA to “provide any person with a covenant not to sue concerning any liability to the United States . . . including future liability.” [FN40] The EPA, in the Guidance, [FN41] interprets the term “any liability” to include a settling party's obligation to pay those response costs incurred by the EPA prior to certification under section 122(f)(3) and to complete the remedial activities included in the Record of Decision (ROD) for a given CERCLA site as contained in the operative consent decree or ***1087** ACO. [FN42] The EPA further contended that “since there is no release of future liability prior to certification, there is no need for reopeners” in the period of time that a settling party might be exposed to so-called present liability. [FN43] Moreover, a settling party's failure to complete the required remedial activities or pay prior response costs are matters for which the settling parties are directly responsible to the court under the EPA's Model Consent Decree. [FN44] Since the EPA's definition of a “reopener” states it “is a provision which reserves EPA's right to require settling parties to take further response action in addition to cleanup measures already provided for in a settlement agreement notwithstanding the covenant not to sue” - it is obvious

that a reopener is not required for enforcement action involving a settling party's precertification or present liability. [FN45] Thus, it is appropriate that any failure of response can be addressed through dispute resolution or by the court or agency under the consent decree or ACO.

The EPA defines future liability as “a responsible party's obligation to perform any additional response activities [beyond those in the consent decree or ACO] at the site which are necessary to protect public health and the environment.” [FN46] Since section 122(f) requires certification before a covenant not to sue can be effective, reopeners or exceptions to covenants not to sue become necessary or operative only after certification. [FN47] Reopeners for future liability fall within two broad areas. SARA expressly required a reopener for unknown conditions. [FN48] SARA also authorized the EPA “to include any other provisions” allowing future enforcement action in the discretion of the EPA when such provisions are “necessary and appropriate to assure protection of public health, welfare and the environment.” [FN49]

Pursuant to the authority of section 122(f)(c), the EPA established a second reopener which addresses situations where “additional information reveals that the remedy is no longer protective of public health or the environment.” [FN50] The EPA, in justifying this second reopener, added “it is not in the public interest to release responsible parties for liability for additional response actions made necessary by new information, given, as noted in the Interim Settlement Policy, (Policy) ‘the current state of scientific uncertainty concerning the impact of hazardous substances, our ability to detect them, and the effectiveness of remedies at hazardous waste sites.’” [FN51]

Under these broadly worded provisions, the EPA is positioned not only to reopen CERCLA settlements for conditions unknown and unreflected in the *1088 administrative record at the time of settlement (i.e., undisclosed facts, unknown site conditions), but also to reopen settlements based on the even more vague standard of discovering after-

acquired “additional information” which reveals “that the remedy is no longer protective of public health or the environment.” [FN52]

A. Unknown Conditions

SARA specifically provides for a reopener when liability at a CERCLA site “arises out of conditions which are unknown at the time the President certifies under paragraph (3) [of section 122(f)(3)] that remedial action has been completed at the facility concerned.” [FN53] Section 122(f)(6)(B) allows the EPA to settle without an unknown conditions reopener under “extraordinary circumstances” and departs from the EPA's interim policy in two significant respects. Under the Policy the EPA could reopen a settlement “where previously unknown or undetected conditions . . . arise or are discovered” which “may present an imminent and substantial endangerment to public health, welfare or the environment.” [FN54] By eliminating the term “undetected” SARA limits the reopener to those instances where the EPA can demonstrate it did not have knowledge of the newly discovered conditions at the time of certification. By rejecting the EPA's requirement that unknown conditions reveal an imminent and substantial endangerment to public health welfare and the environment, [FN55] and replacing it with language tying the reopening for unknown conditions to a more general protection standard, SARA broadened the grounds for invocation of the reopener. [FN56] No clear standard or criteria has been established for determining when conditions unknown at the time of certification warrant reopening a settlement in order to insure that no threat to public health and the environment exists. At least one commentator has noted that the establishment of knowledge in possession of the EPA at the time of certification is closely tied to active participation in and contribution to, the administrative record and, to the extent possible, the language in any ROD. [FN57]

The EPA's Model Consent Decree attempts to extract an agreement from PRPs that the EPA's precertification knowledge contains only that information and those conditions set forth in the ROD and

the administrative record. [FN58] The Model Consent Decree provides that with respect to Post-Certification Reservations the EPA's knowledge is limited to that information*1089 and those conditions found in the ROD, the administrative record supporting the ROD, and any information received pursuant to the consent decree prior to certification. [FN59]

Neither SARA nor the Model Consent Decree give guidance as to what constitutes "unknown conditions." At a minimum, however, the term should include any or all of the following: (1) information withheld from EPA by PRPs which might have resulted in the entry of a Consent Decree containing different substance, (2) then existing and present contaminants or concentrations of contaminants unknown to EPA at the time of certification, (3) new information concerning the fate, mobility or transport of contaminants at the site.

