Does an ASTM Phase I Protect Banks?

*Aaron Gershonowitz**

The author of this article explores whether a Phase I Environmental Site Assessment, prior to taking real property as security for a commercial loan, will protect lenders in the event the property is found to be contaminated.

A Phase I Environmental Site Assessment ("ESA") prior to taking real property as security for a commercial loan is standard practice among lenders. The theory behind this practice is that if the property turns out to be contaminated and a regulatory agency seeks to hold the bank liable for the remediation, the bank will have a defense based on having engaged in "all appropriate inquiry" prior to taking an interest in the property. This practice is questionable. If one has a choice between two similar potential paths, one of which aims to create a defense to a potential regulatory action and one of which aims to avoid the potential regulatory action, it is difficult to understand why anyone would choose the first option.

Bank United v. MECC

A recent decision by the U.S. District Court for the Southern District of New York raises another significant question about the practice of using the environmental investigation to prepare a defense to potential liability.[1] Indeed, the decision indicates that there are times when lenders need the ESA to fail to create a defense. Prior to refinancing a loan, BankUnited retained an environmental consultant to prepare a Phase I Environmental Site Assessment. The bank also retained a second environmental consultant to examine the ESA to assure that the first consultant performed the ESA in accordance with the ASTM standard. The second consultant concluded that the ESA was prepared in accordance with "applicable professional standards as set forth by the American Section of the International Association for Testing Materials."[2] After making the loan, significant contamination was discovered and the borrower defaulted on the loan. No one sued the bank, so having a defense to environmental liability would not have helped the bank. Instead, the bank found itself with a loan in default and worthless security.

The bank sued the environmental consultants and their insurers alleging breach of contract and negligence.[3] Both consultants believed that the ASTM Standard had been followed. It is also worth noting that the origi-

*Aaron Gershonowitz is a partner at Forchelli Deegan Terrana LLP, representing clients in a wide variety of environmental issues—including Superfund matters, RCRA compliance, underground storage tank issues, asbestos in buildings, and the environmental aspects of real estate and corporate transactions. He may be reached at agershonowitz@forchellilaw.com.

nal loan was made based on an ESA by a third consultant who also did not discover the contamination.

We may never know whether all three consultants erred or whether "all appropriate inquiry" was performed because the consultants moved to dismiss based on the statute of limitations and won. The bank's claim was thus dismissed for being late and no decision was rendered on the merits.[4]

The lesson of the decision for lenders is that the ASTM Standard, which the bank required in order to create a defense, was instead used as the basis for the consultants' defense. The bank could only be protected if multiple consultants had failed to follow the ASTM Standard.

While this seems to turn the process on its head, environmental issues resulting in impairment of the collateral and default on the loan are significantly more likely than the scenario in which contamination is found, the bank is a defendant and the bank defends based on an investigation that followed the ASTM Standard.[5] Thus, while lenders may comfort themselves by concluding that the BankUnited decision is an anomaly and all the consultants must have been negligent, the better read of the case suggests that banks should be questioning the process.

Legal Background

The first step in understanding why a Phase I ESA provides little in terms of protecting a lender from environmental liability is to examine why lenders once had a concern about environmental liability. The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund") provides that owners and operators can be subject to strict joint and several liability for the costs of cleaning up an inactive hazardous waste site.[6] That means that a person who played no role in the contamination can be forced to pay millions of dollars in cleanup costs, based solely on his or her status as an owner or operator. Lenders may be at risk regarding Superfund liability because when the lender takes real property as security for a loan it obtains indicia of ownership of the borrower's facility (a mortgage). A lender who forecloses on a mortgage may be liable as an owner. The drafters of the Superfund law understood this and provided two means for a lender to protect itself. First, it provided that a person who holds "indicia of ownership" to protect a security interest is not an owner or operator as long as it does not participate in management of the facility.[7] Second, it provided a defense for innocent owners.[8] Among the requirements for an owner to take advantage of this defense is the requirement that prior to acquiring an interest in the property, it engaged in "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial and customary practice in an effort to minimize liability."[9]

