

EXAMINING CONTRACTUAL MODELS FOR TRANSFERRING ENVIRONMENTAL LIABILITY: HOW THEY WORK AND WHERE THEY ARE HEADED

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INTRODUCTION

Seller (S) wants out. S wishes to sell his property to a prospective buyer (B), but S's property is contaminated with hazardous waste. Under federal hazardous waste law, S is liable for the costs of cleaning up the property to regulatory standards. S is also liable for any damage this contamination caused to third parties, neighboring properties, or natural resources—in the past as well as in the future.¹

Even though B has not participated in any of the activities causing the contamination, B would assume the same liability S presently has if B buys the property without performing due diligence on its environmental condition. If the government has not yet brought an enforcement action against S to force him to remediate the property or to recover its costs for cleaning it, S may be disinclined to transfer the property for fear B will

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1. Based on liability under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2006).

discover and report the contamination. Consequently, the property remains as is, untreated and potentially causing environmental and public health harm. At best, it is not put into productive use as it might have been if sold to B.

Here is where the private liability buyout firm (LBF) comes in. The firm assesses the site and bids to contractually assume S's liability for a one-time-payable, fixed price. The firm estimates the cost to remediate the site to the proper regulatory-use standards and monitor and maintain it there in perpetuity. The LBF then adds a premium based on the extent of the exposure it would be assuming, especially into the future. If utilizing an insurance-backed contract, the firm would simultaneously negotiate with an insurer to purchase site-specific environmental insurance policies to cover any cleanup cost overruns or future expenses associated with the site, thus limiting the firm's own financial exposure.

Depending on S's needs and desire to sell the property, transferring his environmental liability to the firm may be a highly attractive option. If S decides to "cash out," the firm structures a contract between it and S that indemnifies S from future actions by the government and third parties. The firm is motivated by a variety of financial incentives, discussed in detail below. In practice, these environmental risk transfers have been productive transactions for the parties. They enable S to more or less "walk away" and give B peace of mind while facilitating the re-development of contaminated properties.²

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Environmental liabilities can arise through remediation obligations, environmental law violations, or litigation.³ These liabilities may have a deleterious effect on the holder by complicating or impeding property conveyances, or by incurring additional costs through noncompliance penalties, causing reputational damage to the business, or creating a drag on earnings if remediation costs are charged incrementally against net income

2. The author would like to note that this paper is primarily descriptive in nature and does not purport to provide an objective quantitative assessment of the remediation industry's environmental results to date. Because these contracts are private, the available data is largely provided by the industry itself. Further, insufficient time has elapsed to assess the long-term performance of private cleanups against those administered by the Environmental Protection Agency (EPA). This paper, instead, explores when fixed-price contracts may be appropriate and what makes them successful, including the particular statutory framework that first enabled them.

3. Michael O. Hill & C. Gregory Rogers, *Using Insured Fixed-Price Cleanups to Respond to New Accounting Standards, Gain Tax Savings, and Lower Cleanup Costs While Increasing Cost Certainty*, 202 BUREAU OF NAT'L AFFAIRS, ENVTL. DUE DILIGENCE GUIDE, 231:2065, 2070 (Nov. 2008).

on a company's balance sheets.⁴ Although environmental insurance policies are now available through a number of insurance companies,⁵ environmental liability transfers (ELTs) may still be the best strategy for managing these risks in certain types of situations. For reasons discussed below, this Note focuses on liability transfers used to remediate contaminated sites. Significantly, however, other applications for ELTs are gaining prominence as well.⁶ In staying with this purpose, this Note examines the mechanism used most successfully to transfer liability in the context of site cleanups: the insured fixed-price cleanup (IFC) contract.⁷

The concept of using insured fixed-price contracts to transfer environmental liability from the party financially responsible for the contamination⁸ to an LBF was pioneered in the late 1990s by private remediation companies.⁹ The first IFC debuted in 1999 when a private liability buyout firm assumed the liability of hundreds of potentially responsible parties (PRPs) who had contributed hazardous waste to Maine's largest Superfund site, the Portland-Bangor Waste Oil Site Facility, and were being held financially responsible for the cleanup costs.¹⁰ Like *S* in the introductory hypothetical, these PRPs sought relief from ongoing obligations and elected to pay a one-time fee for a full release of their liability.¹¹ This basic model, applicable in a variety of scenarios, has

4. *Id.* at 2066.