Other previously unknown conditions which could trigger the reopener might include discovery of a more protective remedy, inadequacy of the technology utilized, or changed conditions on the ground. By utilizing the Model Consent Decree to narrow the universe of conditions "known" to the EPA, the EPA broadens the universe of conditions it may later claim were unknown. The EPA also seeks to foreclose challenge to the extent of its prior knowledge by making all settling parties acknowledge these limitations at the time the party executes the consent decree or ACO. [FN60] Further, it is noteworthy that the EPA elected to define the boundaries of its knowledge rather than define or establish criteria for an "unknown condition." By so doing, the EPA not only diminishes the value of any covenant not to sue but also places the burden of proof on the settling party to demonstrate, presumably after executing a Model Consent Decree, that conditions which might reopen PRP liability were known to the EPA at the time of settlement. Proving the EPA had knowledge of conditions beyond those reflected in the administrative record or the ROD will undoubtedly be difficult.

B. Additional Information

Section 122(f)(6)(C) of SARA authorizes the EPA to include additional provisions in its covenants not to sue which, in its discretion, "are necessary and appropriate to assure protection of public health, welfare, and the environment." [FN61] In its Guidance, the EPA explained the reasons for creating a second reopener, known generally as the additional information reopener, for future liability:

*1090 EPA believes that it is in the public interest and consistent with the Congressional intent to require a second reopener covering situations where additional information reveals that the remedy is no longer protective of public health or the environment. It is not in the public interest to release responsible parties from liability for additional response actions made necessary by new information . . . [FN62] The EPA's Model Consent Decree implements this exception to its covenant not to sue by reserving its rights to prosecute under the consent decree, or in a new action, its claims for additional costs and further response from PRPs based on "information previously unknown" to the EPA which "together with any other relevant information indicates that the remedial action is not protective of human health or the environment." [FN63] The breadth of the additional information reopener, when coupled with the unknown conditions reopener, leaves a settling PRP with no more than a covenant not to sue for the work performed at the site pursuant to standards applicable to Superfund cleanups at the time of a response. In the Policy, the EPA described additional information as "information, which was not available at the time of the agreement, concerning the scientific determinations on which the settlement was premised (for example, health effects associated with levels of exposure, toxicity of hazardous substances, and the appropriateness of the remedial technologies for conditions at the site)." [FN64] The Policy's requirement that additional information must indicate a present, imminent, and substantial

endangerment to public health, welfare, or the environment is not included in either the Model Consent Decree or the Guidance. The EPA, through the language of the Guidance, has attempted to convert and expand the additional information reopener to cover the failure of the remedy at the site. [FN65] Citing undefined “congressional concern,” the EPA added that remedy failure includes not only a failure of the reliability of the remedial technology utilized to respond at the site, but also “any situation in the future at the site which is judged to present a threat to public health and the environment.” [FN66] As an example, the EPA explained that “should health effect studies reveal that health-based performance levels relied upon in the ROD are not protective of public health or the environment, and that public health or the environment will be threatened without further response action,” the EPA may reopen the settlement. [FN67] While the EPA cautioned these provisions are not meant to require “changes purely based on advances in technology,” [FN68] it appears it intended to reopen settlements when additional information in the form of advances in technology reveals a prior remedy*1091 at a CERCLA site would not eliminate the then current threat to public health or the environment.

The universe of information which could result in reopening a settlement under the additional information provision is incalculable. For example, assume *arguendo*, one performance standard used to reflect successful remediation at a CERCLA site is to reduce benzene levels in soil to four parts per million. This presently defined safe action level may be superseded by lower threshold limits for benzene in soil in years to come. Once the action levels have been reduced, can a PRP successfully argue that the “additional information” does not reveal a threat to public health or the environment without further response? In essence, for purposes of the additional information reopener, the EPA has defined “remedy failure” to be the discovery of any future condition relating to the site which, it con-

cludes, renders the site a current threat to public health and the environment. The reopener is in no way tied to the adequacy of the prior clean-up or the effectiveness of the remedy selected by the EPA and the PRPs. The EPA's capacity through rule making and agency edict to lower acceptable levels and require use of advancing remedial technologies, in addition to the unsure nature of responses at CERCLA sites in general, make the additional information reopener an invitation to perpetual liability at Superfund sites.

IV. SPECIAL SITUATIONS

The impact of the EPA's reopener policies is not limited to its general application to Superfund cleanups. Rather, grafted upon the general policy are at least four specific permutations which require attention.

A. De Minimis Contributors

In section 122(g)(1)(A) of SARA, Congress recognized the concept of a de minimis contributor at a Superfund site. [FN69] Broadly defined, a de minimis contributor or party is a “potentially responsible party who satisfies the requirements for liability under section 107(a) of CERCLA and who does not have a valid section 107(b) defense, but who has made only a minimal contribution (by amount and toxicity) in comparison to other hazardous substances at the site.” [FN70] Section 122(g) of SARA reflects, generally, the agency's position with regard to settlements with de minimis parties which was set forth in the Policy. Section 122(g)(1) allows the EPA, upon a determination that a settlement is “practicable and in the public interest,” promptly to reach a final settlement with de minimis PRPs through a consent decree or administrative order. [FN71] Settlement is authorized if a de minimis PRP's contribution “involves only a minor portion of the response cost at the facility concerned.” [FN72] If the above criteria is met, and if the EPA *1092 determines “the amount of the hazardous substances contributed by that de minimis party to the facility,” and “the toxic or other hazardous effects of the substances contributed by that

party to the facility” are “minimal in comparison to other hazardous substances at the facility,” settlement is authorized. [FN73] As part of a de minimis settlement, the EPA may provide the settling party with a covenant not to sue provided such a covenant would not be “inconsistent with the public interest as determined under Subsection (f) Section 122(f) of this Section.” [FN74]

De minimis settlements, although not mandatorily subject to the unknown conditions reopener, may, nevertheless, include reopener provisions under section 122(f)(6)(C). [FN75] The De Minimis Settlement Guidance [FN76] sets forth three elements which are to be considered in determining the scope of any covenant not to sue in a de minimis settlement. [FN77] The nature of the covenant and the scope of any reopener vary depending upon the timing of the settlement, the amount of information available to the EPA at the time of the settlement, and the amount of any premium payment made by the de minimis parties as a part of such settlement. [FN78] As to those settlements made with de minimis parties early in the investigatory phase, the EPA will reserve its rights against settling de minimis parties should information concerning the volume or toxicity change. [FN79] The EPA frequently requires settling parties, whether de minimis or not, to certify that they have disclosed all information in their possession concerning waste contribution or financial capability. [FN80]

For precertification de minimis settlements, the EPA may require two other reopeners. These reopeners are designed to protect the EPA from the risks attendant to early settlement. They involve protection of “the Agency against (1) the risk of cost overruns during the completion of the remedial action and (2) the risk that further response action will be necessary in addition to the work specified in the ROD.” [FN81] Section 122(j)(2) of SARA prevents natural resource damage claims from being released in a de minimis or other settlement. [FN82] The EPA's De Minimis Settlement Guidance recommends***1093** express reservation of those claims unless a federal natural resource trustee has released them. [FN83]

The De Minimis Settlement Guidance is not directed to finality or certainty. Rather, it recognizes:

The legal fees and other transactions costs of negotiating and litigating with the Government, compounded by the potential costs of asserting and defending claims for contribution with other PRPs at the site, often could exceed the amount such minimal contributors would be expected to pay, even under a settlement or a judgment unfavorable to them. As a result, de minimis parties often seek a swift and efficient means to pay a sum that is commensurate with their involvement at the site and allows them to be dismissed from further negotiations and litigation. The Agency also needs a method for achieving settlements with minimal waste contributions in order to make negotiations in litigation more manageable. [FN84] In this respect, the EPA's De Minimis Settlement Guidance is directed more towards easing the logistics of its negotiations and litigation with private parties, rather than achieving final resolution of liability and responsibility for de minimis parties. In fact, regardless of the premium payment which may be made by settling de minimis parties, the De Minimis Settlement Guidance is clear that even if a party is truly de minimis it will not be released unless “cost overrun or future remediation risks” are covered by non de minimis PRPs. [FN85] Since pre-ROD and pre-Remedial Investigation/Feasibility Study (RI/FS) settlements will not normally provide sufficient technical data to result in an expansive release, direct settlement by de minimis parties with the EPA will result primarily in a reduction of administrative expenses in the form of reduced legal fees and other litigation and investigatory costs, rather than in a reduction of exposure to a failed remedy or unknown condition. [FN86]

