CARL T.C. GUTIERREZ
GOVERNOR OF GUAM

APR 17 1998

Refer to
Legislative Secretary

OFFICE OF THE LEGISLATIVE SECRETARY
ACKNOWLEDGMENT RECEIPT
Received By
Time 4:45pm
Date 4-17-98

The Honorable Antonio R. Unpingco
Speaker
Twenty-Fourth Guam Legislature
Guam Legislature Temporary Building
155 Hesler Street
Agana, Guam 96910

Dear Speaker Unpingco:

Enclosed please find a copy of Bill No. 517 (COR), "AN ACT TO ADD A NEW ARTICLE 33A TO CHAPTER 33, DIVISION 2 OF TITLE 10 OF THE GUAM CODE ANNOTATED, RELATIVE TO MUNICIPAL SOLID WASTE FACILITIES HEALTH MONITORING FOR PERSONS LIVING CLOSE TO SUCH FACILITIES; COMPENSATING THE COMMUNITY; AND TO CITE THIS ACT AS THE 'SWMF HEALTH MONITORING AND COMPENSATION ACT OF 1998'", which I have **signed** into law today as **Public Law No. 24-181.**

This legislation responds to the community's interest in maintaining a safe environment and seeks to protect the health of our island. Realizing that proper solid waste management is an urgent necessity, this legislation provides for the Department of Public Health and Social Services to do a base line study of people, vectors (which are animals and insects which carry diseases) and other animals around a solid waste management facility within a radius of 1 mile of the facility. This base line study will provide information concerning the occurrence of diseases now present. A follow up study will be conducted every 2 years to compare results and study trends.

The funding for the base line study, as well as funding for other health needs, will come from those who operate solid waste management facilities. Facility operators will contribute 1% of the tipping fees to a Medical Monitoring Fund for this purpose.

Office of the Speaker
ANTONIO R. UNPINGCO
Date: 4-17-98
Time: 1445
Rec'd by:
Print Name: Charlene D.

Ricardo J. Bordallo Governor's Complex • Post Office Box 2950, Agana, Guam 96932 • (671)472-8931 • Fax (671)477-GUAM

The money in the Medical Monitoring Fund will be apportioned 25% to the village where a landfill facility is closed (Ordot-Chalan Pago), 25% to the village where a solid waste management facility is located, and 50% to the Department of Public Health and Social Services.

Although Guam may be considered overloaded with studies in some areas, health care studies are in short supply. I believe that the data resulting from this study will be very important.

Very truly yours,

Carl T. C. Gutierrez
Governor of Guam

Attachment

cc: The Honorable Joanne M. S. Brown
Legislative Secretary

TWENTY-FOURTH GUAM LEGISLATURE
1998 (SECOND) Regular Session

CERTIFICATION OF PASSAGE OF AN ACT TO THE GOVERNOR

This is to certify that Bill No. 517 (COR), "AN ACT TO ADD A NEW ARTICLE 33A TO CHAPTER 33, DIVISION 2 OF TITLE 10 OF THE GUAM CODE ANNOTATED, RELATIVE TO MUNICIPAL SOLID WASTE FACILITIES HEALTH MONITORING FOR PERSONS LIVING CLOSE TO SUCH FACILITIES; COMPENSATING THE COMMUNITY; AND TO CITE THIS ACT AS THE "SWMF HEALTH MONITORING AND COMPENSATION ACT OF 1998," was on the 27TH day of March, 1998, duly and regularly passed.

ANTONIO R. UNPINGCO
Speaker

Attested:

MARK FORBES
Senator and Acting Legislative Secretary

This Act was received by the Governor this 7th day of April, 1998, at 3:30 o'clock P.M.

Assistant Staff Officer
Governor's Office

APPROVED:

CARL T. C. GUTIERREZ
Governor of Guam

Date: 4-17-98

Public Law No. 24-181

TWENTY-FOURTH GUAM LEGISLATURE
1998 (SECOND) Regular Session

Bill No. 517 (COR)
As amended by the Author and
on the Floor.

Introduced by:

E. J. Cruz
J. C. Salas
L. F. Kasperbauer
Felix P. Camacho
A. R. Unpingco
A. C. Blaz
F. B. Aguon, Jr.
Francisco P. Camacho
A. C. Lamorena, V
T. C. Ada
J. M.S. Brown
M. C. Charfauros
W. B.S.M. Flores
Mark Forbes
C. A. Leon Guerrero
L. Leon Guerrero
V. C. Pangelinan
A. L.G. Santos
F. E. Santos
J. Won Pat-Borja

AN ACT TO ADD A NEW ARTICLE 33A TO CHAPTER 33, DIVISION 2 OF TITLE 10 OF THE GUAM CODE ANNOTATED, RELATIVE TO MUNICIPAL SOLID WASTE FACILITIES HEALTH MONITORING FOR PERSONS LIVING CLOSE TO SUCH FACILITIES; COMPENSATING THE COMMUNITY; AND TO CITE THIS ACT AS THE

"SWMF HEALTH MONITORING AND COMPENSATION ACT OF 1998."

BE IT ENACTED BY THE PEOPLE OF GUAM:

Section 1. A new Article 33A is hereby added to Chapter 33, Division 2 of Title 10 of the Guam Code Annotated to read as follows:

"ARTICLE 33A.

SWMF HEALTH MONITORING AND COMPENSATION.

Section 33A101. Legislative Finding and Intent. Solid Waste Management Facilities ('SWMF') have byproducts that if exposed repeatedly, or consumed in finite amount, can be detrimental to good health. The community where the SWMF is processing municipal solid waste should be compensated for accepting a facility (incinerator, landfill, WTEF, combustion, plasma, processing) which is essential for the Islands' health and welfare, but inherently exposes that village with not only noxious and eyesore surroundings, but perhaps imposes respiratory disease, infection disorders, cancer ailments and other disorders more than the expected distribution for such illnesses. It is therefore imperative that the monitoring of people, since the facilities and the environment are being monitored already by the Guam Environmental Protection Agency ('GEPA') and the Department of Public Health and Social Services ('DPHSS'), be established and also logically that we should compensate villages.

Recognizing the critical need to establish a Municipal SWMF, it is the intent of the Guam Legislature to provide for the monitoring and

compensation of the environmental impact of the Municipal SWMF on the health and welfare of residents in the neighborhood.

Section 33A102. Title. This Article may be cited or referred to as the, *"SWMF Health Monitoring and Compensation Act of 1998."*

Section 33A103. Additional Definitions to this Chapter. In addition to the words and phrases defined herein, all definitions contained in §51102 of Chapter 51, Part 2, Division 2 of Title 10 of the Guam Code Annotated are applicable, unless specifically defined for in this Chapter:

(1) '**Department**' means the Department of Public Health and Social Services ('DPHSS').

(2) '**Director**' means the Director of DPHSS.

(3) '**Division**' means the Division of Environmental Health of DPHSS.

(4) '**DISID**' means the Department of Integrated Services for Individuals with Disabilities.

(5) '**Base Line Study**' shall mean a collection of information and/or test results for the following, but not limited to: laboratory studies, radiology, tissue and specimen samples, etc.

(6) '**GEPA**' shall mean the Guam Environmental Protection Agency.

(7) '**DOAg**' shall mean the Department of Agriculture.

Section 33A104. Monitoring. All efforts toward the opening, maintenance, operation and closure of solid waste management facilities, including dump sites, landfills, incinerators and the like, shall be taken with utmost caution, taking into consideration the environmental impact of such municipal solid waste management programs upon the lives and health of the families residing in the neighborhood of such facilities. Specifically, the following related tasks are assigned:

(a) Monitoring Authority. All SWMF that are involved in the following: landfill, waste to energy facility, incineration, plasma torch or flame technology and other SWMF that the Director of DPHSS or Administrator of GEPA designates shall be monitored. The Environmental Health Division of DPHSS shall conduct an initial base-line study of the people, vectors and other animals around the solid waste management facility within a radius of one (1) mile from the perimeter of the SWMF and may be extended to cover an area up to five (5) miles at the discretion of the Director of DPHSS. The GEPA and DOAg shall provide assistance to DPHSS, not limited to technical support, training, collaboration of data, etc. The base-line data shall be established and should at least include relevant data of the best indicators determining whether the prevalence of allergies, respiratory disorders, infectious diseases, cancer ailments and other diseases are more than the expected distribution than that of a national standard or an established local standard. The summary report of such findings

shall be reported to the Governor, the Speaker of the Guam Legislature, and the Director of DISID for the Division of Health Planning. The follow-up analysis shall be no less than every two (2) years and may be as frequent as authorized by the Director of DPHSS. The Director of DPHSS may hire the assistance of no more than three (3) consultants, such that one (1) must be a certified epidemiologist and one (1) must be a licensed physician. The Director may also contract the project to a qualified company with a certified epidemiologist and a licensed physician staff according to the Procurement Laws, Chapter 5 of Title 5 of the Guam Code Annotated.

(b) Source of Funding. Any person operating a Solid Waste Management Facility(ies) shall be levied one percent (1%) of all tipping fees, as defined in §51118 of Part 2, Division 2 of Title 10 of the Guam Code Annotated. The collected amount by DPW shall be deposited to the SWMF Medical Monitoring Fund ('SWMF-MMF').

(c) Distribution of Funds. There shall be a quarterly disbursement of funds from the SWMF-MMF by the Director of DPHSS for the amount collected in Paragraph (b) above as follows:

(1) **For Landfill Closure.** The village(s) where the landfill facility is to be closed shall receive twenty-five percent (25%) of the levied amount from Subsection (b), Source of Funding, up to five (5) years after the date of closure declared by DPW. The monetary amount shall be appropriated from the SWMF-MMF to the respective village(s) Mayor's operational

account for community health care needs or community health programs. After the fifth (5th) year, the amount set aside for this Paragraph shall be appropriated equally to Paragraphs (2) and (3) below. The Village of Ordot/Chalan Pago Landfill closure shall be the first recipient of this Provision.

(2) For other village(s) with a Solid Waste Management Facility(ies), the sum of twenty-five percent (25%) of the levied amount from Paragraph (b), Source of Funding, shall be appropriated from the SWMF-MMF to the respective village Mayor's operational account for community health care needs or community health programs.

(3) The Department of Public Health and Social Services shall receive fifty percent (50%) of the levied amount from Paragraph (b), Source of Funding, for the purpose of this Act. GEPA and DOAg shall be compensated for all expenses relative to the enforcement of this Act from the SWMF-MMF by the Director of DPHSS.

(4) **Administrative Responsibility and Accountability.** The respective recipient mayor(s), Director of DPHSS, GEPA and DOAg are hereby authorized to use their share of the SWMF-MMF for the purposes intended in this Act and shall prepare a financial summary report to the Governor and the Speaker of the Guam Legislature on an annual basis, or as per request by the Governor or Speaker of the Guam Legislature.

(5) **Creation of SWMF-MMF.** There is hereby created, separate and apart from other funds within the Department, a fund to be known as the Solid Waste Management Facilities - Medical Monitoring Fund ('SWMF-MMF'). The SWMF-MMF shall not be commingled with the General Fund or any other funds of the government of Guam, and it shall be maintained in a separate bank account as required under this Article and may be deposited in an interest bearing account.

(6) **Promulgating Rules and Regulations.** DPHSS shall promulgate rules and regulations within sixty (60) days after enactment of this Act through the Administrative Adjudication Law. The rules and regulations shall include revising and creating forms, maintaining the confidentiality of records, summary reports appropriate for public disclosure, other documents as are necessary in accordance with the management of confidentiality of patient records, provisions for violation or breech of information management and any other provision to falsify the intent and the enforcement of this Act.

(7) The lack of rules and regulations shall not impede the enforcement of Paragraphs (1), (2) and (3) above.

Section 33A105. Standing to Sue, Injunction.

The Director of DPHSS shall have standing to bring a lawsuit in the Superior Court of Guam for public nuisance in order to enjoin the operation of a SWMF."

Section 2. Severability. If any provision of this Law or its application to any person or circumstance is found to be invalid or contrary to law, such invalidity shall not affect other provisions or applications of this Law which can be given effect without the invalid provisions or application, and to this end the provisions of this Law are severable.

TWENTY-FOURTH GUAM LEGISLATURE

Office of the Vice-Speaker

ANTHONY C. BLAZ

LEGISLATIVE COMMITTEE MEMBERSHIP

Chairman
Finance & Taxation

Vice-Chairman
Rules, Government Reform & Federal Affairs

Education

Natural Resources

Health & Human Services

Tourism, Economic Development & Cultural Affairs

Judiciary, Public Safety & Consumer Protection

Transportation, Telecommunications, & Micronesian Affairs

MEMBERSHIP

Guam Finance Commission

Commission on Self Determination

March 16, 1998

The Honorable Speaker Antonio R. Unpingco
24th Guam Legislature
155 Hesler Street
Agana, Guam 96910

Dear Mr. Speaker:

The Committee on Finance and Taxation, to which was referred **Bill No. 517**, "AN ACT RELATIVE TO MUNICIPAL SOLID WASTE FACILITIES HEALTH MONITORING FOR PERSONS LIVING CLOSE TO SUCH FACILITIES AND COMPENSATING THE COMMUNITY BY ADDING A NEW ARTICLE 4 TO CHAPTER 51 OF TITLE 10 OF THE GUAM CODE ANNOTATED, RELATIVE TO HEALTH MONITORING AND COMPENSATION AND TO CITE THIS ACT AS THE "SWMF HEALTH MONITORING AND COMPENSATING FOR NOT IN MY BACKYARD ("NIMBY") SYNDROME ACT OF 1998"", herein reports back with the recommendation **TO DO PASS.**

Votes of the committee members are as follows:

10 To Pass

0 Not to Pass

0 To Place in Inactive File

0 Abstain

0 Off-Island

0 Not Available

A copy of the Committee's report and other pertinent documents are enclosed for your reference and information.

Sincerely,

ANTHONY C. BLAZ

attachments

155 Hesler St. Agana, Guam 96910 Tel: 472-3557/58/60 Fax: 472-3562 EMail: tonyblaz@kuentos.guam.net

Committee on Finance and Taxation

Vote Sheet

Bill No. 517

AN ACT RELATIVE TO MUNICIPAL SOLID WASTE FACILITIES HEALTH MONITORING FOR PERSONS LIVING CLOSE TO SUCH FACILITIES AND COMPENSATING THE COMMUNITY BY ADDING A NEW ARTICLE 4 TO CHAPTER 51 OF TITLE 10 OF THE GUAM CODE ANNOTATED, RELATIVE TO HEALTH MONITORING AND COMPENSATION AND TO CITE THIS ACT AS THE "SWMF HEALTH MONITORING AND COMPENSATING FOR NOT IN MY BACKYARD ("NIMBY") SYNDROME ACT OF 1998

Committee Member	To Pass	Not to Pass	Abstain	Inactive File
A. C. Blaz, Chairperson	✓			
M. Forbes, Vice Chairperson				
A. R. Unpingco, Ex-Officio				
E. Barrett-Anderson, Member				
J. M. S. Brown, Member				
E. J. Cruz, Member	✓			
L. F. Kasperbauer, Member	X			
A. A. C. Lamorena, V, Member	✓			
C. A. Leon Guerrero, Member				
J. C. Salas, Member				
T. C. Ada, Member	✓			
M. C. Charfauros, Member	✓			
W. B. S. M. Flores, Member	✓			
F. E. Santos, Member				

Committee on Finance and Taxation
Report on
Bill No. 517 (COR)
(as amended by the Author)

AN ACT RELATIVE TO MUNICIPAL SOLID WASTE FACILITIES HEALTH MONITORING FOR PERSONS LIVING CLOSE TO SUCH FACILITIES AND COMPENSATING THE COMMUNITY BY ADDING A NEW ARTICLE 33A TO CHAPTER 33, DIVISION 2 OF TITLE 10 OF THE GUAM CODE ANNOTATED AND TO CITE THIS ACT AS THE "SWMF HEALTH MONITORING AND COMPENSATION FOR NOT IN MY BACKYARD ('NIMBY') SYNDROME ACT OF 1998.

Introduced by Senators
E. J. Cruz, J. C. Salas, L. F. Kasperbauer, Felix P. Camacho, A. R. Unpingco,
A. C. Blaz, F. B. Aguon, Jr., Francisco P. Camacho, and A. C. Lamorena V.

