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QUESTION, *Professor King*: Clive, do you have any thoughts on the implementation of the recommendations you mentioned?

ANSWER, *Mr. Allen*: I think that for responsible businesses, it's a matter of working effectively with the regulators, being fair minded in the way one proceeds, being really responsible, and, importantly, being perceived in the community as being responsible. One can also join with other responsible companies in various trade and business associations and, in effect, bring about changes to the law.

We certainly want to see this problem taken care of. We are as much affected by the environment and industry as the rest of the world, so we all have an interest in not jeopardizing our future or generations unborn. Having said that, it has to be done in a reasonable and fair manner, and the recommendations that I made went directly towards that end.

QUESTION, *Mr. Marlais*: When a cleanup is completed, is there a definition under the law now, and what should be the definition, of what is a "restored land"?

ANSWER, *Mr. Polito*: The question of how clean is clean, and whether there are standards that define the level of clean, depends upon what you're looking at; if it's federal law, which federal law, and if it's state law, which state law?

In Michigan, after many years of applying what I call ad hoc rule making guidelines, we went to a system whereby regulations established three levels of cleanup: Type A, Type B, and Type C.

Type A is basically, you clean up to either the analytical level of detection arrived at by the quantitative laboratory method that you apply to determine whether there are substances there, or you define what natural background conditions are there. You go out and sample a non-effective location, whether it's ground, water or soil, and then you take the contaminated site, compare the level of contamination, and clean up so you get down to background levels, which in some cases can be higher than risk-base levels, because of the presence of contaminants naturally in the environment.

Type B is the risk-base level. For that, you do a generic risk assessment, employ certain algorithms that are in the role, look at the exposure

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routes and the conditions of exposure and contaminants, and put these very roles into the model. The model tells you what level of contaminant will be sufficient to protect against a risk, given the media involved and the exposure route.

Type C is what we call a site-specific remedial action. It is basically looking at the specific site, the specific exposure route, the specific contaminants and the remedy that you intend to employ, whether it's some kind of institutional control, such as preventing disturbance of the soil, or the drilling of wells, and you determine whether, given all those factors, what the risk to human health in the environment is, and then whether that level of risk is acceptable.

Consequently, in Michigan, we have an answer to how clean is clean? It's going to depend upon a number of different variables, but there is a way to get there. Under the federal Superfund statute, we have what's called ARAS, Applicable and Relevant and Appropriate Standards, where EPA looks at site conditions, does a remedial assessment and looks at alternatives or at other environmental laws for standards. Drinking water standards, for instance, would be generally applicable to ground water contamination. They set those as the cleanup goals and determine the method to get there.

The problem with the federal system is that, for remedies where a permanent treatment technology is not employed, where you leave contaminants in place, EPA is statutorily mandated to review the remedy every five years, and, theoretically, every five years the remedy can be reopened based upon new science and new regulations, and additional cleanup actions can be acquired.

QUESTION, *Mr. Marlais*: Assume that the entity responsible for a polluted site no longer exists, that the corporate officers and directors are dead, and that the party who is the current owner, and any lenders involved, would be bankrupted by the cost of a sizable cleanup. What is the current remedy for such a situation?

ANSWER, *Mr. Polito*: The answer, under both Michigan law and under the federal law, is that that's not a defense. If you have status with respect to the facility, or property that meets the statutory criteria for being a responsible party, you've got that liability unless you can prevail on the defense, and it is not a defense that your predecessor in interest is no longer around.

Now, if this party is bankrupt, the federal system and most state systems have their own cleanup funds, the federal Superfund being the prime example. There is money there that EPA can access to, in effect, perform the cleanup and then seek to recover that cost from third parties.

When you have an orphan share situation, and you have people in the chain who may be responsible, the normal result is that EPA will cut a deal. That's why there are so many consent judgments and administra-

tive consent orders that define the extent of participation. EPA is sensitive to those situations, but as a purely legal matter, it is not a defense. You have to rely on the good faith and fortunate discretion of the responsible agency, EPA or Department of Justice, to cut a deal that allows the successor, the innocent successor, to maintain some level of viability.