In the early 1990s, the Environmental Protection Agency ("EPA") took a very expansive view of the owner and operator concept and began targeting people who could be viewed as an owner or operator based on their relationship with the real owner or operator of the facility, including lenders, corporate shareholders, and corporate parents. Lenders began to feel very insecure based largely on the U.S. Court of Appeals for the Eleventh Circuit opinion in United States v. Fleet Factors Corp.[10]

Fleet had a factoring agreement with

Swainsboro Print Works ("SPW") whereby Fleet advanced funds against an assignment of accounts receivable.[11] SPW filed for bankruptcy and Fleet foreclosed on its security interest in SPW's inventory and equipment. It then sold what it could and contracted to have the remaining inventory and equipment removed.[12] EPA inspected the facility and found drums of toxic chemicals. EPA spent about $400,000 responding to the environmental threat and sued the principal shareholders of SPW and Fleet to recover its costs.[13] Cross motions for summary judgment were denied and Fleet appealed challenging the denial of its motion for summary judgment.[14]

The Eleventh Circuit affirmed the denial of Fleet's motion for summary judgment.[15] The court began its analysis by noting that CERCLA holds an owner or operator of a facility strictly liable to the Unites States for response costs.[16] The court then noted that CERCLA excludes from the definition of "owner or operator" a person who "without participating in management . . . holds indicia of ownership primarily to protect his security interest." Fleet clearly held indicia of ownership to protect a security interest and the question before the court was whether it participated in management.[17]

The court stated that because of the "overwhelmingly remedial goal of the CERCLA statutory scheme, ambiguous statutory terms should be construed to favor liability."[18] The government argued that any participation in management should result in liability. Fleet argued that participation in financial management should be permissible and only participation in management that relates to hazardous substances should result in liability.[19] The rule adopted by the court was that "a secured creditor will be liable if its involvement in the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose."[20] The court explained that its conclusion should encourage creditors to investigate environmental issues and weigh the risks of CERCLA liability into its loan agreements.[21]

Fleet Factors left lenders with a great deal of uncertainty regarding what they could do to police a loan. It would be difficult to exaggerate the impact of this case.[22] Banks responded in part by instituting environmental due diligence programs and in part by pressuring the government to change the law.[23] The EPA attempted to fix the problem by issuing regulations intended to clarify the range of activities that lenders could engage in without being viewed as having participated in management. These regulations, published in the April 29, 1992 Federal Register[24] were stricken by the U.S. Court of Appeals for the D.C. Circuit decision in Kelly v EPA,[25] on the ground that the EPA did not have authority to interpret the statute by regulation.

How the Risk Created by *Fleet Factors* Was Eliminated

The EPA regulations had a major impact. Remember, the problem prior to the issuance of these regulations was that EPA was pushing a very narrow reading of the secured lender exemption, one which the Fleet Factors court said "would largely eviscerate the exemption Congress intended to afford to secured creditors."[26] The regulations amounted to an about-face by EPA, from taking the most restrictive view of the secured lender exemption in litigation, to taking a more expansive view.

After the regulations were vacated, EPA issued a guidance document stating that, as a matter of enforcement policy, it would continue to treat the vacated regulations as law.[27]

The EPA's opinion was helpful, but lenders remained concerned about environmental liability because the EPA opinion is not law. In October 1996, Congress enacted the Asset Conservation Lender Liability and Deposit Insurance Protections Act, which amended CERCLA to protect lenders.[28] To a large extent, the 1996 amendments to CERCLA codified the protections described in the vacated EPA regulations. The amendments addressed the two main concerns of lenders: how do we know whether our actions will be "participation in management" and can we foreclose without inheriting environmental liability.[29]

The amendments make clear that mere capacity to influence or control is not participation in management, thus confirming that Fleet Factors is not good law. Participation in management now means either (1) decision-making control or responsibility for hazardous substance handling or disposal practices or (2) exercise of manager level control of (i) day-to-day environmental management decisions or (ii) operational functions as distinguished from financial functions.[30] The statute contains a list of activities that do not constitute participation in management.[31] In a sense, the new statute means that lenders can police their loans without risk of environmental liability, as long as they do not get involved in decisions related to waste.