B. Natural Resource Damages

Pursuant to 42 U.S.C. § 9607(a)(4)(C), liability

under CERCLA includes “damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.” [FN87] Section 122(j)(2) authorizes a covenant not to sue in CERCLA settlement agreements pertaining to natural resource damages. [FN88] Such a covenant, however, may only be made if the federal natural resource trustee has agreed to it in writing. [FN89] Moreover, the federal natural resource trustee may agree to such a covenant only “if the potentially responsible *1094 party agrees to undertake appropriate actions necessary to protect and restore the natural resources damaged by such release or threatened release of hazardous substances.” [FN90] By establishing the criteria for the granting of a covenant not to sue for natural resource damages, SARA sets forth a clear standard on which private parties may depend. Unfortunately, a strict interpretation of the statutory language reveals the covenant may be granted only “if the potentially responsible party agrees to undertake appropriate actions necessary to protect and restore the natural resources.” [FN91] The phrase “potentially responsible party” appears to apply to the settling party. In those instances where natural resource damages can be precisely calculated and quantified at the time of settlement natural resource damage reopeners would, theoretically, not be needed. Since this is rarely the case, however, a natural resource damage reopener will normally be a part of any CERCLA settlement. [FN92] Since natural resources are broadly defined, and since such damages can include the cost of restoring, replacing or acquiring the equivalent of the damaged resources, the reopener provision will be expansive indeed. [FN93] To date, as one commentator has noted “the natural resource damages doctrine . . . has in practical application hardly been implemented at all.” [FN94] The blanket natural resource damage reopener made a part of virtually all Superfund settlements will undoubtedly give rise to greater private party future liability exposure as the doctrine establishing recovery for natural resource damages develops.

C. Mixed Funding/Five-Year Review

Under section 122(b) of SARA, the EPA may enter into a settlement agreement with potentially responsible parties whereby funding for implementation*1095 of a response at a site is mixed between private and public funds. [FN95] Pursuant to a mixed funding settlement agreement, the settling parties will perform the response, but the EPA will finance it with fund moneys. [FN96] The EPA is to make “all reasonable efforts to recover the amount of such reimbursement under Section 9607.” [FN97] The EPA's decision regarding availability and use of the fund for financing the response action is not subject to judicial review. [FN98] In instances where mixed funding is selected, the EPA and the Superfund shall be subject “to an obligation for subsequent remedial actions at the same facility but only to the extent that such subsequent actions are necessary by reason of the failure of the original remedial action.” [FN99] The future obligation on the fund “shall be in a proportion equal to, but not exceeding, the proportion contributed by the Fund for the original remedial action.” [FN100] The fund's future remedial action obligation may be met either through fund expenditures or through moneys recovered through settlement or enforcement actions against those parties that did not settle under the original agreement. [FN101]

Since the EPA's current policies favor private party funding of response actions, the mixed funding provision of section 122 of SARA has not been utilized frequently. From the standpoint of PRPs, utilization of the mixed funding provision would result in greater certainty, less money committed to the original response, and less exposure for future response. While reopeners for unknown conditions and additional information would undoubtedly be included, exposure under them could be limited to that percentage of the original remedy funded by the private party. [FN102] As a part of the Model Consent Decree, settling defendants covenant not to make any claim for reimbursement from the fund. [FN103] Because of the limitations of liability associated with proportionate mixed fund cleanups, and the inherently greater direct costs to the EPA associated with such a cleanup, widespread use of the mixed funding provision, absent special circum-

stances, is unlikely. [FN104]

D. Five-Year Review

Congress passed section 121(c) of SARA to formalize its preference for *1096 permanent remedies. [FN105] Section 121(c) provides that when the EPA selects a remedial action that permits any hazardous substances, pollutants, or contaminants to remain at the site, “the President shall review such remedial action no less often than each five years after the initiation of such remedial action to assure that human health and the environment are being protected by the remedial action being implemented.” [FN106] Beginning with the time remedial action is initiated, every five years, and, possibly, prior to certification, the EPA must consider the factors which give rise to reopening any settlement agreement made with private PRPs. [FN107] Under this “statutory” reopener, if, in the EPA’s judgment, “action is appropriate at such site in accordance with Section 9604 or 9606” the EPA shall take or require further response. [FN108] Such a review could result in a reopening of a settlement prior to completion of the remedy. The provision assures that the EPA will review those factors that may justify reopening the settlement each five years after work at the site commences. [FN109] There is no time limit under CERCLA for ending the site review process.

V. CONCLUSION

Reopener liability under section 122 of CERCLA has no end. The covenant not to sue with its reopeners and reservations of rights provided under the Model Consent Decree offer little more than an agreement not to prosecute at the time of settlement for the work performed at the site, provided such work is performed properly. The five-year review provision, however, threatens the concept of a release for the work performed as of the settlement date. In addition, reopeners could be triggered prior to completion of a site’s cleanup.

Arguably, the benefits of settlement with the EPA, such as contribution protection and the very limited covenant not to sue, are offset by the

“certainty” that a settling party is jointly and severally liable at the site not only for the remedy being performed, but for myriad other costs and damages which may arise in the future. Further, by entering into a consent decree or ACO with the EPA, settling parties find themselves obliged to abide not only by CERCLA’s strict provisions, but also by the broader, discretionary reopeners found in the EPA’s guidance and policies. While the EPA contends that the scope of any release is commensurate with the effectiveness and permanency of the remedy selected at PRP lead cleanups, this is not the case. Rather, the effectiveness and permanency of the remedy may, in some instances,*1097 provide greater assurance that the unchanging reopener provisions contained in the EPA’s consent decrees will not be triggered, or will not be triggered as soon. The effectiveness or perceived permanency of the remedy at the time of settlement does nothing, however, to change the language or scope of the reopeners in CERCLA settlement documents.