In Michigan, the legislature, as a part of a massive piece of legislation, was supposed to enact a funding mechanism that would have created a state orphan share fund, so that in situations where you had multiple parties, and not all the parties were liable, the orphan share fund would kick in and pay for that orphan share. Monies in that fund were going to be raised by some kind of an excess tax on gasoline and products.

That particular legislation was never adopted. We have now in Michigan the realization of an orphan share potential, but since the legislation did not get adopted, Michigan law now provides that once you calculate the orphan share, you are supposed to divide up the respective interest of the other named parties, and they're supposed to, pro rata, pick up the orphan share's allocation.

QUESTION, *Mr. Cameron*: Are you aware of any constitutional challenge being taken to the provisions of CERCLA for the potentially-responsible parties?

ANSWER, *Mr. Polito*: They've been challenged and basically have been upheld as valid. The basic challenge has been due process and retroactive liability. I think the Fourth Circuit's decision in the *Monsanto* case is probably the best reason, but I think they concluded that the statute was constitutional and was not impermissibly retroactive, because it was remedial in nature and, secondly, the conditions, although they may have been created in the past, still posed a present harm that needed to be remediated; therefore, it did not have true retroactive application in the constitutional sense.

QUESTION, *Ms. H. Campbell*: Are there provisions in the CERCLA legislation with respect to warrants to enter upon land?

ANSWER, *Mr. Polito*: The Superfund statute contains very broad grants of authority to EPA for information gathering activities and for on-site inspections, as well as warrant authority, including subpoena authority as a result of the 1986 amendments.

Entry authorities have traditionally been used in all the U.S. environmental laws, and have been used very effectively. Search warrants are also used, mostly, however, in the criminal context. The general rule is that if they're proceeding on a civil basis, they will use the Level 4 authorities under CERCLA. If they think there's some criminal components, the safe way for them to proceed is to try to secure a search warrant.

QUESTION, *Ms. H. Campbell*: Are those large fines provisions under CERCLA actually used, and are those collected?

ANSWER, *Mr. Polito*: CERCLA does provide, like many other environmental laws, for pretty large daily fines. I think in CERCLA they range up to $25,000 per day. In fact, under Section 106 of CERCLA, EPA can to issue administrative orders requiring responsible parties to clean up. If the parties refuse, without sufficient cause, to comply with an order, they can be held responsible for the costs that the Agency incurs in carrying out the remedy that the parties refused to perform plus three times the cost of the remedy. Court decisions have upheld the application of that triple penalty award under the statute, and that has also held to be constitutional.

So, yes, they is used, and, yes, the courts have already dealt with them and have awarded penalties to EPA under the triple penalty provision. As to whether those fines are collected, the one party that was hit with I think a $1,600,000 triple penalty is collectible. Whether it's been collected or not, I don't know, and it probably will be subject to some appeal. It is at the District Court level now.

QUESTION, *Professor King*: We hear the concerns that plants have located or relocated to take advantage of lax environmental controls. Do you have any comments on the location of plants and the concerns involved therein?

ANSWER, *Mr. Allen*: Northern Telecom has tried to be very progressive in this respect. We have tried to extend the most demanding restrictions, the most demanding standards in North America, to our operations around the world. Whether it's a plant in Malaysia, or Northern Ireland, or Turkey, or Brazil, wherever it is, we have tried to bring those plants, if they're not already, up to the standards that we meet in the most demanding jurisdictions in North America. I'm not sure that everyone can afford to follow this approach, and I would have to think that it has some impact on where people choose to locate plants.

Having said that, while environmental concerns and environmental costs might be a factor in plant location, I would have to think that the dominant factors by far in plant selection are going to be quality and cost of labor, tax incentives and tax structures. Starting with a new plant and doing it professionally, I would have to think that the environmental costs or the costs associated with doing something in an environmentally sound manner are relatively small. If you can do things in Malaysia and pay top salaries in the country at five dollars a day, that is the reason for doing it there, particularly if you've got a fifteen-year tax holiday. You're not going to move there just to save a few hundred thousand dollars in the way you structure your plant.