PUBLIC HEARING:

The Committee on Finance and Taxation conducted a public hearing on Friday, March 13, 1998, at 9:00 a. m., to hear testimonies on Bill No. 517 (COR), "AN ACT RELATIVE TO MUNICIPAL SOLID WASTE FACILITIES HEALTH MONITORING FOR PERSONS LIVING CLOSE TO SUCH FACILITIES AND COMPENSATING THE COMMUNITY BY ADDING A NEW ARTICLE 4 TO CHAPTER 51 OF TITLE 10 OF THE GUAM CODE ANNOTATED, RELATIVE TO HEALTH MONITORING AND COMPENSATION AND TO CITE THIS ACT AS THE 'SWMF HEALTH MONITORING AND COMPENSATING FOR NOT-IN-MY-BACKYARD ('NIMBY') SYNDROME ACT OF 1998'." The public hearing was held in the Vice Speaker's Conference Room.

MEMBERS PRESENT:

The meeting was called to order by Vice Speaker Anthony C. Blaz, Chairperson of the Committee on Finance and Taxation. Committee and other members present were: Senators Edwardo J. Cruz and Francisco P. Camacho.

TESTIMONY:

The Director of the Department of Health and Human Services submitted a written testimony supporting Bill No. 517 (LS) and at the same time not objecting to, and therefore accepting, the responsibility assigned to the Division of Environmental Health which is to conduct a base-line study of the people, vectors, and other animals around the solid waste management facility; further suggested the addition of Section 51404 (a) requiring the

Guam Environmental Protection Agency and the Department of Agriculture also to participate in such study in order to make this effort a multi-disciplinary agency approach.

Finally, he proposed an amendment to Section 51404(c)(3) to reflect the Division of Environmental Health (DEH) to be the recipient of the funds to be created into a separate and distinct revolving account for DEH, not to be commingled with the general fund.

Mayor Rossana D. San Miguel of Chalan Pago-Ordot also submitted a testimony favoring and strongly recommending the enactment of Bill No. 517 (COR). Also submitting testimony in support of Bill No. 517 was Peter R. Sgro, Jr.

FINDINGS:

The Committee finds the following:

- The enactment of Bill No. 517 (COR) would enable the government of Guam to provide for the monitoring and compensation of the environmental impact of the Municipal Solid Waste Management Facility on the health and welfare of residents of the neighborhood of such facility.
- The Division of Environmental Health of the DPHSS has no objection to conduct a base-line study of the people, vectors, and other animals around the MSWMF to enable monitoring, and eventually, compensating parties entitled to compensation in order to protect the health and welfare of residents in the neighborhood of municipal solid waste management facilities.
- The revision proposed by the DPHSS Director to include GEPA and the Department of Agriculture in the multi-disciplinary agency approach towards conducting such base-line study is acceptable.
- It is therefore imperative that the monitoring of people (since the facilities and the environment are being monitored already by GEPA and DPHSS) be established and also logically that we should compensate villages that we imposed the "Not in my Back Yard ('NIMBY') Syndrome."
- Recognizing the critical need to establish a Municipal Solid Waste Management Facility, it is the intent of the Guam Legislature to provide for the monitoring and compensation of the environmental impact of the Municipal Solid Waste Management Facility on the health and welfare of residents in the neighborhood.

RECOMMENDATION:

After reviewing the testimonies submitted in support of Bill No. 517 (COR), the Bill No. 517 (COR), "**AN ACT RELATIVE TO MUNICIPAL SOLID WASTE FACILITIES**

HEALTH MONITORING FOR PERSONS LIVING CLOSE TO SUCH FACILITIES AND COMPENSATING THE COMMUNITY BY ADDING A NEW ARTICLE 33A TO CHAPTER 33, DIVISION 2 OF TITLE 10 OF THE GUAM CODE ANNOTATED AND TO CITE THIS ACT AS THE "SWMF HEALTH MONITORING AND COMPENSATION FOR NOT IN MY BACKYARD ('NIMBY') SYNDROME ACT OF 1998," as amended, be passed by the Committee on Finance and Taxation.

Profile of Bill No. 517 (COR)

Brief Title:	"The Solid Waste Management Facility (SWMF) Health Monitoring and Compensation for Not-In-My-Backyard ('NIMBY') Syndrome Act of 1998"
Date Introduced:	Submitted to the Legislature for introduction on Tuesday, February 24, 1998, and ratified during the Second Regular Session of the 24th Guam Legislature.
Main Sponsors:	Senators E. J. Cruz, J. C. Salas, and L. F. Kasperbauer
Committee Referral:	Referred by the Committee on Rules, Government Reform and Federal Affairs to the Committee on Finance and Taxation.
Public Hearing:	The Committee on Finance and Taxation conducted a public hearing on Bill No. 517 (COR) at the Vice Speaker's Conference Room on Friday, March 13, 1998.
Official Title:	AN ACT RELATIVE TO MUNICIPAL SOLID WASTE FACILITIES HEALTH MONITORING FOR PERSONS LIVING CLOSE TO SUCH FACILITIES AND COMPENSATING THE COMMUNITY BY ADDING A NEW ARTICLE 33A TO CHAPTER 33, DIVISION 2 OF TITLE 10 OF THE GUAM CODE ANNOTATED AND TO CITE THIS ACT AS THE "SWMF HEALTH MONITORING AND COMPENSATION FOR NOT-IN-MY-BACKYARD ('NIMBY') SYNDROME ACT OF 1998."
Co-Sponsors:	Senators Felix P. Camacho, A. R. Unpingco, A. C. Blaz, F. B. Aguon, Jr., Francisco P. Camacho and A. C. Lamorena V.
Recommendation:	To pass.

OVERVIEW AND INTENT:

Bill No. 517 (COR) proposes to recognize the critical need to establish a Municipal Solid Waste Management Facility with the intent of monitoring and providing compensation for the environmental impact of such Facility on the health and welfare of residents in the surrounding neighborhood. The compensation, which will come from the tipping fees collected by DPW as defined in Section 51118, Part 2, Division 2 of Title 10 GCA, and systematically distributed in such a way as to appropriately compensate the community where the SWMF is processing municipal solid waste for accepting such facility (Incinerator, Landfill, WTEF, Combustion, Plasma, Processing) which may expose

that community not only to noxious and eyesore surrounding, but perhaps, possible exposure to respiratory disease, infection disorders, cancer ailments, and other illnesses. This compensation for the 'NIMBY' syndrome involved is intended to provide monitoring and actual healthcare services necessary to protect the affected residents from the hazards associated with SWMF.

SECTION ANALYSIS:

Section 1. This Section proposes to add a new Article 33A to Chapter 33, Division 2, Title 10 GCA, namely:

Article 33A101 defines the Legislative Findings and Intent, as summarized above.

Section 33A102. Cites the title of this Act as the "SWMF Health Monitoring and Compensation for Not-In-My-Backyard ('NIMBY') Syndrome Act of 1998."

Section 33A103. Defines the peculiar words, phrases, and abbreviations used in this new Chapter.

Section 33A104. Discusses the Monitoring efforts toward the opening, maintenance, operation, and closure of SWMF, including the monitoring authorities assigned (DPHSS, GEPA, and the Department of Agriculture); the reporting requirements; the Source of Funding, the Distribution of Funds; Creation of the SWMF Medical Monitoring Fund which must be separated from and not commingled with General Fund; and the promulgation of needed rules and regulations by the DPHSS.

Section 33A105. Empowers the Director of the DPHSS to declare as "Public Nuisance" under the provisions of Chapter 20, Title 10 GCA any SWMF that does not comply with the promulgated rules and regulations pursuant to this Act.

24th Guam Legislature
Committee on Rules, Government Reform and Federal Affairs
Senator Mark Forbes, Chairman

MAR 0 9 1998

MEMORANDUM

TO: Chairman
Committee on Finance and Taxation

FROM: Chairman
Committee on Rules, Government Reform and Federal Affairs

SUBJECT: Referral- Bill No. 517

The above Bill is referred to your Committee as the principal committee. It is recommended you schedule a public hearing at your earliest convenience.

Thank you for your attention to this matter.

MARK FORBES

Attachment

155 Hesler Place • Agana, Guam • 96910 • Telephone Numbers 472-3512, 472-3407/8

GOVERNMENT OF GUAM

Carl T.C. Gutierrez
GOVERNOR

Madeleine Z. Bordallo
LIEUTENANT GOVERNOR

DEPARTMENT OF PUBLIC HEALTH & SOCIAL SERVICES
(DIPATTAMENTON SALUT PUPBLEKO YAN SETBISION SUSIAT)
Post Office Box 2816 Agana, Guam 96932
123 Chalan Kareta, Route 10
Mangilao, Guam 96923

Dennis G. Rodriguez
DIRECTOR

Marilyn D.A. Manibusan
DEPUTY DIRECTOR

TWENTY-FOURTH GUAM LEGISLATURE
1998 (SECOND) REGULAR SESSION
PUBLIC HEARING
March 13, 1998 - 2:00 - 4:00 p.m.

Bill No. 517 - An Act Relative to Municipal Solid Waste Facilities Health Monitoring for Persons Living Close to Such Facilities and Compensating the Community by Adding a new Article 4 to Chapter 51 of Title 10 of the Guam Code Annotated, Relative to Health Monitoring and Compensation and to Cite this Act as the "SWMF Health Monitoring and Compensating for Not in My Backyard ("NIMBY") Syndrome Act of 1998".

Good afternoon Mr. Chairman (Senator Anthony C. Blaz) and committee members on the Committee on Finance and Taxation, ladies and gentlemen. My name is Dennis G. Rodriguez, Director of the Department of Public Health and Social Services. I am here today to provide testimony in support of Bill No. 517.

We do not object to the Division of Environmental Health being identified to conduct a base-line study of the people, vectors, and other animals around the sold waste management facility; however, we would like to have a multi-disciplinary agency approach towards conducting this study. We would like to see an addition to Section 51404 (a) identifying and requiring the Guam Environmental Protection Agency and Department of Agriculture to participate in the study. By doing so, the agencies would be compelled to provide assistance such as manpower, technical support, training etc.

Finally, we would like to amend Section 51404 (c)(3) to reflect the Division of Environmental Health (DEH) to be the recipient of the funds. Contingent to this amendment is a language to create a distinct and separate revolving account for DEH not to commingle with the general fund. A clause can be added to hold DEH responsible and accountable for purposes of training, equipment, manpower resources, contracts and supplies.

We are pleased that this legislative body is addressing this issue. For so long now, the people of Guam, Ordot village residents, have cried out for help. Addressing their concerns by looking at the environmental impact such facilities have on our island and the public's health and well-being is a move in the positive direction. We hope that our recommendations be favorably considered.

RECEIVED
MAR 13 1998

Respectfully,

Marilyn Manibusan

for DENNIS G. RODRIGUEZ
Director

TEL. NO.: (671) 735-7399, 735-7171, 735-7119, 735-7173
FAX: (671) 734-5910

Commonwealth Now!

Office of the Mayor

DISTRICT OF CHALAN PAGO / ORDOT
P.O. Box 786
Agana, Guam 96910

Rossana D. San Miguel
MAYOR

Fax: (671) 472-8302
Tel: (671) 477-1333

TESTIMONY IN SUPPORT OF BILL NO. 517

BY

Mayor Rossana D. San Miguel; District of Chalan Pago/Ordot

Mr. Chairman and members of the Committee on Health and Human Services, I am here today representing the District of Chalan Pago/Ordot. I would like to say that I am in full support of Bill 517, and would like to applaud the sponsors for caring about the health of people, which is often forgotten whenever there is discussion on solid waste management on our island.

My only suggestion is to provide language in the Bill, that provides for the monitoring of the health of the residents of Ordot and Chalan Pago, as well as the students attending Agueda Johnston Middle School, within 30 to 60 days after the passage of this Bill.

There are many health risks and problems of landfilling waste, and the residents that live near the Ordot dump and the students that attend school near the Ordot dump, have been exposed to these risks for over 15 years.

Attached to this testimony is an article about the problems of landfilling waste and I would like to read into the record a few of these problems my people have had to live with for over 15 years.

(Read attached article)

Thank you very much for giving me this opportunity to support Bill 517.

Rossana D. San Miguel

RECEIVED
MAR 13 1998
10:02am

The Problems of Landfilling Waste

Almost 90% of all the household waste produced in Surrey is transported to landfill sites. At present, a third of this waste has to be taken to sites in Bedfordshire, as the reamining space in Surrey is running out. In the future, there is likely to be less room for our waste in the County, as reamining sites are filled. The County Council is looking to move away from landfill, towards higher levels of waste recovery/ recycling. Just some of the prinicpal problems with the continued landfilling of waste are set out below:

Causes of Pollution

Leachates

These are the liquids produced from rainwater and existing waters within the landfill site during rotting of wastes. They contain many toxins, produced as a result of chemical reactions within the wastes. If allowed to enter water courses untreated, they will harm marine plant and animal life, and may ultimately lead to pollution of underground drinking water supplies.

Landfill gas

A mixture of methane (CH4), and Carbon dioxide (CO2) gas is produced bry rotting wastes in a landfill site. If allowed to build up, this can be explosive or act as an asphyxiant. The release of these gases is also contributing to climate change. Methane is particularly harmful, as it is 11 times more pwerful at causing climate change than carbon dioxide.

With adequate controls on the gas escaping from landfill sites, including burning the gas for the generation of electricity, reduces emissions to the atmosphere. However, this does not prevent the majority of emissions.

As well as the two main problems above, landfills can also create problems of smell, rodents, litter, and birds.

Wastes energy

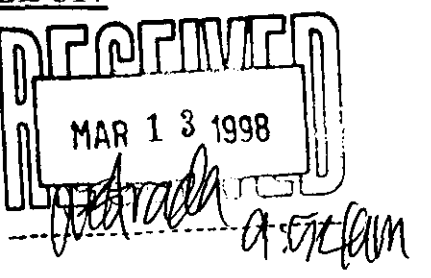
The production of new products requires considerable energy. If these materials are re-used or recycled instead of being disposed to landfill sites, less energy will be used, saving on scarce resources e.g. oil, coal. For example, the production of an aluminium can from recycled metal uses 95 % less energy than a can produced from raw aluminium.

Uses valuable space

PETER R. SGRO, JR.

SUITE 201, FIRST SAVINGS AND LOAN BUILDING
655 S. MARINE DRIVE, TAMUNING, GUAM 96911
TEL: (671) 649-0804 • FAX: (671) 649-0810

TESTIMONY IN SUPPORT OF BILL 517



BY

Peter R. Sgro, Jr.

INTRODUCTION

The United States and its agencies, such as the Navy, is liable under the Superfund in the same manner as any non-governmental entity. The Navy can be named as a potentially responsible party ("PRP") to contribute to the cleanup cost for the Ordot dump on a joint and several liability basis. Under Superfund laws, a PRP is defined as any individual or company - including owners, operators, transporters, or generators - potentially responsible for, or contributing to, the contamination problems at a Superfund site. The Navy is a "PRP" as to the Ordot dump since the Navy first built the dump and disposed materials before transfer of the site to the Government of Guam. Under Superfund, once a "PRP", always a "PRP" regardless of when the "PRP" utilized the dump for it's own purposes. The liability exposure to the Navy based on hazardous waste disposal by the Navy is significant. It is important to note that there are no statute of limitations problems or limitations of imposing liability by statute, even if the PRP deposited hazardous materials 40 years ago.

POTENTIALLY RESPONSIBLE PARTY LIABILITY FOR HEALTH CARE COSTS

Utilizing the same concept under Superfund laws which provides for joint and several liability for cleanup costs, I would like to suggest that PRP's in a local Guam statute, by providing an additional section to Bill 517, also be liable for any health care costs residents must pay or the Government of Guam must pay if there is a clear causal connection between a PRP's activities and any health problem of a resident.

ATTACHMENT

Attached as Exhibit "A" for the Committee's review, is a good summary of apportioning liability for cleanup costs among PRP's, which can be used as a guideline for a new section to Bill 517 for apportioning liability for health care costs.

Attached as Exhibit "B" is a July 31, 1997 letter from Attorney Michael J. Van Zant addressed to me which is another good guideline for apportioning health care liability costs.

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agement or manufacturing facility. For monitoring purposes, this is often considered to be thirty years.

Potable Water: Water that is safe for drinking and cooking.

Potentially Responsible Party (PRP): Any individual or company—including owners, operators, transporters, or generators—potentially responsible for, or contributing to, the contamination problems at a Superfund site. Whenever possible, EPA requires PRPs, through administrative and legal actions, to clean up hazardous waste sites PRPs have contaminated.

PPM/PPB: Parts per million/parts per billion, a way of expressing tiny concentrations of pollutants in air, water, soil, human tissue, food, or other products.

Precipitate: A solid that separates from a solution because of some chemical or physical change.

Precipitation: Removal of solids from liquid waste so that the hazardous solid portion can be disposed of safely; removal of particles from airborne emissions.

Precipitators: Air pollution control devices that collect particles from an emission.

Precursor: In photochemical terminology, a compound such as a volatile organic compound (VOC) that "precedes" an oxidant. Precursors react in sunlight to form ozone or other photochemical oxidants.

Preliminary Assessment: The process of collecting and reviewing available information about a known or suspected waste site or release.

Pressure Sewers: A system of pipes in which water, wastewater, or other liquid is transported to a higher elevation by use of pumping force.

Pretreatment: Processes used to reduce, eliminate, or alter the nature of wastewater pollutants from nondomestic sources before they are discharged into publicly owned treatment works.

Prevention: Measures taken to minimize the release of wastes to the environment.

Prevention of Significant Deterioration (PSD): EPA program in which state and/or federal permits are required that are intended to restrict emissions for new or modified sources in places where air quality is already better than required to meet primary and secondary ambient air quality standards.

Primary Drinking Water Regulation: Applies to public water systems and specifies a contaminant level, which, in the judgement of the EPA Administrator, will have no adverse effect on human health.

Primary Waste Treatment: First steps in wastewater treatment; screens

EXHIBIT "A"

order.[104.1] Similarly, his failure to participate in settlement may cause him to ultimately pay a great deal more (both in litigation costs, and in paying the premium assessed against nonsettling parties) than otherwise.

The assertion of a defense, therefore, may be strategically unwise, except in cases of clear assurances of its ultimate validation. Even acquiescence of EPA in the defense, alone, with regard to the availability of the defense, may not be enough to justify reliance on a shaky defense. The other PRPs are each separately empowered to seek reimbursement and can bring an action that will require judicial testing of the defense.

Finally, the party who believes that a defense applies may choose to pay a share of cleanup, then seek reimbursement later. If successful, the party might avoid all liability, apart from the cost of reimbursement litigation. The unfortunate fact, however, is that, in practice, recovery actions are lengthy and uncertain of result and should not be relied on as a method for protecting "innocent purchasers."

[d] Apportionment of Responsibility to Pay Cleanup Costs

Under CERCLA and many state superfund laws, the PRPs are jointly and severally liable for the costs of cleanup. Thus, any PRP could be compelled to bear the initial burden of cleanup costs and to seek reimbursement or contribution directly from the other PRPs. The landowner, one of the most easily located responsible parties and the one whose assets may be entailed without a judgment,[105] will typically be among the parties named in such orders or lawsuits. For him and all PRPs, liability apportionment issues are of critical import.

As yet, these matters have been largely unexamined by the courts. In one case, the responsibility of a former owner of a part of the contaminated site was examined. That case, *United States v. Rohm & Haas*,[105.1] is illustrative of the type of factors that must be considered in such situations. The defendant was a former owner of approximately 10 percent of the land area of a contaminated facility. The defendant objected to joint and several liability, claiming that inequity would result, owing to the relatively small share of responsibility attributable to this defen-

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104.1 CERCLA § 109(a)(1)(E); and (b)(5).

105 CERCLA § 107(1). Under some statutes, the owner's other property may be subject to a lien, as well.

105.1 United States v. Rohm & Haas, 2 F.3d 1265 (3d Cir. 1993).

dant. The court noted that this factor was critical to the question of apportionment, but would not prevent the imposition of joint and several liability. Under this thinking, the defendant would be forced to incur

(*Text continued on page 15-57*)

some (perhaps all) of the costs of response, and to then seek contribution. At that time, the dramatic difference in level of responsibility might carry the cause. Hence, the mechanisms and standards for determining the parties' respective shares of environmental cleanup costs and natural resource damages present many unresolved issues.[106]

See generally Machlin and Young, *Managing Environmental Risk* Chapter 4.

[i] Agencies' Role in Determining Apportionment Among PRPs

Under the federal environmental statutes, EPA is not obligated to make any determination concerning the apportionment of cleanup costs among the PRPs. EPA may recover all of its cleanup costs from any PRP unless that party can affirmatively prove that the harm, and the associated cleanup costs, are divisible.[107]

The courts have held that a PRP is not entitled to require EPA or any other party seeking cleanup or reimbursement to name other PRPs in its cleanup order, or to pursue such parties in a reimbursement action.[108] Thus, the full burden of responsibility for locating other parties devolves on the parties named in a cleanup order or action, who must seek contribution for costs incurred by suing those parties directly.[109]

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[106] *See generally* United States v. Chem-Dyne, 572 F. Supp. 802 (S.D. Ohio 1983), which raises a number of contribution related issues, without resolving them. *See also* Manor Care, Inc. v. Yaskin, 950 F.2d 122 (3d Cir. 1991).

[107] *See* United States v. Chem-Dyne, 572 F. Supp. 802 (S.D. Ohio 1983). This burden of proof may be impossible to meet vis-a-vis subsurface cleanup costs, but may be easier where a surface storage site is involved.

[108] United States v. A&F Materials Co., 578 F. Supp. 1249, 1260-61 (S.D. Ill. 1984); Idaho v. Bunker Hill Co., 635 F. Supp. 665 (D. Idaho 1986); Sand Springs Home v. Interplastic Corp., 670 F. Supp. 913 (N.D. Okla. 1987). (*See*, however, CERCLA § 122(e), 42 U.S.C. § 9622(e), mandating EPA notice to "all" PRPs if EPA chooses to pursue settlement negotiations with them.) Moreover, the parties have no right to require that EPA participate in settlements of the PRP's contribution claims against one another. New Jersey v. Gloucester Envtl. Management Services, Inc., 668 F. Supp. 404 (D.N.J. 1987).

[109] 42 U.S.C. § 9613(f); Sand Springs Home v. Interplastic Corp. 670 F. Supp. 913, (N.D. Okla. 1987); Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135, 1142 (E.D. Pa. 1982) (liability for gov't costs); United States v. New Castle County, 642 F. Supp. 1258, 1262-69 (D. Del. 1986) (noting also that the PRPs, and not EPA are responsible for locating other PRPs and seeking contribution), Colorado v. Asarco, Inc., 608 F. Supp. 1484 (D. Colo. 1985); *but see* United States v. Westinghouse Elec. Corp., 22 Envt'l Rep. Cas. (BNA) 1230, 1234 (S.D. Ind. 1983) (no contribution allowed; *distinguished in Colorado v. Asarco, supra* at 1491.) For an excellent discussion of the use of contribution by CERCLA responsible parties, *see* Moorman & Williams, "Contribution Under the Superfund Amendments and Reauthorization Act of 1986," 1986 Chem. Waste Litig. Rptr. 29 (1986).

Both PRPs and persons who have established defenses to liability may seek reimbursement under section 107 of CERCLA.

EPA, in its discretion, may affect the allocation of response costs through the use of several settlement and apportionment mechanisms created by the 1986 CERCLA amendments.[110] One such method allows EPA to make a temporary allocation, known as the "non-binding allocation of responsibility," or NBAR, to determine the parties' shares of initial payment.[111] The NBAR provides a basis for a possible settlement offer by the parties, but EPA is free to reject that offer (with reasons), and its rejection is not subject to judicial review.[112] Further, the NBAR is not admissible evidence and cannot be used to establish causation or divisibility of the harm.[113]

Other methods of apportionment under CERCLA include consent decrees, covenants not to sue, and settlement agreements between the government and the PRPs.[114] The use of these settlement mechanisms may, in some instances, affect the ultimate allocation among the responsible parties, by restricting the rights of non-signatories to seek contribution from settling responsible parties.[114.1] Advantages to settlement include the "better deal" afforded to "non-recalcitrant" settling PRPs, who may ultimately pay a much smaller share than similarly situated non-settlors.

See also Stever, *Law of Chemical Regulation and Hazardous Waste* Chapter 6, and Machlin and Young, *Managing Environmental Risk* Chapters 4, 9, and 19.

[ii] Statutory Treatment of Allocation Issues

CERCLA does not provide direct guidance concerning the basis on which liability should be apportioned among responsible parties, stating only that the parties are permitted to apportion liability among themselves or to seek judicial determination of apportionment.[115] A

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[110] CERCLA §§ 112(b) and 122(e)(3), 42 U.S.C. §§ 9612(b) and 9622(e)(3).

[111] CERCLA § 122(e)(3), 42 U.S.C. § 9622(e)(3).

[112] CERCLA § 122(e)(3)(E), 42 U.S.C. § 9622(e)(3)(E).

[113] *Id.*, § 122(e)(3)(C), § 9622(e)(3)(C).

[114] CERCLA § 122, 42 U.S.C. § 9622.

[114.1] *See* United States v. AZKO Coatings of Am., Inc., 949 F.2d 1409 (6th Cir. 1991), noting the difference between CERCLA's consent decree and its preliminary apportionment provisions.

[115] 42 U.S.C. §§ 9607(e) and 9613(f); *and see* Chem-Waste Management Co. v. Armstrong World Industries Inc., 669 F. Supp. 1285 n.10 (E.D. Pa. 1987); United States v. New Castle County, 642 F. Supp. 1258 (D. Del. 1986). EPA's primary concern vis-a-vis

court allocating costs in such action may rely on "such equitable factors as the court determines are appropriate."[116] This statement indicates that established common law principles should be utilized in this determination.[117]

The general concept of cost allocation under CERCLA, however, presents several unique issues not treated by common law allocation or contribution concepts. Among these, the method and basis of determining the landowner's share of the costs of a multiparty cleanup is particularly important. Early in CERCLA's history, some courts indicated their belief that the landowner who had not contributed to contamination was included as a responsible party under CERCLA as an accommodation, to assure jurisdiction over the contaminated property.[118] Other courts and commentators, recognizing a restitutional component to the CERCLA liability scheme, read the statute more literally, and indicated that even landowners who did not participate in the contamination of the site would bear a more-than-token share of the cost of the cleanup.[119]

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the apportionment of liability among the responsible parties is to assure that all governmental outlays relating to the site are reimbursed. Note also that the courts have determined that the defendants bear the burden of proving that their relative contribution to a CERCLA site is apportionable (*i.e.* that liability is properly several—a proof that may require the joinder of all responsible parties); United States v. Wade, 577 F. Supp. 1326, 1338-39 (E.D. Pa. 1983).

116 CERCLA § 113(f), 42 U.S.C. § 9613(f).

117 Several courts came to this conclusion under pre-amendment CERCLA, as well. *See* United States v. New Castle County, 642 F. Supp. 1258 (D. Del. 1986) (in enacting CERCLA, Congress intended to create a right of contribution under federal common law); Colorado v. Asarco, Inc., 608 F. Supp. 1484, 1492 (D. Colo. 1985). *Compare*, for example, the Congressional intent to apply long-established joint and several and strict liability principles to CERCLA enforcement.

118 *See* United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100, 1105 (D. Minn. 1982) (landowner is a necessary party to CERCLA cleanup action, for purposes of enabling the court to compel appropriate cleanup activities on land).

119 *See* Sand Springs Home v. Interplastic Corp., 670 F. Supp. 913 (N.D. Okla. 1987) (landowner's apportioned share stipulated at 15 percent of total cleanup costs); United States v. Tyson, 1989 U.S. Dist. LEXIS 15761 (E.D. Pa. Dec. 20, 1989) (the current site owner and operator, whose involvement in the hazardous substances in a lagoon on its property was purely passive, must bear at least 50 percent of the cleanup liability, with the rest being borne by less passive former owners). In Jersey City Redevelopment Authority v. PPG Industries Inc., 655 F. Supp. 1257 (D.N.J. 1987), the landowner contracted with a transporter defendant for the importation of fill which was later determined to have come from waste piles at a former chromium processing facility. The court noted that CERCLA § 113(f) allows a court to allocate costs among liable parties using such equitable factors as are appropriate. Liability was allocated between the party that created the waste and the party that sold the transporter the waste and held that "[i]mposition

of CERCLA strict liability upon an unknowing landowner is unnecessary and unfair where knowing generators and distributors are available." The courts and the EPA have taken occasionally inconsistent positions on the nature of the CERCLA remedy, treating it as equitable recovery in some cases, and tort liability in others. United States v. Argent Corp., 21 Envt'l Rep. Cas. (BNA) 1354 (D.N.M. 1984) (denying jury trial); United States v. Wade, 577 F. Supp. 1326 (E.D. Pa. 1984); Artesian Water Co. v. New Castle County, 605 F. Supp. 1348, 1354 (D. Del. 1955) (denying summary judgment on sovereign immunity defense, since CERCLA suits may not be "tort claims"); *but see* United States v. Conservation Chem. Co., 628 F. Supp. 391, 402 (W.D. Mo. 1985) (applying Uniform Comparative Fault Act (discussed below), but assuming an equitable approach to apportionment: "[t]he Court will not tolerate either a 'windfall' or a 'wipeout' which results in an apportionment of responsibility which arbitrarily or unreasonably ignores the comparative fault of the parties"); *see also* United States v. Dae Rim Fishery Co., 794 F.2d 1399 (9th Cir. 1986) (holding comparable recovery under the Clean Water Act to be quasi-contractual, and subject to six-year quasi-contract statute of limitations). CERCLA §§ 101(30) and 107(b). A good discussion of CERCLA's restitutional nature is found in Seng, "The Quasi Contractual Nature of Cost Recovery Actions Under CERCLA," 5 Va. J. Nat. Res. L. 35 (1985).

The innocent landowner and third party acts defenses particularly support the restitutional approach, in that they allow exemption of the landowner (who, if dismissed from the action, would not provide a basis for jurisdiction) only in certain limited circumstances. CERCLA § 101(35), 42 U.S.C. § 9601(35). The clear implication of these amendments is that the unexempt landowner is fully responsible, even if he purchases the property after the deposits occurred, or was otherwise innocent of any actual involvement in the contamination. *See Sand Springs Home v. Interplastic Corp., supra* (landowner's apportioned share stipulated at 15 percent of total cleanup costs).

The courts determining the proper sharing of liability among the PRPs have not yet been called upon to create a mechanism for dividing liability among the various categories of responsible parties—reconciling, for purposes of contribution, conduct-based liability with ownership-based liability. *See* United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984 (D.S.C. 1984) (holding that the PRPs could not meet the burden of proving divisibility of the harm at a drum treatment site the court stated that "[i]t is simply impossible to divide this environmental hazard in any meaningful way among waste generators transporters, site owners and site operators"). Common law does not provide any general guidance concerning the basis on which the apportionment decision must be made. United States v. New Castle County, 642 F. Supp. 1258 (D. Del. 1986).

Since CERCLA liability is assessed without regard to the liable party's fault in causation of the harm, existing contribution mechanisms such as the Uniform Contribution Among Tortfeasors Act, 12 Uniform Laws Ann. 57, Uniform Comparative Fault Act of 1977, cited in United States v. Conservation Chem. Co., 628 F. Supp. 391, 401-02 (W.D. Mo. 1985), or the Restatement (Second) of Torts § 886A, cited in Sand Springs Home v. Interplastic Corp., 670 F. Supp. 913 (N.D. Okla. 1987), provide little guidance where more than one category of responsible parties is before the court. Although a few cases have analyzed contribution issues using these acts as guidelines, none of these cases appears to have involved apportionment between a landowner who was not also involved in contamination-causing activities and other responsible parties. *See* United States v. Conservation Chem. Co., 628 F. Supp. at 401-02 (W.D. Mo. 1985), United States v. New Castle County, *supra*; United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1396 (D.N.H. 1985). *See also* Superfund § 301(e) Study Group, Report to Congress, App. C (Aug. 1982) reprinted in 12 Envtl. L. Rep. 30031 (Nov. 1982) (concluding that such recovery would be extremely difficult absent CERCLA, since known remedies have not devel-

CERCLA's provisions relating to the NBAR process do identify several factors upon which EPA should rely in apportioning responsibility.[120] The act requires EPA to develop guidelines which "may include such factors as . . . volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors."[121] These regulatory de-

(*Text continued on page 15-61*)

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oped a method of apportioning landowner liability in such cases). Thus, the fact that those cases speak in terms of "fault" in apportioning costs is not necessarily determinative of the applicability of tort contribution principles to cleanup costs.