5. *Id.* at 2066–67. Insurance companies added pollution exclusions to their standard commercial general liability insurance policies in response to the new statutory environmental liabilities created by CERCLA's enactment in 1980. As a result, pollution liabilities were generally not insured against until the 1990s. *Id.* at 2066.

6. Most notably, accounting requirements now mandate disclosing certain corporate liabilities. As discussed in more detail below, this may create a market for using ELTs as a legal and responsible way to remove environmental liabilities from corporate balance sheets. *See id.* at 2069–70.

7. IFCs, or variants thereof, are also referred to as guaranteed fixed-price remediation (GFPR), performance-based contracts (PBCs), and liability buyouts (LBOs). *Id.* at 2065 n.2.

8. Transferors could include potentially responsible parties (PRPs) (if the liability arose from an enforcement action under CERCLA) or an owner wishing to sell a contaminated property, among others. *See* 42 U.S.C. § 9607(a)(1)–(4) (2006) (enumerating the parties that could be held liable for property contamination).

9. The Travelers Research Corporation (TRC), a publicly held company, was the first to register a proprietary IFC model, “The Exit Strategy®,” in 1998. INTERNATIONAL DIRECTORY OF COMPANY HISTORIES, (Jay P. Pederson & Taylor Grant eds., 32d ed. 2000) (citing section entitled “TRC Companies, Inc.—Company History”), available at <http://www.fundinguniverse.com/company-histories/TRC-Companies-Inc-Company-History.html>.

10. *See* John J. Fialka, *Maine Experiment May Point the Way to Ending Tangle of Litigation Around U.S. Superfund Law*, WALL ST. J., Apr. 29, 1998, at A28.

11. *See* Michael O. Hill, *A Tale of Two Sites: How Insured Fixed-Price Cleanups Expedite Protections, Reduce Costs, and Help the EPA, the SEC, and the Public*, 18 NAT'L ENVTL. ENFORCEMENT J. 3, 3 (Sept. 2003), available at <http://www.naag.org/assets/files/pdf/neej-2003-september.pdf>.

become the basis for the liability transfer industry. Though initially considered a “radical experiment,”¹² ELTs have become well-accepted devices used to manage environmental liability risk and allocation.¹³ A number of remediation firms now compete for these contracts.¹⁴

Thus, the ELT industry has created a valuable niche market in less than ten years.¹⁵ Starting in 2008, however, the economic climate has changed significantly. Indeed, much ink has been spilled over the role of debt swaps in what has been termed a global financial “meltdown,”¹⁶ as well as the ensuing government bailouts of key players in several industries, including insurers that underwrite fixed-price cleanup contracts.¹⁷ While still uncertain, the negative ramifications of the current economic crisis on the ELT industry thus far appear to be contained to the potential loss of some of the insurers that presently provide insurance products used to secure fixed-price cleanup contracts.¹⁸ As is explored in a later section of this Note, depressed economic conditions may actually promote *increased* use of ELTs because of their potential utility in bankruptcies as well as in

12. TRC Companies, Inc., Exit Strategy Program, www.trcsolutions.com (follow “Services” hyperlink; then “Environmental” hyperlink; then “Real Estate” hyperlink; then “Exit Strategy Program” hyperlink) (last visited Dec. 23, 2009).

13. Joshua A. Bloom, *Environmental-Liability Buyouts: How to Know When It's the Real Thing*, 20 NAT. RESOURCES & ENV'T 37, 37 (2006) (“Years ago, this then-novel and fairly unknown [ELT] concept was viewed with suspicion. Today, however, under the right conditions and structured to truly benefit all parties, these transactions have an important and secure place . . .”).

14. Nationwide, there are approximately twenty to thirty firms that offer a version of these services, including the aforementioned TRC; CH2M Hill Ltd.; Dames & Moore, Inc.; EMCON; Environmental Elements; Environmental Resources Management; Harding Lawson Associates Group, Inc.; ICF Kaiser International, Inc.; IDM International; IT Group; Roy F. Weston; Safety-Kleen Corp.; Thermo Terra Tech; Thermo Retec; