Untangling the Web of WQARF — Arizona's Superfund Reform

by Karen L. Peters and Christopher D. Thomas

Avoiding the delays that have plagued reform proposals at the federal level, Arizona's efforts to transform the unwieldy process for remediating historically contaminated sites continue to produce dramatic changes.[1] Most significantly, in April the Arizona Legislature approved House Bill 2114, substantially amending the state Superfund program, the Water Quality Assurance Revolving Fund (WQARF).[2] House Bill 2114, sponsored by House Environment Committee Chairman Russell "Rusty" Bowers (R-Mesa), suffered greatly in its genesis, but its passage places Arizona firmly in the forefront of the national Superfund reform debate. Indeed, if Arizona is successful in finding funding sufficient for remediating its WQARF sites, the woes of the national Superfund program could prove irrelevant here.

Like its federal counterpart, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Arizona's WQARF program has been subject to a barrage of criticism. Poignant tales of small businesses and individuals suffering financial hardship, perceived persecution by environmental agencies, and social stigma of the "polluter" label have driven policymakers at the state and federal level to reexamine the way contaminated sites are addressed. Now, in conjunction with ongoing administrative efforts to develop uniform standards for remediation of soil and groundwater, Arizona's WQARF amendments may largely resolve the familiar dilemmas created by Superfund programs: the prospect for minor contributors to site contamination and even subsequent purchasers of impacted property to be held jointly and severally liable for the significant and unpredictable costs of remediation, and for major players to delay remediation while squabbling about cost allocation.

Why WQARF?

While most of the state enjoys a clean environment, there are many sites, particularly in urban areas, where historic soil and groundwater contamination poses some risk to human health and the environment. The United States Environmental Protection Agency (EPA) and the Arizona Department of Environmental Quality (ADEQ) identify, assess, and seek remediation of these sites in accordance with federal and state regulations.[3] Ten sites in Arizona are on the federal National Priorities List (NPL) and therefore are addressed under the federal Superfund program.[4] Currently, 28 sites are on the state WQARF Priority List; these sites are addressed using a combination of funds from WQARF and private responsible parties. ADEQ also oversees remediation at 19 other "non-priority" WQARF sites. Generally speaking, both EPA and ADEQ seek to compel private parties to conduct cleanups where possible, preserving public funds for "orphan" sites where no solvent liable parties remain.

NPL sites typically are discrete areas of significant contamination; WQARF sites generally have been designated because of local or regional groundwater contamination — which may or may not impact property located above it. Thousands of businesses are located within the vast geographic boundaries of WQARF Project Areas. The cost to address contaminated soil and groundwater in Arizona's 28 WQARF areas has been estimated by ADEQ to be in the neighborhood of $1.2 billion. This estimate includes the cost savings resulting from selecting remedies that control migration of contamination, rather than fully restore all groundwater to its original "clean" state.[5]

Imagine for a moment a hypothetical machine shop owner in the Miracle Mile WQARF study area in Tucson. He has operated at the same site for thirty years — employed dozens of people, paid his taxes, and now is looking forward to retirement after years of hard work. Over the years, his shop has done its best to comply with applicable environmental requirements and common industry practice; however, in 1972, that unfortunately meant that the degreaser used to clean parts was disposed of on the ground behind the shop. In 1996, he receives notice from ADEQ or EPA that his shop is one of a number of "potentially responsible parties," or "PRPs," that must contribute to the $3.7 million cleanup of the area. Imagine further a shopping center developer who built a strip mall in the east central Phoenix WQARF area in 1968. The center's tenants have included a print shop, a veterinarian and a drycleaner. There once was a drywell, or hole, in the back parking lot where some of the tenants occasionally disposed of liquid wastes. In 1995, after deciding to put the property on the market, the mall developer receives notice from ADEQ that she is a PRP who must contribute to the $1 million source control remedy in the area. Not surprisingly, there is no interest from potential buyers.

In either case, these people are now caught in the "web" of WQARF. No problem, they think — my contribution to the contamination is minimal; I want to do the right thing. Then they consult their lawyers, who describe how federal and state Superfund law works. Problem.

The Traditional Superfund Approach

Both CERCLA and WQARF establish a liability regime that prompts government and private-party litigation and provides for an administrative enforcement program for remediation of hazardous substance contamination. Under CERCLA and WQARF, EPA and ADEQ may either spend government funds to remediate contaminated sites and thereafter seek reimbursement from responsible parties, or administratively or judicially compel site investigation and/or remediation.

The parties defined as liable include those who currently or previously owned or operated a contaminated site; those whose hazardous substances (broadly defined)[6] were disposed there (commonly called "generators"); and those who transported hazardous substances to the site, if they selected the disposal site.[7] Superfund liability has been held to be retroactive, strict, joint and several, without regard to causation, unless the defendant can demonstrate that its actions caused a harm divisible from the harm to the entire site. A few, infrequently successful, defenses to CERCLA and WQARF liability are enumerated in the statutes.[8] These defenses, weak as they are, are generally deemed to be exclusive.[9]

Perhaps most harshly, CERCLA and, to a somewhat lesser extent, WQARF, can hold current owners of contaminated property liable even if they didn't cause the contamination. Current owners and operators are liable unless they acquired the property without knowledge or reason to know of the presence of a hazardous substance on the property and exercised due care upon discovery of the release or threatened release.[10] It is not required that the current owner have allowed, caused, created or even known of the disposal or subsequent release of hazardous substances at its facility.[11] No defense is provided for those who wish to knowingly acquire abandoned sites in order to return the property to productive use.[12]

While its strict liability provisions made it arguably effective, from the outset the WQARF program suffered from a number of shortcomings, most of them shared by CERCLA as well. First, the joint liability scheme caused even small waste contributors and prospective property buyers, as well as their lenders, to fear overwhelming cleanup liability. Second, the state lacked the ability to easily resolve the liability of small contributors and those proposing to acquire property within the broad WQARF project areas. This problem was exacerbated by ADEQ's approach to site listing, under which areas of groundwater contamination as large as 25 square miles, having multiple sources, were listed. Third, the absence of clear cleanup criteria left even willing parties in the dark about how much time, money, and effort would be required to remediate a site.[13] Finally, in the case of groundwater, the default assumption that all portions of impacted aquifers should be restored to drinking water standards collided headlong with technical feasibility.[14]

Imagine again the machine shop owner and the shopping center developer, as they leave their lawyers' offices. The news is not good. Each faces potential liability for the entire cost of the selected remedy. It is possible that their liability will remain unresolved for years. The shopping center is unlikely to sell. The machine shop is operating under a dark cloud of contingent liability, making it next to impossible to bid successfully on government contracts. It doesn't seem fair, particularly since the disposal that implicates them was perfectly legal, perhaps even state-of-the-art, at the time, and likely contributed only minimally to the contamination.

A Hopeful First Step

Arizona's effort to remake the Superfund process began in earnest with passage in 1995 of House Bill 2197, now codified at A.R.S. § 49-151-52, during the first regular session of the 42nd Legislature. Among other things, HB 2197 required the establishment of uniform cleanup standards for contaminated soil including, at a minimum, separate standards for "residential use" and "non-residential use." The bill was key because of the sometimes conflicting remediation standards that could be applied in Superfund cleanups. In accordance with the bill, ADEQ has developed uniform, risk-based soil remediation standards. Promulgated effective March 29, 1996, ADEQ's "Interim Soil Remediation Standards" provide a consistent set of cleanup criteria.[15] The rule, codified at Chapter 7 of Ariz. Admin. Code Title 18, allows soil cleanups to be conducted to "Health-Based Guidance Levels" (HBGLs) developed by the Arizona Department of Health Services (ADHS) or alternative levels deemed appropriate after a site-specific risk assessment. As a result, unlike their colleagues in many states, Arizona attorneys can now confidently provide a clear answer when clients ask how clean contaminated soils have to be made to satisfy regulators.

Variations on the Traditional Theme

Not satisfied with a piecemeal approach to WQARF reform, Arizona plunged into the abyss in 1996, proposing dramatic changes to the liability scheme. In the span of a 105-day legislative session, the

Arizona Legislature wrestled with the issues that have stymied Congress' CERCLA reform efforts throughout the 1990s: the unfairness of joint liability and the funding shortfall that would accompany its elimination. The debate that followed resulted in HB 2114, which offers some measure of hope to WQARF "victims" like our machine shop owner and shopping center developer. Indeed, many of the innovative approaches in this legislation have already attracted attention from across the country. Here are some of the highlights:

Liability — Joint liability is removed from WQARF from July 20, 1996, until July 31, 1997. On August 1, 1997, joint liability is restored. While this temporary repeal of joint liability is somewhat counterintuitive and legally confusing, it represents a fragile compromise, designed to provide an incentive for parties who have advocated for the permanent removal of joint liability to continue working to identify additional funding for the WQARF program. As a result of HB 2114, prior to August, 1997, the state cannot force our machine shop owner or shopping center developer to pay for more than their "fair share" of the cleanup cost.

Orphan Shares — A definition of "orphan shares" is added, namely "the equitable shares of the cost for remedial actions that are uncollectible because those costs are allocated to persons who are unable to pay for those shares."[16] In addition, WQARF funds are authorized for payment of remedial action costs if the responsible party is insolvent, is not subject to claims due to bankruptcy, or is otherwise protected from judgment.[17] These provisions are intended to prevent our machine shop owner or shopping center developer from paying the uncollectible shares of other PRPs.

Owner Liability — The bill clarifies how a purchaser of previously contaminated property would "associate himself with the release," thereby losing an exemption from liability. "Associated with the release" is defined as "having actual knowledge of the release and taking action or failing to take action that the person is authorized to take and that increases the volume or toxicity of the hazardous substance that has been released."[18] This provision should provide some comfort to potential buyers of the shopping center property.

Notice Letters — A WQARF notice letter is deemed withdrawn two years after its issuance if ADEQ has not entered into a settlement agreement, issued an order, or filed an action in state or federal court against the notice letter recipient. Failure to take such action within the two-year period precludes the state from seeking from the target its "post-response" costs, which then become orphan shares recoverable only from the general fund, not WQARF.[19] The bill also allows the recipient of a notice letter to make a written request to ADEQ that it be withdrawn; ADEQ must respond within 90 days.[20] Denial of the request may be appealed to the newly created Office of Administrative Hearings.[21] These provisions offer our machine shop owner or shopping center developer a way out of WQARF's web if they can disprove any release of hazardous substances.

De Minimis Settlements — A party who contributed only minimally to contamination may request a *de minimis* settlement if it has received either a notice letter or other written notification of potential liability under WQARF (current law allows any PRP to request such a settlement, regardless of written notice from ADEQ).[22] ADEQ must respond within ninety (90) days, and denial of a *de minimis* settlement may be appealed to the newly created Office of Administrative Hearings.[23] Criteria for determining whether a *de minimis* settlement is "in the public interest" (one of the threshold settlement criteria) are also added.[24] Thus, if our protagonists cannot disprove any release, there is still a possible escape if the release and associated risk are minimal in comparison with the releases of others.

WQARF Appeals — Any of the following ADEQ actions may be appealed to the Office of Administrative Hearings (OAH): written notification of WQARF liability or potential liability; issuance of a notice letter pursuant to A.R.S. § 49-291; denial of a request for withdrawal of a notice letter; issuance of an order requiring conduct of remedial action; failure to enter into a *de minimis* settlement; or any other agency action that imposes potential liability. Any such appeal must be initiated by filing a notice of appeal with the OAH within thirty (30) days after receipt of the written notice of the action being appealed.[25]

Joint Select Committee on WQARF — An interim legislative study committee, comprised of six legislators and ten public members representing various interests, is directed to conduct a broad examination of the WQARF program and make reform recommendations to the entire Legislature by December 1, 1996.[26]

Settlement Protocol — Between July 20, 1996 and July 31, 1997, ADEQ may demand in settlement of any claim under WQARF or CERCLA *only* the responsible party's proportionate share of liability, considering a number of equitable factors.[27] Orphan shares and the shares of non-participating parties are *not* to be included in any other party's proportionate share. Moreover, if a responsible party is negotiating in good faith or is engaged in an administrative appeal, ADEQ may not proceed with litigation against that

party. In the event that the parties are unable to reach settlement, ADEQ may initiate litigation under either WQARF or CERCLA; however, actions filed by ADEQ remain subject to the settlement factors.