Traditional contribution and comparative or contributory negligence principles do apply to landowners who are jointly liable with the creator of a hazardous condition where the cleanup can be characterized as nuisance abatement. In such cases, the landowner's defenses to causation and contributory negligence claims may be relevant. *See, e.g.*, Van Horn v. William Blanchard Co., 88 N.J. 91, 438 A.2d 552 (1981) (plaintiff, who was adjudged 20 percent at fault, not allowed to recover anything from any of the forty generators who were each determined to be 2 percent at fault).

[120] CERCLA §§ 113(f)(2)-(f)(3), 122(e)(3), (g)(5), (h)(4), 42 U.S.C. §§ 9613(f)(2)-(f)(3), 9622(e)(3), (g)(5), (h)(4).

[121] CERCLA § 122(e)(3)(A), 42 U.S.C. § 9622(e)(3)(A). These factors have been adopted by the courts. *See* Michigan v. Thomas Solvent Co., 717 F.Supp. 507 (W.D. Mich. 1989); United States v. Stringfellow, 1993 US Dist. LEXIS 19113 (C.D. Cal. Nov. 30, 1993). EPA has published guidance on these factors, as well. 52 Fed. Reg. 19919 (1987). These interim guidelines suggest that "culpability is a significant factor in determining the percentage of responsibility to be allocated. For example a commercial owner and/or operator that managed waste badly should receive a higher allocation than a passive non-commercial landowner that doesn't qualify as innocent under § 122(g)(1)(B) of SARA. The relative allocation among successive owners and/or operators may be determined where

terminations are expressly separate from the judicial process of determining liability, and it is not clear whether or how they will be applied in such determinations.

See also discussions of claims for equitable indemnity and contribution in Chapter 7, Machlin and Young, *Managing Environmental Risk*.

[e] Asbestos

Asbestos has typically received great attention from legislators and transaction participants. The following is a brief overview of the basic duties and issues facing owners of property containing asbestos.

[i] Statutory Responsibilities

If asbestos material crumbles or is broken, it can "release" asbestos fibers—a hazardous substance—into the air. Two kinds of statutes may specifically require notice to tenants where such releases are possible: (i) consumer and community disclosures such as California's Safe Drinking Water and Toxic Enforcement Act ("Proposition 65")[121.1] and (ii) specific real estate transfer provisions.[121.2]

Under community and worker protection statutes, general disclosures about asbestos may be required in a number of circumstances. One of the most inclusive of such requirements is the California statute known as Proposition 65. This law requires a business that knowingly exposes any individual to a "carcinogen," a term that includes asbestos, to give "clear and reasonable warning" concerning the exposure to all individuals so exposed.[121.3] Application of this requirement to a residential building containing asbestos may depend upon what the building owner is deemed to "know" about the activities occurring on site, including the activities of tenants and contractors. Given that the California courts have been very protective of tenants and guests on real property,[121.4] the owner may be deemed to know about activities of

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all other circumstances are equal, by the relative length of time each owned the site." *Id.*

121.1 *See, e.g.*, Cal. Health & Safety Code §§ 25249.5, *et seq.*

121.2 *See, e.g.*, Cal. Health & Safety Code §§ 25359.7.

121.3 Cal. Health & Safety Code §§ 25249.6.

121.4 *See, e.g.*, Muro v. Superior Court, 184 Cal. App. 3d 1089, 1096 n.4 (1986) (implied warranties); Evans v. Thomason, 72 Cal. App. 3d 978 (1977) (owner liable for damage caused by inadequately installed electrical wiring done on owner's property by a third-party tenant); Younger v. United States, 662 F.2d 580 (9th Cir. 1981) (owner liable for damages caused by absence of smoke detectors).

anyone legitimately on property, both intentional and reasonably anticipated accidental effects.

Proposition 65's warning requirements do not contain express de minimis limitations, so that, unless the business can qualify for one of the few exceptions and "safe harbors,"[121.5] an exposure to any amount of a listed carcinogen constitutes a violation. Significant penalties attend failure to provide notice, if required.[121.6] The fines and penalties under Proposition 65, moreover, are not calculated based upon the damage suffered, but upon the existence of a violation, even where no apparent harm has been caused. As applied to asbestos in buildings, this fact is crucial. It is relatively easy to determine when asbestos fibers must have been released by minor activities such as the drilling of holes in asbestos ceiling tiles or the opening of a wall containing old insulation materials. The likely exposures suffered by tenants in a carefully maintained building might never result in measurable harm to tenants, but might still constitute an actionable violation of Proposition 65. Such a violation may be litigated by private individuals as well as the state.

Under another statute, if the owner of property knows or has cause to believe that any release of a hazardous substance has come to be located on or beneath real property, he may be required to provide notice concerning that release to tenants and purchasers of that property prior to the close of the transaction.[121.7] This statute applies to releases, and may not apply to asbestos that has not been "emitted." The statute does not require current disclosures, but only at the time of some transaction.

[3] Special Liability Issues for Government Landowners

Government landowners are potentially subject to many of the liabil-

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121.5 A business can be excepted from the warning requirement by either (1) demonstrating compliance with the "safe harbor" provisions (22 Cal. Adm. Code § 12701(b)(3)) or (2) conducting a risk assessment for the substance and thereby showing that the expected exposure presents "no significant risk," assuming lifetime exposure at the levels in question. Cal. Health & Safety Code § 25249.10; 22 Cal. Adm. Code §§ 12701-12721. Qualification under these exceptions is quite difficult, since the permissible contaminant levels under the safe harbor are extremely low, and the methodology for risk assessment is extremely conservative.

121.6 *Id.* § 25249.7; *see* Sample Provision 19.04[5], *infra*.

121.7 Discussed in § 16.03[1][b][ii], *infra*.

ities described in this chapter.[122] However, where government entities own property subject to hazardous waste liabilities, they may encounter liabilities and potential defenses that are not applicable to private parties. In addition, the defenses available for government facilities and property reflect some of the particularities of government ownership.

[a] Defenses Relating to the Acquisition of Property or Other Activities in the Exercise of Sovereign Powers

CERCLA specifically (albeit qualifiedly) protects from cleanup liability any municipalities and other government agencies or entities that have acquired the contaminated property through exercise of rights such as tax sales, escheat or eminent domain.[123] These qualified exemptions appear to arise in two ways.

[i] Powers Exercised Without "Voluntary" Action by the Sovereign Entity

First, CERCLA's definition of "owner" specifically exempts state or local government entities that involuntarily acquire property upon abandonment, bankruptcy or similar circumstances.[124] The person who so abandoned or conveyed the property shall continue to be its owner.[125] Thus, the government agency acquiring title in this way is not the "owner" under CERCLA, regardless of when it acquires this title.

These agencies acquire interests in property through the operation of laws and mandates, without the option to refuse. EPA's rule on this exemption[125.1] lists the general types of transfers that are within the exemption:

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[122] *See, e.g.*, CERCLA § 120, 42 U.S.C. § 9620; United States v. J.B. Stringfellow Jr., No. Civ-83-2501-JMI, 1990 U.S. Dist. Lexis 19001 (C.D. Cal. Jan. 19, 1990); United States v. Union Gas Co., 792 F.2d 372 (3d Cir. 1986), *vacated and remanded sub nom.* Union Gas Co. v. Pennsylvania, 479 U.S. 1025 (1987) (CERCLA abrogates states' eleventh amendment immunity from federal court lawsuits); Buckeye Union Fire Ins. Co. v. Michigan, 383 Mich. 630, 178 N.W.2d 476 (1970) (nuisance claim).

[123] CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A).

[124] CERCLA § 101(20)(D), 42 U.S.C. § 9601(20)(D).

[125] CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A).

[125.1] 57 Fed. Reg. 18344, 18346 (Apr. 29, 1992), adding 40 C.F.R. § 300.1105. This rule was promulgated in conjunction with EPA's Final Rule on the Secured Creditor Exemption. Concerns relative to the validity of this rule are discussed in § 17.02[3], *infra*.

(1) Transfers occurring pursuant to abandonment proceedings, or by operation of tax or escheat laws or similar situations;[125.2]

(2) Acquisitions or transfers to government entities or their agents, including loan insurers (such as the Federal Deposit Insurance Corporation (FDIC)), loan guarantors and secondary mortgage trading agencies, financial regulatory agencies which acquire the security interests of failed private lending institutions (such as the Resolution Trust Corporation) "when acting as conservator or receiver pursuant to clear direct statutory mandate *or regulatory authority*";[125.3]

(3) Government agency's foreclosure in connection with a government loan or loan guarantee program. This section presumably refers to programs such as the Small Business Administration, and the federally backed loan guarantee organizations (FNMA, GNMA, FDMC, etc.); and

(4) Government seizures or forfeitures.[125.4]

Arguably, these categories of transactions would clearly be included within the exemption where they are "involuntary"—occurring by operation of law, rather than in the discretion of the government agency. The EPA rule, however, states that transactions in these categories are automatically "involuntary" for purposes of the exemption.[125.5]

As discussed in § 17.02[3], *infra*, the agency's authority to adopt regulations is at its lowest with regard to rules that interpret legal issues and the nontechnical language of the statute. In particular, statutory construction which accords to ordinary terms a meaning other than their ordinary meaning should be avoided.[125.6] Courts may fail to give deference to this rule to the extent that their construction of CERCLA differs from the agency's on legal questions such as the meaning of the phrase "involuntary acquisition."

The re-transfer of liability for property ownership under this provision may be interpreted strictly, however. In *Fleet Factors*, for example, the property had been held by a bankruptcy trustee immediately prior

125.2 These transactions are specifically referred to in CERCLA's § 101(35)(A).

125.3 The concerns of the governmental lending and loan guarantying agencies (*see* 57 Fed. Reg. 18346) are discussed in chapter 17, *infra*. The reference to "regulatory authority" in the rule indicates that internal agency practices may convert a "voluntary" acquisition procedure into an automatic or "involuntary" one. It is not clear that the agency's take on this issue will be deferred to by any court. *See* § 17.02[3], *infra*.

125.4 40 C.F.R. § 300.1105(a).

125.5 *Id.*

125.6 *See Sutherland Statutory Construction* § 46.01 (especially note 3) (5th ed. 1992).

to a sale to the county to satisfy a tax delinquency.[125.7] When the cost recovery action was filed, the county owned the property and asserted its qualification for an exemption under this section. The court held that current owner/operator status, which should be conferred on the party who owned/operated the facility "immediately beforehand," applied to the bankruptcy trustee.

[ii] Voluntary Acquisitions

Where the government's acquisition of property occurs through voluntary exercise of its sovereign powers, the foregoing exemption does not apply. The entity may, however, qualify for a special defense to CERCLA liability. CERCLA provides that when an agency acquires property through tax sale, escheat proceedings, condemnation or similar means, the entity automatically qualifies as an "innocent landowner," with respect to such property, regardless of its failure to investigate the site before acquisition. An entity relying on this sovereign powers defense to CERCLA liability, like any other "innocent landowner," will be entitled to use this defense only if it undertakes measures to protect against contamination during its ownership and properly responds to any discovery of contamination on site that occurs during this period. In both cases, the statutory protection will be unavailable if the government entity caused or contributed to the release of hazardous substances from a facility.[126]

[iii] Judicial Construction of Other Liabilities of Acquiring Sovereigns

Where a statute provides for automatic transfer of property to the state (as do some escheat provisions, as well as state and local property tax statutes that authorize a ministerial recordation of sale to the state where taxes are unpaid), the government entity will not be an owner under CERCLA. Where the government affirmatively acquires the land through eminent domain proceedings or the holding of a formal foreclosure sale, it must satisfy additional requirements for the sovereign powers defense. Under tort principles, by contrast, such entities have been held liable for abatement based on their ownership of the

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125.7 United States v. Fleet Factors, 901 F.2d 1550 (11th Cir. 1990), *reh'g denied en banc*, 911 F.2d 742 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991) (discussed in § 17.02, *infra*).

126 CERCLA §§ 101(20)(D) and (35)(D), 42 U.S.C. §§ 9601(20)(D) and (35)(D).

nuisance, even where such acquisition involved only a transfer of "paper title" to the property.[127]

The parameters of CERCLA's "sovereign powers" provisions have not been explored in the courts. Although stated broadly, these protections appear to have been aimed at government acquisitions other than negotiated purchases. Escheats and tax sales, for example, are not conducted as property acquisitions, but as sovereign actions protective of government rights and interests. Even purchases undertaken pursuant to (or under threat of) eminent domain authority are not consummated according to the conventional purchase procedures and motivations. Arguably, then, a governmental acquisition that involved standard arm's length bargaining protections might not fall within the sovereign powers defense, regardless of the purpose of the acquisition.

[b] Liabilities Based on Government Activities

In addition, governmental facilities are potentially subject to a number of liabilities and risks, arising from the nature of government properties, and from governmental authorities, from waste management to cleanup actions on private properties.

[i] Governmental Liability for Regulatory Activities on Hazardous Waste or Contamination Sites

Several courts have examined the government's liability under CERCLA for contamination which is alleged to have been caused, at least in part, by the government's regulatory actions. In general, liability has not been found where a government's only contact with the site was

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[127] *See* Buckeye Union Fire Ins. Co. v. Michigan, 383 Mich. 630, 178 N.W.2d 476 (1970) state liable for damages caused by fire or property acquired in "paper" or tax sale, where property constituted a nuisance due to fire danger). *See also* United States v. Fleet Factors, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991).

One defense potentially applicable to these liabilities is the recreational use immunity. Colvin v. Southern California Edison Co., 194 Cal. App. 3d 1306 (1987); California Civil Code § 846 (codifying a similar immunity). Under this concept, a landowner whose property is open for public recreational use is immune to claims for negligent injury to persons so using the property. Thus, where a government entity owns recreational property on which releases occurred prior to the entity's acquisition of that property, private claims for personal injury or property damage caused by those deposits may be barred by this immunity.

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FILE NUMBER 99999-PRO

DIRECT DIAL

July 31, 1997

PRIVILEGED AND CONFIDENTIAL
VIA FAX AND FIRST CLASS MAIL

Mr. Peter S. Sgro
Attorney at Law
Suite 201
First Savings and Loan Building
655 S. Marine Drive
Tamuning, Guam 96911

Dear Peter:

You have asked me to provide you with some information and advice concerning the potential liability of the federal government with regard to contributions to a solid waste landfill that qualifies for cleanup under Superfund. You have also asked for advice concerning how the Government of Guam can minimize its liability when it may also be a potentially responsible party. As you know, I have considerable experience with Superfund cases, having been the chief environmental attorney for two U.S. Air Force Major Commands and the Strategic Defense Initiative Organization in the Department of Defense. In private practice, I have represented several corporations and individuals in Superfund cases where federal and state governments are parties to the action.

First, the United States has waived its sovereign immunity from suit for actions brought under the federal Superfund Act. 42 U.S.C. 9620(a)(1). The United States is liable under the Superfund in the same manner as any nongovernmental entity. Therefore, the United States can be named as a potentially responsible party ("PRP") in a Superfund liability suit and is obligated to contribute to the cleanup on a joint and several basis. 42 U.S.C. 9613. Normally, the amount of contribution from a potentially responsible party is based on their apportioned share of hazardous substances sent by the PRP to the site. If there are hazardous substances at the site for which no PRP can be identified then that "orphan" share is apportioned to the rest of the PRPs based on their percentage contribution of hazardous substances to the site. The site owner or operator as well as the owner or operator of the site at the time of the disposal of the hazardous substances share in the liability.

EXHIBIT "B"

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Finally, transporters which select the disposal site are also potentially liable for the materials they transport to the site.

Since the Government of Guam is defined in the Superfund law as a "State," the Government of Guam may act as the lead agency in any cleanup of the site. This is true even though Guam is the owner/operator and a contributor to the site. Under the National Contingency Plan (40 CFR Part 300), a state may take the lead in a cleanup of a site if it enters into an agreement with the U.S. Environmental Protection Agency. The agreement is called a Superfund Memorandum of Agreement or "SMOA." By taking the lead in a cleanup effort, the Government of Guam can better exercise control of the process and where justified make sure that all PRPs pay their fair share of the cleanup costs. It is also appropriate for the Government of Guam to settle the liability of various PRPs, including the liability of Guam itself. Naturally, any settlement entered into by Guam must be able to withstand judicial scrutiny.

There are many intelligent and creative ways to approach the problem of a Superfund cleanup. The best way is for the PRP to participate fully, and if possible, lead the effort.

If you have any questions, please call. I look forward to working with you on this exciting project.

Best regards,

McQUAID, METZLER, McCORMICK
& VAN ZANDT, L.L.P.

By _____
Michael J. Van Zandt

cc: Matthew J. Nasuti, Esq.

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