By utilizing the unknown conditions, additional information, and natural resource damage reopeners in conjunction with SARA’s mandatory five-year review, the EPA has broad, almost unlimited, discretion to reopen sites, impose stricter cleanup standards, and require PRPs to spend greater amounts of money to achieve, in some cases, only marginal increases in protection of the public and the environment. Private PRPs that have resolved their liability with the EPA in the mistaken belief that they have finally settled their liability at a CERCLA site will find they have purchased a very expensive policy of environmental term insurance which covers only the work previously performed and few, if any, future claims. Under such a system a private PRP is arguably benefitted by rejecting an invitation to join the PRP group, await contribution litigation, and contend its liability is several. By avoiding settlement and execution of the EPA’s Model Consent Decree a private party may, in fact, be in a more advantageous position than if it had settled with the EPA. With final settlement of CERCLA actions illusory rather than real, reopener liability under CERCLA is not limited and, under the current statutory and regulatory system, extends

from here to eternity.

[FNa] B.B.A., Southern Methodist University, 1974; J.D., University of Texas School of Law, 1977. Mr. Addison is currently a shareholder of the Dallas law firm of Locke Purnell Rain Harrell. The views expressed herein are solely those of the author and do not represent the position of any other person or entity. The author expresses his appreciation to librarians of Locke Purnell Rain Harrell, Ms. Carolyn E. Grimes, Ms. Laura K. Justiss and Ms. K. Marine Shaw for their retrieval of information used in this article.

[FN1]. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 851 (3d ed. 1986).

[FN2]. As to the United States or a state, liability under CERCLA is "resolved" rather than settled. See 42 U.S.C. § 9613(f)(2) (1988).

[FN3]. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)); Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613-1782 (amending CERCLA of 1980). See 42 U.S.C. § 9622(f) (1988). See Memorandum: Covenants Not to Sue Under SARA, 52 Fed. Reg. 28,038, 28,039-44 (1987) (also published as OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE (OSWER), EPA, DIRECTIVE 9834.8 (July 10, 1987) [hereinafter Guidance].

[FN4]. Superfund is a commonly used synonym for CERCLA, after the tax-based fund established thereunder.

[FN5]. The more general topic of settlement of CERCLA litigation after the 1986 SARA amendments has been the subject of much commentary, including: William H. Hyatt, Jr., Negotiating Covenants Not to Sue under the Superfund Amendments and Reauthorization Act, in HAZARDOUS WASTE LITIGATION 1988: CURRENT PROBLEMS AND PRACTICAL SOLUTIONS, at 103

(PLI Litig. & Admin. Practice Course Handbook Series No. 349, 1988); Gene A. Lucero, Superfund Settlements: Negotiations, Settlement Process and Issues, in HAZARDOUS WASTE LITIGATION 1988: CURRENT PROBLEMS AND PRACTICAL SOLUTIONS, at 249 (PLI Litig. & Admin. Practice Course Handbook Series No. 349, 1988); Richard H. Mays, Settlements with SARA: A Comprehensive Review of Settlement Procedures under the Superfund Amendments and Reauthorization Act, in HAZARDOUS WASTE LITIGATION 1988: CURRENT PROBLEMS AND PRACTICAL SOLUTIONS, at 229 (PLI Litig. & Admin. Practice Course Handbook Series No. 326, 1988); Stephen D. Ramsey, How To Settle Superfund Cases, A.L.I.-A.B.A. COURSE OF STUDY, Aug. 1988, at 117; Stephen D. Ramsey & Samuel I. Gutter, Settlement in Superfund Cases, in 374 HAZARDOUS WASTE LITIGATION 1989: ADVANCED TACTICS AND PRACTICE, at 259 (PLI Litig. & Admin. Practice Course Handbook Series No. 374, 1989); Frank B. Cross, Settlement Under the 1986 Superfund Amendments, 66 OR. L. REV. 517 (1987); James M. Strock, Settlement Policy Under the Superfund Amendments and Reauthorization Act of 1986, 58 U. COLO. L. REV. 599 (1988); William W. Balcke, Note, Superfund Settlements: The Failed Promise of the 1986 Amendments, 74 VA. L. REV. 123 (1988); Peter F. Sexton, Comment, Superfund Settlements: The EPA's Role, 20 CONN. L. REV. 923 (1988).

[FN6]. Generally, the EPA considers remedy failure to include any instance where the response at a CERCLA site no longer adequately protects public health and the environment. See *infra* notes 60-63 and accompanying text.