In contrast to the struggle for passage of HB 2114, a related bill, Senate Bill 1410, *Environmental Law; Liability* passed without obvious controversy or fanfare.[28] SB 1410 clarifies and limits the WQARF liability of secured creditors and fiduciaries, including trustees, and expands ADEQ's ability to enter into WQARF settlements with prospective purchasers of contaminated property.[29]

The bill was prompted by concerns of the lending and fiduciary community, which viewed with increasing alarm a series of judicial interpretations of CERCLA holding secured creditors and fiduciaries personally liable for cleanup costs under certain circumstances,[30] and by logistical difficulties with prospective purchaser agreements, or "PPAs." Previously ADEQ had been hampered in its ability to resolve the liability of prospective purchasers because of a lack of statutory authority to make PPAs assignable to subsequent titleholders.[31] The amended statute expressly provides such authority. As with prior practice under WQARF and CERCLA, the amended statute authorizes ADEQ to confer covenants not to sue under WQARF and CERCLA and contribution protection (immunity from further private party civil litigation)[32] to prospective purchasers in circumstances where the agreement "will provide a substantial public benefit." That benefit can include an agreement to perform or fund remedial measures or to provide for productive reuse of brownfield property.[33]

Tossing Tradition Out the Window

Taken together, the various amendments of HB 2114 and SB 1410 amount to effective reform of the WQARF scheme aimed at providing relief to the "bit player" — a party whose contribution to a site's contamination is minor or relatively less harmful than another's. Who then, is still in the game? Deep pockets, that's who, like manufacturing industries, mines, utilities, water providers, cities and (of course) the state.

To help finish the reform process, ADEQ and the Arizona Department of Water Resources appointed a Groundwater Cleanup Task Force in February, 1996. The Task Force now consists of 37 members representing public agencies, businesses, utilities, mines, cities, water providers, environmental consultants, and affected citizens from around the state. Seven subgroups of the Task Force are meeting to develop recommendations on the following issues: end use of remediated water; funding; site prioritization; public participation; remedy selection; well design and use; and liability/use of federal law.

The challenge facing both the Groundwater Cleanup Task Force and the Joint Select Committee on WQARF is formidable. Considerable support for a permanent repeal of joint liability exists at the Arizona Legislature and at the national level. Some support is there for a repeal of retroactive liability as well. These repeals have not carried the day for one reason — lack of replacement funding. If the State cannot impose joint liability on responsible parties, it must pick up the tab for orphan shares or watch contaminated sites go unremediated. One might say that joint liability is viewed as the worst system for funding remediation of historic contamination — except for the other systems tried thus far.[34] In the absence of joint liability, the state likely will have greatly increased site characterization and PRP investigative costs as well, because private parties will have no incentive to incur those costs. Where will this money come from? WQARF already has been underfunded for years; the wildly unpopular "Drano Tax" was repealed shortly after it went into effect in the late 1980s.

If adequate, dedicated funding for WQARF cleanups is identified *and* adopted by the next Legislature, all interested parties likely will support permanent repeal of joint liability. Hence, the "temporary" repeal of joint liability in HB 2114. Presumably, support for a new tax will come easier if it is tied to relief from potential liability for millions in cleanup costs.

In the absence of a dedicated funding source sufficient to allow cleanup to proceed notwithstanding elimination of joint liability, Arizona's efforts to avoid the headaches of the federal Superfund scheme likely will come to naught. Virtually all litigation regarding contaminated sites, whether initiated by the government or by private parties, has been conducted under CERCLA rather than WQARF — precisely because of the prospect for at least conditional imposition of joint and several liability on other liable parties.[35] In the absence of funding sufficient to make up the shortfall caused by the elimination of joint liability under WQARF, at least private parties likely will have no choice but to continue litigating hazardous substance cases under the federal CERCLA scheme, once again largely relegating WQARF to irrelevance. In addition, if the funding shortfall impedes the timely progress of site remediation, there is the specter of more aggressive EPA involvement in Arizona sites. If the funding dilemma is resolved, however, Arizona can achieve something not yet accomplished elsewhere: implementation of a workable, more equitable system for remediation of contaminated sites that allows Arizona to crawl out of the quagmire of CERCLA.

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ENDNOTES

1. Notwithstanding bipartisan support, Congress has been unable to pass federal Superfund amendments despite considerable effort over the last several years. The funding shortfall that would be created by the elimination of joint and/or retroactive liability has proven to be most troublesome. This year's primary federal Superfund reform vehicle is H.R. 2500, introduced by Representative Michael Oxley (R.-Ohio) in October 1995. As modified by proposed amendments introduced on March 4, 1996 by Representative Thomas Bliley (R.-Virginia), HR 2500 would repeal the liability of generators and transporters for activities that occurred before January 1, 1987, conditionally repeal the liability of owners and operators of municipal landfill sites, and eliminate joint liability in favor of a mandatory fair share allocation process. On the Senate side, the primary reform vehicle is S. 1285, introduced last fall by Senator Robert Smith (R.-New Hampshire).
2. Chapter 259, 1996 Laws.
3. The primary blueprint for CERCLA cleanups is the National Contingency Plan (NCP), 40 C.F.R. Part 300. Arizona's WQARF remediation rules are set forth in Ariz. Admin. Code R18-7-104, R18-7-109.
4. The NPL is published at 40 C.F.R. Part 300, Appendix B. Arizona NPL sites are the Apache Powder Co. in St. David, the Hassayampa Landfill in Maricopa County southwest of Phoenix, the Indian Bend Wash (North and South) in Scottsdale/Tempe, the Phoenix-Goodyear Airport, the Motorola, Inc. 52nd Street site in Phoenix, the 19th Avenue Landfill in Phoenix, the Tucson International Airport Area, Luke Air Force Base in Glendale, Williams Air Force Base in Chandler, and the Yuma Marine Corps Air Station.
5. While all Arizona aquifers are designated for drinking water use, A.R.S. § 49-224.B, surface water is the source of drinking water in most urban areas, and natural salts and solids make many aquifers unsuitable for drinking in any event.
6. Both CERCLA and WQARF define as hazardous a variety of substances regulated under other environmental statues. 42 U.S.C. § 9601(14); A.R.S. § 49-281(3). Petroleum and its constituents are excluded from the definition, however, and hence underground storage tank cleanups are not covered by CERCLA or WQARF.
7. *See* Section 107 of CERCLA, 42 U.S.C. § 9607; A.R.S. § 49-283.A.
8. Under both statutes, a party is not liable if it can prove by a preponderance that the release or threat of release was caused *solely* by:
   (1) An act of God (never successfully raised); or
   (2) An act of war (again, never successful on the merits); or
   (3) An act of a third party with whom the defendant had no agency or contractual relationship, if the defendant also establishes that he exercised due care with regard to the hazardous substances, and took precautions against foreseeable acts and the consequences of them (infrequently successful).
   42 U.S.C. § 9607(b); A.R.S. § 49-284.D. Additionally, WQARF provides slightly more favorable treatment to subsequent purchasers of contaminated sites, who are not liable unless they "associated" themselves with the hazardous substance release. A.R.S. § 49-283.B.3.
9. *See, e.g.*, 42 U.S.C. § 9607(a) (liability is "notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b)"); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1316-17 (9th Cir. 1986).
10. *See* CERCLA Section 101(35), 42 U.S.C. § 9601(35); A.R.S. §§ 49-283.B., 49-283.D.
11. *See, e.g., New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044-1045 (2nd Cir. 1985) ("[S]ection 9607(a)(1) unequivocally imposes strict liability on the current owner of a facility... without regard to causation").
12. Perhaps even more frustrating, EPA has refused to unequivocally agree that parties are not liable under CERCLA merely because they have the misfortune to own property located above groundwater contaminated by somebody else. Rather, the agency has only begrudgingly issued guidance stating its general disinclination, as a matter of enforcement discretion, to sue such unlucky owners. *See* U.S. EPA, "Policy Toward Owners of Property Containing Contaminated Aquifers," 60 Fed. Reg. 34790 (July 3, 1995). While the policy is better than nothing, it falls far short of recognizing that such owners likely are not liable at all because of the "third-party defense" of 42 U.S.C. § 9607(b). WQARF, fortunately, expressly states that such persons are not liable. A.R.S. § 49-283.E.
13. For instance, rather than set forth its own cleanup criteria, CERCLA requires that parties conduct a complex and laborious analysis of applicable or analogous cleanup criteria established by other environmental programs. 42 U.S.C. § 9621. For one instance, CERCLA groundwater cleanups have commonly selected as remediation targets Safe Drinking Water Act Standards for tap water. 40 C.F.R. § 300.430(e)(2)(i).
14. EPA's CERCLA policies were premised on the assumption that full restoration to drinking water standards could be achieved by pumping and treating groundwater for 2-30 years, if nothing else. 55 Fed. Reg. 8666, at 8753-54 (March 9, 1990). Recent studies have concluded that restoration time frames may more likely range from 100-1,000 years. *See, e.g.*, "The Effectiveness of Groundwater Pumping as a Restoration Technology" (Oak Ridge Nat'l Lab. May, 1991).
15. Ariz. Admin. Register, Vol. 2, Issue 16 (April 19, 1996). ADEQ originally proposed the standards on July 21, 1995.
16. New A.R.S. § 49-281(4).
17. A.R.S. § 49-282.C(2).
18. A.R.S § 49-283.B(3).
19. A.R.S. § 49-291.E.
20. A.R.S. §§ 49-297.A, B.
21. A.R.S. § 49-297.C.
22. A.R.S. § 49-293.A. A similar process is established under CERCLA pursuant to 42 U.S.C. § 9622(g) for alleged generators who have contributed hazardous substances that are minimal in both volume and toxicity. Neither statute expressly states what "minimal" means, but in practice it typically has meant 1 percent or less of the total volume of hazardous substances at a facility. *See, e.g., U.S. v. Rohm & Haas Co.*, 721 F. Supp. 666, 698 and n. 38 (D. N.J. 1989) (court upholds EPA's use of 1 percent "rule of thumb" for defining "minimal").
23. A.R.S. § 49-293.B.
24. A.R.S. § 49-293.F.
25. A.R.S. § 49-298.
26. Chapter 259, Section 14.
27. Similar to the "Gore Factors" unsuccessfully proposed to be added to CERCLA in 1986 by then-Senator Gore, the factors include:
   1. The party's contribution to soil and groundwater contamination;
   2. The amount, concentration and degree of toxicity of each hazardous substance released by the party;
   3. The degree of involvement by the party in the generation, transportation, treatment, storage or disposal of the hazardous substance;
   4. The financial resources of the party; (a unique WQARF factor)
   5. The party's ability to continue in business after payment of its proportional share and whether the payment of the proportionate share would render the party insolvent or require the party to seek bankruptcy protection; (also unique to WQARF)
   6. The magnitude of risk to human health or the environment caused by each hazardous substance released by the party;
   7. The cooperation or the lack of cooperation of the party with ADEQ; and
   8. Any other factors deemed appropriate to balance the equities.
   Chapter 259, Section 18.
28. Chapter 177, 1996 Laws.
29. New A.R.S. § 49-283 provides that a holder of a security interest in a facility who does not participate in the management of the facility is not liable as an owner or operator of that facility unless it (1) "through intentional misconduct or gross negligence" causes or contributes to a release of a hazardous substance; (2) fails to disclose the known presence of contamination during sale of the facility; (3) fails to conduct an adequate Phase I Environmental Assessment; or (4) fails to take reasonable steps to allow ADEQ access to the site for remediation, to limit public access to the contaminated portion thereof, and to sell the property. New Section A.R.S. 49-283.I expressly states that fiduciaries are not personally liable as owners or operators of facilities, unless they cause or contribute to contamination through intentional misconduct or gross negligence or were appointed for the purpose of avoiding liability.
30. A lender may be liable as an owner under CERCLA if it holds title or other sufficient "indicia of ownership" to contaminated property. *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 579 (D. Md. 1986). CERCLA's "security interest" exemption provides that the holding of indicia of ownership primarily to protect a security interest a facility does not make one a liable owner. 42 U.S.C. § 9601(20)(A). Most alarming to lenders, however, the U.S. Court of Appeals for the Eleventh Circuit held that a secured creditor can lose the liability exception even absent foreclosure if its involvement with the management of a facility is "sufficiently broad to support the inference that it could affect waste disposal decisions if it so chose." *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557-58 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1993). *Cf. In re Bergsoe Metal Corp.*, 910 F.2d 668, 672 (9th Cir. 1990) (secured creditor does not lose exception unless it actually participates in borrower's waste disposal operations). Closer to home, fiduciaries reacted with dismay to a District of Arizona ruling finding the trustee of a testamentary trust personally liable. *See City of Phoenix v. Garbage Service Co., et al.*, 816 F. Supp. 564 (D. Ariz. 1993) (title-holding trustee is owner under CERCLA); 827 F. Supp 600 (D. Ariz. 1993) (trustee's liability under CERCLA is not always limited to assets of trust).
31. Although the original prospective purchaser guidance was little-used, ADEQ did enter into several agreements modeled after the policy. *See, e.g., State of Arizona v. Bank One, Arizona, N.A.*, CV 94-0082 PHX EHC (D. Ariz., January 11, 1994) (Bank One and certain successor titleholders receive a covenant not to sue from ADEQ and protection against claims for contribution under CERCLA or WQARF in exchange for the bank's agreement to contribute $399,000 to cleanup of the Arboleda property near 16th Street