At this point, the risk of liability that lenders felt after Fleet Factors had been eliminated by both EPA and Congress. Lenders, nevertheless, continued to behave as if environmental liability was a real danger to them.

There is very little case law interpreting the 1996 amendments' definition of participation in management, largely because EPA is not pursuing lenders. Another possible explanation of why there is so little case law is that the law is now clear on what lenders can and cannot do. In either case, the primary reason that lenders began to require environmental due diligence programs, i.e. fear of environmental liability, was largely eliminated by statute and by regulatory policy.

There have also been important developments in the case law that would have alleviated the risk of lender liability, even without the change in the statute. In United States v Best Foods,[32] for example, the U.S. Supreme Court rejected a broad reading of owner and operator liability in a manner that suggests a rejection of the Fleet Factors court's reading of CERCLA. The issue was whether a corporate parent could be held liable as operator of the facility owned and operated by the subsidiary.[33] EPA argued that a corporate parent should have operator liability because of its capacity to control.[34] The Court rejected that argument, holding that status as a corporate parent with the capacity to control would generally not create CERCLA operator liability.[35] The Court then described the rather limited circumstances in which a corporate parent could have such liability, requiring that the corporate parent engage in "management specifically related to pollution."[36] While the Court did not directly address lender liability, the Court's reasoning suggests that lenders would have the same protections as corporate parents. Note that Fleet Factors held that capacity to control makes a lender liable as an owner or operator and the Supreme Court held that capacity to control does *not* make a corporate parent liable as an owner or operator.

In addition to Best Foods, there have been several other instances of the Supreme Court reversing lower court decisions that were based on the reasoning used by the Fleet Factors court. The *Fleet Factors* court reasoned that the "overwhelmingly remedial goal of the CERCLA statutory scheme" implies that "ambiguous statutory terms should be construed to favor liability."[37] In more recent cases, the Supreme Court instructed courts to follow the language of the statute, as opposed to what the courts viewed as the remedial goal. For example, in *CTS* Corporation v Waldburger,[38] the Court noted that "The Court of Appeals supported its interpretation of 9658 [the CERCLA provision regarding statutes of limitations] by invoking the proposition that remedial statutes should be interpreted in a liberal manner. The Court of Appeals was in error when it treated this as a substitute for a conclusion grounded in the statute's text and structure."[39]

Thus, the risk of liability lenders felt after *Fleet Factors* has been eliminated by (1) EPA's change of policy; (2) an amendment to CERCLA; and (3) several Supreme Court rulings that should prevent EPA from rethinking the issue and taking a new, expanded view of lender liability. That was not, however, enough for the lending community. It obtained another level of protection via the ASTM Standard and EPA's adoption of that Standard, as is discussed below.

The due diligence process is another way that lenders have sought to protect themselves from environmental risk. Due diligence can serve two purposes: (1) by requiring borrowers to investigate the environmental condition of the property and then, not making loans on contaminated or potentially contaminated properties, lenders can make sure that they do not become owners or operators of contaminated properties and (2) due diligence can help the lender qualify for the CERCLA innocent landowner defense. To qualify for the defense, one needs to engage in "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial and customary practice in an effort to minimize liability."[40]

The statutory phrase "all appropriate inquiry" is less than fully clear regarding what inquiry is appropriate, but the statutory language indicated that industry standards would play a role.[41] In the early 1990s ASTM created a standard intended to define "all appropriate inquiry," and the banking and environmental consulting communities embraced this definition. EPA later endorsed the ASTM Standard in regulations that were a further attempt to define "all appropriate inquiry."[42] Nearly all banks now require an environmental site assessment consistent with the ASTM Standard.

It is worth noting that no court has used the ASTM definition of "all appropriate inquiry" as the basis for finding that a lender had a defense to CERCLA liability. The most likely reason that no court has found an ASTM site assessment to be a defense for a lender is that courts react to the finding of significant contamination after a site assessment in precisely the way BankUnited reacted to the discovery of contamination—they assume that if there is significant contamination that was not identified by the site assessment, then the investigation must have been inadequate. For there to be a defense, it must be possible for there to a fully adequate investigation that misses significant contamination. That is certainly possible. BankUnited's reaction, however, is easy to understand and that reaction makes it unlikely that an investigation that misses significant contamination will be found to be adequate.

Banks and environmental consultants have embraced by ASTM Standard because it proposes to create clarity in an otherwise unclear rule, the rule requiring "all appropriate inquiry." The ASTM Standard, however, has a number of significant limitations. Most significantly, because it is an attempt to define "all appropriate inquiry" for Superfund purposes, it looks almost exclusively at Superfund issues, excluding examination of non-Superfund issues such as asbestos in buildings and regulatory compliance. Thus, while it may be adequate for a lender, whose primary environmental concern is Superfund liability, it may not be adequate for a purchaser because a purchaser will have environmental concerns that go beyond Superfund (for example, asbestos in buildings, regulatory compliance, and petroleum). Oddly, the ASTM Standard appears to have been written for banks and not purchasers, even though the goal is the innocent purchaser defense.

Environmental Liabilities v. Environmental Costs

From the lender's perspective, environmental concerns can be divided into two broad categories. First, there are environmental liabilities that the law imposes on owners and operators of facilities. Superfund liability is the best example,[43] but there are other laws that do the same thing, including the Resource Conservation and Recovery Act ("RCRA")[44] and some state petroleum spill programs.[45] These laws may present the lender with the potential for liability, i.e., the lender has a risk of being ordered to clean up the site, even if the cost would exceed the value of the property or the value of the loan.

Most environmental laws, however, are act-based and not status-based. They impose liability on people who engage in specified activities, not on people who have a particular status (e.g. owner or operator).[46] These environmental liabilities create potential costs for the person engaged in such activities and not potential liabilities for the lender, who is merely a potential owner or operator. Asbestos in buildings is a good example. There is no law requiring an owner to remove asbestos from buildings (except in the context of renovation or demolition).[47] However, the presence of asbestos in the building creates additional costs for the owner and potential for tort liability. For example, assume that the owner of a building is engaged in a renovation project. The cost of the project would be greater if asbestos-containing building materials were present. Additionally, if the asbestos-containing building materials are mishandled, the building owner who engaged in the renovation can face regulatory or tort liability. Such costs and potential liabilities, however, could not be imposed on the lender. They are of concern to lenders only to the extent that they present costs that make it more difficult for the borrower to repay the loan or impair the value of the collateral.

Virtually all environmental compliance obligations are in the category of costs that do not impose potential liabilities on the lender. If the facility in question is an industrial facility and the operator needs a permit for some activity, the permit would impose obligations on the party engaged in the regulatory activity. If there was a violation and subsequently someone else became owner of the facility, there is no basis for suggesting that the subsequent owner violated the law. Additionally, if a Phase I ESA noted that there were past violations at the facility, a new owner would not acquire those violations—he or she did not operate without a permit. The new owner would face compliance costs, i.e. costs to come into compliance, before starting operations. These are the costs that a lender should be aware of—because the cost of compliance may affect the owner's ability to repay the loan—not costs that present potential liability to lenders, unless the lender intends to take over the facility and operate it in violation of certain regulations.

There are several important differences between the liabilities that lenders were concerned with when they began to impose environmental requirements on borrowers and the compliance issues that create costs to the borrower: (1) the environmental issues that can create costs for the borrower are the broader category so that if you want to catch as many potential issues as possible, you would structure an investigation to address these issues; (2) the magnitude of the costs is generally larger on the cleanup side; and (3) the issues that create costs to the borrower tend to be easier to quantify. Accurately estimating the cost of a Superfund remediation is almost impossible prior to the selection of the remedy, which follows a remedial investigation/feasibility study process that may take years. The cost of an asbestos removal, however, can be pretty accurately predicted based knowledge of the type of material, and an estimate of the number of square feet or linear feet of material.

Some of these differences help explain why lenders are so concerned about Superfund liability—the costs tend to be very high and the costs tend to be very difficult to predict. On the other hand, structuring an investigation to address the broader category should have the benefits of both.

Lenders have tended not to differentiate between contamination that is a potential Superfund liability concern and other environmental costs. A couple of examples illustrate this point. A site that is not a former industrial site and has no evidence of any contamination is the subject of a Phase I ESA. The report notes that there are indications that there was, at some time, a fuel oil tank at the property. The documentation regarding removal of the tank cannot be located. For a buyer, this represents a potential cost in the future, but the likelihood of ever incurring these costs is low because no one had inquired about this for years, and the costs are not likely to be great because it was not a large tank and sampling indicates no impact to groundwater. A rational buyer could decide to purchase. A bank, on the other hand, might require proof that there is no concern, and that may prevent the transaction.

In another case, a site is the subject of a thorough Phase I and Phase II process, including groundwater sampling. The only issue is the presence of semi-volatile organics in some dry wells in the parking lot. The consultant notes that this contamination is probably the result of incomplete combustion of automobiles (not a spill or release) and estimates the cost of remediation at between $30,000 and $50,000. The buyer understands the potential costs and is willing to close with a reduction in the purchase price and perform the work post-closing. However, the bank will not permit it because there is contamination.

Advantages of the Broader Inquiry

In addition to identifying more of the potential issues that a lender or borrower could be concerned with, there are other reasons for a lender to use the broader inquiry, at least on larger loans. First, the investigation is more likely to provide the detailed information a business decision maker should want. An ASTM investigation is designed to create a "Yes" or "No" answer—are there recognized environmental concerns or not? On issues that require a judgment call, the consultant will often err on the side of caution and require additional work. In many cases that means the bank will not issue the loan or loans and the borrower's business project will be significantly delayed, without a real analysis of the scope of the issue. Most of these borderline cases, however, are borderline because they do not present a significant risk that the site will be a Superfund site. Instead, they present a potential cost to the borrower. In many of those cases, a reasonable business person would proceed, but the lender community is not trained to examine risks and make environmentally based business decisions. They are trained to say "Yes" or "No" to the loan and most of the time, if there is a hint of a problem, the answer is "No." A broader investigation would give the lenders the ability to examine each issue individually and determine whether to make the loan.

A second reason to require a broader investigation is that it is more likely to be an actual investigation. This is not to suggest that an ASTM investigation is not an investigation; the point is that it does not have to be. That is, the ASTM tells lenders what investigation to do—it includes a checklist. It is a great checklist, but there is a difference between following a checklist and doing an investigation. The better consultants will do both. One can, however, satisfy the ASTM Standard without a real investigation. Having reviewed site assessments for a bank, it was not difficult to distinguish the reports that were real investigations from those that were not.

Disadvantages of the Broader Investigation

The broader investigation is more difficult to perform and its results are more difficult to assess. From the consultant's perspective, it requires more judgment regarding what questions to ask and where to look. And conversely, from the lender's perspective, it is more difficult to determine whether the investigation is adequate. That means relying more on the expertise of the investigator. Most people who hire an expert rely on their expertise. The history here, however, is to have a checklist against which to test the adequacy of the investigation. In that sense, reliance is placed on the agency that prepared the checklist more than on the reviewer. It is unclear why one would prefer to rely on the judgment of the agency making the checklist than on the judgment of the expert who is performing the investigation, but that is sometimes the result.

The broader investigation may cost more. There will be sites at which there is a clean Phase I ESA, but the amount of the loan suggests a deeper look. Some developers already require some soil sampling at such sites. Ideally, the Phase I ESA would suggest what to look for and where, but a grid pattern with a broad range of parameters can give a purchaser additional security.

Conclusion

Lenders need to give real thought to why they are engaged in environmental investigations. Is it to avoid a hypothetical potential liability suggested in the Fleet Factors decision? If so, Congress, the EPA, and the courts have done away with that liability, so in an odd sort of way, it works perfectly. On the other hand, if the goal is to identify potential costs to the borrower that may affect the ability to repay the loan or the value of the collateral, then a broader investigation may be in order for many loans.