[FN7]. In its Superfund Program, the EPA defines performance standards as "those cleanup standards, standards of control, and other substantive requirements, criteria or limitations set forth in the ROD [Record of Decision] of Section - of the SOW [Statement of Work]." Notice: Model CERCLA RD/RA Consent Decree, 56 Fed. Reg. 30,996, 30,998 (1991) [hereinafter Model Consent Decree].

[FN8]. Pub. L. No. 99-499; 100 Stat. 1613-1782 (amending CERCLA of 1980).

[FN9]. Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034 (1985) [hereinafter Policy].

[FN10]. *Id.* See Guidance, *supra* note 3. A release is defined as “the abandonment of a claim to a party against whom it exists; it is a surrender of a cause of action and may be gratuitous or for a consideration.” *Melo v. National Fuse & Powder Co.*, 267 F.Supp. 611, 612 (D. Colo. 1967). Conversely, the more narrow covenant not to sue is defined as “[a] covenant by one who had a right of action at the time of making it against another person, by which he agrees not to sue to enforce such right of action.” BLACK’S LAW DICTIONARY, 329 (5th ed. 1979). The covenant “does not extinguish the cause of action and does not release other joint tortfeasors even if it does not specifically reserve rights against them.” *Van Cleave v. Gamboni Constr. Co.*, 665 P.2d 250, 252 (Nev. 1983).

[FN11]. 42 U.S.C. § 9622(f) (1988).

[FN12]. *Id.* § 9622(f)(6)(C).

[FN13]. Guidance, *supra* note 3.

[FN14]. Model Consent Decree, *supra* note 7.

[FN15]. 42 U.S.C. § 9622(f)(1).

[FN16]. *Id.*

[FN17]. *Id.* § 9622(f)(4). This section requires the EPA to consider the following public interest factors in the decision whether to grant a covenant not to sue to a settling party:

(A) The effectiveness and reliability of the remedy, in light of the other alternative remedies considered for the facility concerned.

(B) The nature of the risks remaining at the facility.

(C) The extent to which performance standards are included in the order or decree.

(D) The extent to which the response action provides a complete remedy for the fa-

cility, including a reduction in the hazardous nature of the substances at the facility.

(E) The extent to which the technology used in the response action is demonstrated to be effective.

(F) Whether the fund or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the facility.

(G) Whether the remedial action will be carried out, in whole or in significant part, by the responsible parties themselves.

[FN18]. *Id.* § 9622(f)(2)(A), (B).

[FN19]. *Id.*

[FN20]. 42 U.S.C. § 9622(f)(3).

[FN21]. *Id.* § 9622(f)(5).

[FN22]. *Id.* § 9622(f)(6)(A).

[FN23]. *Id.* See *In re Acushnet River & New Bedford Harbor*, 712 F.Supp. 1019, 1038 (D.C. Mass 1989) (district court rejected a proposed decree on the grounds it failed to include the mandatory reopener).

[FN24]. 42 U.S.C. § 9622(f)(6)(B).

[FN25]. *Id.*

[FN26]. *Id.* § 9622(f)(6)(C).

[FN27]. Policy, *supra* note 9.

[FN28]. *Id.* at 5035.

[FN29]. *Id.*

[FN30]. *Id.*

[FN31]. *Id.*

[FN32]. Policy, *supra* note 9, at 5035.

[FN33]. *Id.* at 5039.

[FN34]. *Id.*

[FN35]. *Id.*

[FN36]. Among other provisions, the Policy provides that “[r]eleases or covenants must also include certain reopeners which preserve the right of the Government to seek additional cleanup action and recover additional costs from responsible parties in a number of circumstances.” *Id.* The Policy stated that, at a minimum, reopeners would be required for unknown or undetected conditions arising or discovered after the time of settlement which present imminent and substantial danger. *Id.* at 5040. It also provided for reopening the settlement when the EPA receives additional information, unavailable at the time of settlement, indicating conditions at the site may present an imminent or substantial danger to public health or the environment. *Id.* The Policy also provided for waiver of the reopeners under extraordinary circumstances. *Id.*

[FN37]. They include:

- (a) Only the PRP providing consideration may receive a covenant not to sue;
- (b) The covenant not to sue may cover only those claims involved in the case;
- (c) Criminal matters may not be released;
- (d) Releases for partial cleanups are limited to work actually completed;
- (e) Release of natural resource damage claims require the approval of the Federal Trustees;
- (f) Settling parties must release any related claims against the federal government including the Hazardous Substances Response Fund;
- (g) The covenant not to sue does not become effective until the response is complete in a manner satisfactory to the EPA;
- (h) Releases should be drafted as covenants not to sue in order to protect the federal government.

Policy, *supra* note 9, at 5040.