and Camelback).

32. Both CERCLA and WQARF create private rights of actions for liable parties who incur cleanup expenses. 42 U.S.C. § 9607(a); 42 U.S.C. § 9613; A.R.S. § 49-285. To facilitate settlement with individual parties in multi-party sites, both statutes accordingly allow EPA or ADEQ to confer "contribution protection" to settling parties. 42 U.S.C. § 9613(f)(2); A.R.S. § 49-292.C. Contribution protection allows early settlors in multi-party litigation to resolve their liability in complex litigation without "fear that a later contribution action will compel them to pay still more money to extinguish their liability." *In re Acushnet River and New Bedford Harbor*, 712 F. Supp. 1019, 1027 (D. Mass. 1989). *See also State of Arizona and City of Phoenix v. Motorola, Inc.*, 139 F.R.D. 141, 145 (D. Ariz. 1991).
33. In an attempt to reinvigorate its program, the U.S. Environmental Protection Agency had released on July 3, 1995 new guidance on settlements with prospective purchasers of contaminated property. Under the new guidance, EPA will consider entering into PPAs where doing so would provide a direct benefit to the agency (*i.e.*, cash) or "a substantial indirect benefit to the community, coupled with a lesser direct benefit to the agency." Among the benefits appropriate for such consideration include "the creation or retention of jobs, productive use of abandoned property, or revitalization of blighted areas." 60 Fed. Reg. at 34793.
34. *Cf.* Winston Churchill, "Indeed, it has been said that democracy is the worst form of Government except for all those other forms that have been tried from time to time." (Speech to House of Commons, Nov. 11, 1947.)
35. A tremendous debate has been raging in the Courts about whether CERCLA allows liable parties to seek imposition of joint and several liability on other PRPs under 42 U.S.C. § 9607 or limits them to seeking fair share contribution under 42 U.S.C. § 9613. This seemingly arcane legal issue can have a million-dollar impact in CERCLA litigation, where proving equity can be extremely difficult, by shifting the burden of proof to the non-working defendants. *Compare United Technologies v. Browning-Ferris Industries, Inc.*, 33 F.3d 96 (1st Cir.), *cert. denied*, 115 S. Ct 1176 (1995) (PRPs can only seek fair-share contribution) *with The Pinal Creek Group v. Newmont Mining Corp.*, No. CIV 91-1764 PHX WPC (D. Ariz. 1991) (slip op. March 28, 1995) (PRPs who conduct cleanups can sue for joint and several liability, subject to defendants' contribution counterclaim).