The property at issue in the BankUnited case was unusual in a number of ways. The environmental issues were not the type that would ordinarily turn up on the traditional data bases. The agencies did not have documents related to the site filed the address. There is no certainty that a broader investigation would have identified that particular problem. There is reason to believe, however, that the lender would not find itself in the odd position of hoping that the defense it thought it needed will fail.

NOTES:

[1] *BankUnited, N.A. v. Merritt Environmental Consulting Corp.*, 360 F. Supp. 3d 172 (S.D. N.Y. 2018).

[2] *Id.* at 4–5. (new page point should be 179–180)

[3] *Id.* at 17. (new page point should be 192)

[4] The decision is significant for its conclusion that environmental consultants are professionals for purposes of the rule that provides a shorter limitations period for claims of professional malpractice than for ordinary negligence claims, but that will not be the focus of this article.

[5] Indeed, I could not find any case in which a bank successfully defended an environmental action based on having and ASTM Phase I ESA.

[6] 42 U.S.C.A. § 9607(a).

[7] 42 U.S.C.A. § 9601(E)(i).

[8] 42 U.S.C.A. § 9601(35)(A)(i).

[9] 42 U.S.C.A. § 9601(35).

[10] *U.S. v. Fleet Factors Corp.*, 901 F.2d 1550, 20 Bankr. Ct. Dec. (CRR) 977, 31 Env't. Rep. Cas. (BNA) 1465, 20 Envtl. L. Rep. 20832 (11th Cir. 1990).

[11] *Id.* at 1552.

[12] *Id.* at 1552–1553.

[13] *Id.* at 1553.

[14] *Id.* at 1552.

[15] *Id.*

[16] *Id.* at 1554.

[17] *U.S. v. Fleet Factors Corp.*, 901 F.2d 1550, 1556, 20 Bankr. Ct. Dec. (CRR) 977, 31 Env't. Rep. Cas. (BNA) 1465, 20 Envtl. L. Rep. 20832 (11th Cir. 1990).

[18] *Id.* at 1557.

[19] *Id.* at 1556.

[20] *Id.* at 1558.

[21] *Id.*

[22] A quick Westlaw search for articles about Fleet Factors and lender liability pulled up 558 articles. One commentator described the reaction of the banking industry as "widespread panic." See Lawrence J. Sheh, Lender Liability and the Corporate Veil: An Analysis of Lenders As Shareholders Under CERCLA, 25 B.C. Envtl. Aff. L. Rev. 687 (1998).

[23] See, e.g. "Lender Liability Under CERCLA: Shaping a New Legal Rule," 4 N.Y.U. Envtl. L.J. 61,65 (noting that Congress acted in response to "extreme pressure from the banking industry."

[24] 57 Fed. Reg. 18,334 (1992).

[25] *Kelley v. E.P.A.*, 15 F.3d 1100, 38 Env't. Rep. Cas. (BNA) 1193, 24 Envtl. L. Rep. 20511 (D.C. Cir. 1994).

[26] *U.S. v. Fleet Factors Corp.*, 901 F.2d 1550, 20 Bankr. Ct. Dec. (CRR) 977, 31 Env't. Rep. Cas. (BNA) 1465, 20 Envtl. L. Rep. 20832 (11th Cir. 1990).

[27] www.2epa.gov/sites/production/files/2013-09/documents/lend-fidu-amend.pdf.

[28] Pub. L. No. 104-208, 110 Stat. 3009-462.

[29] 42 U.S.C.A. § 9601 (20)(F)(i)(ii).

[30] 42 U.S.C.A. § 9601 (20)(F)(iii)(iv).

[31] 42 U.S.C.A. § 9601 (20)(F)(20)(E)(i)(II).

[32]524 U.S.C.A. § 51 (1998).

[33]*Id.* at 55, 60.