[FN38]. *Id.*

[FN39]. SARA deletes the requirement of establishing that conditions at the site present an imminent and substantial endangerment to public health or welfare or the environment in order to reopen a settlement and replaces it with a provision which allows the reopener to be triggered upon a release or threatened release. 42 U.S.C. § 9622(f)(6)(A).

[FN40]. 42 U.S.C. § 9622(f)(1).

[FN41]. Guidance, *supra* note 3.

[FN42]. *Id.* at 28,040.

[FN43]. *Id.* at 28,041.

[FN44]. Model Consent Decree, *supra* note 7, at 31,000, 31,005.

[FN45]. Guidance, *supra* note 3, at 28,038.

[FN46]. *Id.* at 28,040.

[FN47]. *Id.* at 28,041.

[FN48]. 42 U.S.C. § 9622(f)(6)(A).

[FN49]. *Id.* § 9622(f)(6)(C). In at least one case, *United States v. Rohm & Haas Co.*, 721 F.Supp. 666, 672 (D.N.J. 1989), the EPA utilized its section 122(f)(6)(C) authority to require a reopener which would be triggered if the clean-up exceeded a total cost of \$94 million.

[FN50]. Guidance, *supra* note 3, at 28,041.

[FN51]. *Id.* (citing 50 Fed. Reg. 5039 (1985)).

[FN52]. *Id.*

[FN53]. 42 U.S.C. § 9622(f)(6)(A).

[FN54]. Policy, *supra* note 9, at 5040.

[FN55]. *Id.* at 5034.

[FN56]. See, Gene A. Lucero, *Superfund Settlement: Negotiations, Settlement Process and Issues*, in *HAZARDOUS WASTE LITIGATION 1988: CURRENT PROBLEMS AND PRACTICAL*

SOLUTIONS at 259 (PLI Litig. & Admin. Practice Course Handbook Series No. 349, 1988).

[FN57]. Stephen D. Ramsey & Maureen M. Gough, *The Superfund Amendments and Reauthorization Act of 1986*, in *HAZARDOUS WASTE LITIGATION 1988: CURRENT PROBLEMS AND PRACTICAL SOLUTIONS* at 448 (PLI Litig. & Admin. Practice Course Handbook Series No. 349, 1988).

[FN58]. Model Consent Decree, *supra* note 7, at 31,009.

[FN59]. *Id.* The exact language of paragraph 82 of the Model Consent Decree reads as follows:

For purposes of paragraph 80 [Pre-certification Reservations], the information and the conditions known to EPA shall include only that information and those conditions set forth in the Record of Decision for the Site and the administrative record supporting the Record of Decision. For purposes of paragraph 81 [Post-certification Reservations], the information and conditions known to EPA shall include only that information and those conditions set forth in the Record of Decision, the administrative record supporting the Record of Decision, and any information received by EPA pursuant to the requirements of this Consent Decree prior to Certification of Completion of the Remedial Action.

[FN60]. *Id.* at 31,009-10.

[FN61]. 42 U.S.C. § 9622(f)(6)(C).

[FN62]. Guidance, *supra* note 3, at 28,041.

[FN63]. Model Consent Decree, *supra* note 7, at 31,009.

[FN64]. Policy, *supra* note 9, at 5040 (request for public comment Feb. 5, 1985).

[FN65]. See Guidance, *supra* note 3, at 28,041 (request for public comment July 27, 1987).

[FN66]. *Id.* Referencing the mixed funding provi-

sion of SARA, the EPA concludes, “responsible parties who have settled retain liability for additional work necessary to address remedy failure.” *Id.* Congressional concern, however, did not result in an express remedy failure reopener. Instead, the EPA has extrapolated it from its general grant of authority found in § 122(f)(6)(c) and by then including it as a part of its additional information reopener.

[FN67]. *Id.*

[FN68]. *Id.*

[FN69]. 42 U.S.C. § 9622(g)(1)(A).

[FN70]. Superfund Program; De Minimis Contributor Settlements, 52 Fed. Reg. 24,333, 24,334 (1987) [hereinafter *De Minimis Settlement Guidance*].

[FN71]. 42 U.S.C. § 9622(g)(1), (4).

[FN72]. *Id.* § 9622(g)(1).

[FN73]. *Id.* § 9622(g)(1)(A).

[FN74]. *Id.* § 9622(g)(2).

[FN75]. *Id.* § 9622(f)(6)(C). See also 42 U.S.C. § 9622(f)(6)(A) (“[t]he President is authorized to include any provisions allowing future enforcement action under section 9606 or 9607 of this title . . . to assure protection of public health, welfare, and the environment”).

[FN76]. *De Minimis Settlement Guidance*, *supra* note 70.

[FN77]. *Id.* at 24,337.