[34]The district court held that a corporate parent has such direct liablility. *CPC Intern., Inc. v. Aerojet-General Corp.*, 777 F. Supp. 549, 572, 22 Envtl. L. Rep. 20457 (W.D. Mich. 1991), aff'd in part, rev'd in part, 59 F.3d 584, 41 Env't. Rep. Cas. (BNA) 1001, 25 Envtl. L. Rep. 21399, 1995 FED App. 0211P (6th Cir. 1995), reh'g en banc granted, judgment vacated, 67 F.3d 586 (6th Cir. 1995) and on reh'g en banc, 113 F.3d 572, 44 Env't. Rep. Cas. (BNA) 1577, 27 Envtl. L. Rep. 20949, 1997 FED App. 0154P (6th Cir. 1997), vacated, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43, 46 Env't. Rep. Cas. (BNA) 1673, 28 Envtl. L. Rep. 21225, 157 A.L.R. Fed. 735 (1998) and cert. granted, judgment vacated, 524 U.S. 924, 118 S. Ct. 2317, 141 L. Ed. 2d 692 (1998) and cert. granted, judgment vacated, 524 U.S. 924, 118 S. Ct. 2317, 141 L. Ed. 2d 692 (1998) and aff'd in part, rev'd in part, 113 F.3d 572, 44 Env't. Rep. Cas. (BNA) 1577, 27 Envtl. L. Rep. 20949, 1997 FED App. 0154P (6th Cir.1997). The U.S. Court of Appeals for the Sixth Circuit agreed that a corporate parent could have such liability. *U.S. v. Cordova Chemical Co. of Michigan*, 113 F.3d 572, 44 Env't. Rep. Cas. (BNA) 1577, 27 Envtl. L. Rep. 20949, 1997 FED App. 0154P (6th Cir. 1997), vacated, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43, 46 Env't. Rep. Cas. (BNA) 1673, 28 Envtl. L. Rep. 21225, 157 A.L.R. Fed. 735 (1998) and cert. granted, judgment vacated, 524 U.S. 924, 118 S. Ct. 2317, 141 L. Ed. 2d 692 (1998) and cert. granted, judgment vacated, 524 U.S. 924, 118 S. Ct. 2317, 141 L. Ed. 2d 692 (1998).

[35]*Id.* at 69–71.

[36]*Id.* at 66-67, stating that to be an operator for CERCLA purposes requires "management specifically related to pollution."

[37]*U.S. v. Fleet Factors Corp.*, 901 F.2d 1550, 1557, 20 Bankr. Ct. Dec. (CRR) 977, 31 Env't. Rep. Cas. (BNA) 1465, 20 Envtl. L. Rep. 20832 (11th Cir. 1990).

[38]*CTS Corp. v. Waldburger*, 573 U.S. 1, 134 S. Ct. 2175, 189 L. Ed. 2d 62, 78 Env't. Rep. Cas. (BNA) 1505, 86 A.L.R. Fed. 2d 665 (2014). See also, *U.S. v. Atlantic Research Corp.*, 551 U.S. 128, 136, 127 S. Ct. 2331, 168 L. Ed. 2d 28, 64 Env't. Rep. Cas. (BNA) 1385, 22 A.L.R. Fed. 2d 735 (2007) (stating "the Government's interpretation [of CERCLA] makes little textual sense.").

[39]*Id.* at 2185.

[40]42 U.S.C.A. § 9601 (35).

[41]The statute used the phrase "in accordance with good commercial and customary practice."

[42]40 C.F.R. Pt. 312.

[43]42 U.S.C.A. § 9607.

[44]42 U.S.C.A. § 6921 et seq.

[45]For example, case law interpreting the New York Navigation Law have interpreted "discharger" to include property owners.

[46]For example, the Clean Water Act prohibits the "discharge" of pollutants (33 U.S.C.A. § 1311), the Toxic Substances Control Act prohibits the manufacture and sale of chemical substances unless required testing has been performed (15 U.S.C.A. § 2603), the Endangered Species Act prohibits the taking of endangered species (16 U.S.C.A. § 1538).

[47]In New York, asbestos abatement is regulated pursuant the Labor Law. The regulations specify who may perform asbestos abatement projects and how they are to be performed. The regulations do not, however, require owners or operators of buildings to perform asbestos abatement. See 10 NYCRR § 73. See also, Asbestos Hazard Emergency Response Act, 15 U.S.C 2561.