[FN78]. *Id.*

[FN79]. *Id.*

[FN80]. *De Minimis Settlement Guidance*, *supra* note 70, at 24,337. See *United States v. Vertac Chem. Corp.*, 756 F.Supp. 1215 (E.D. Ark. 1991). In *Vertac*, the court required continuing financial certification by those parties claiming insufficient

resources to participate fully in remediation. *Id.* at 1219.

[FN81]. De Minimis Settlement Guidance, *supra* note 70, at 24,337. Ironically, the EPA refers repeatedly in its guidance and policies on Superfund settlements to the protection required of “the Agency”. It is as though the Agency exists with transcendent goals beyond those of the members of the public that CERCLA was passed to protect, and with whom the Agency is settling.

[FN82]. 42 U.S.C. § 9622(j)(2).

[FN83]. De Minimis Settlement Guidance, *supra* note 70, at 24,337.

[FN84]. *Id.* at 24,334, 24,335.

[FN85]. *Id.* at 24,337.

[FN86]. De minimis settlers will also receive the benefit of contribution protection, just as major PRPs will receive a reduction in the potential liability by the amount of the de minimis settlement. 42 U.S.C. § 9622(g)(5).

[FN87]. *Id.* § 9607(a)(4)(C).

[FN88]. *Id.* § 9622(j)(2).

[FN89]. *Id.*

[FN90]. *Id.*

[FN91]. 42 U.S.C. § 9622(j)(2) (emphasis added).

[FN92]. The Model Consent Decree bears this thinking out at paragraph 83(3). It states that “liability for damages for injury to, destruction of, or loss of natural resources” is specifically reserved from those covenants not to sue set forth at paragraph 80-82 of the Model Consent Decree under EPA’s General Reservations of Rights. Model Consent Decree, *supra* note 7, at 31,009-10.

[FN93]. Natural resources are defined as “land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources be-

longing to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States . . . any State or local government, [or] any foreign governments.” 42 U.S.C. § 9601(16) (1988). Damages to natural resources include the costs of restoring, replacing or acquiring the equivalent of the damaged resources, the value of the lost use of that resource during the destruction and restoration, and the reasonable costs of assessing the natural resource damages. See 42 U.S.C. § 9607(a)(4)(C), (f)(1); see generally *Ohio v. United States Dep’t of the Interior*, 880 F.2d 432, 441-59 (D.C. Cir. 1989)(CERCLA recovery should not be limited to the lesser of restoration or replacement costs). Natural resource damages may even include damage to resources not directly owned by the government if “[a] substantial degree of government regulation, management or other form of control over privately owned property would make it a CERCLA natural resource.” Kevin M. Ward, *Recovery of Natural Resource Damages Under CERCLA*, 25 TORT. & INS. L. J. 559, 572-73 (1990); see also *Ohio*, 880 F.2d at 432; *Lutz v. Chromatex, Inc.*, 718 F.Supp. 413 (M.D. Pa. 1989).

[FN94]. Barry Breen, *Citizens Suits For Natural Resource Damages: Closing a Gap in Federal Environmental Law*, 24 WAKE FOREST L. REV. 851, 869 (1989)(advocates permitting citizen suits for natural resource damages because such claims are a “relative rarity” under the current government trustee system).

[FN95]. 42 U.S.C. § 9622(b)(1).

[FN96]. *Id.*

[FN97]. *Id.*

[FN98]. *Id.* § 9622(b)(2).

[FN99]. *Id.* § 9622(b)(4).

[FN100]. 42 U.S.C. § 9622(b)(4).

[FN101]. *Id.*

[FN102]. See generally 42 U.S.C. § 9622(b)(4) (future obligation of the Fund “shall be in a propor-

tion equal to, but not exceeding, the proportion contributed by the Fund for the original remedial action.”).

[FN103]. Model Consent Decree, *supra* note 7, at 31,010 (1991). Under EPA's internal guidance for implementation of mixed funding settlements dated October 20, 1987, a number of scenarios are considered including shared work arrangements between EPA and the private parties, partial private fundings with shared work arrangements, and Fund lead state and private party sharing responses. Absent site specific litigation risks or other special circumstances EPA has little incentive to participate in mixed funding when private party cleanups can be imposed.

[FN104]. See 52 Fed. Reg. 31,010 (1987).

[FN105]. Section 121(b) establishes a preference for “treatment which permanently and significantly reduces the volume toxicity or mobility of the hazardous substances, pollutants, and contaminants” at remedial sites. 42 U.S.C. § 9621(b)(1).

[FN106]. *Id.* § 9621(c).

[FN107]. *Id.*

[FN108]. *Id.*

[FN109]. In many instances backfilled soil or treated groundwater will contain residual elements of “hazardous substances, pollutants or contaminants” at the site under the work plan implemented through a consent decree. *Id.* § 9621(b)(1). A broad reading of Section 121(c) would result in those remaining contaminants giving rise to the mandatory five-year review for that site.

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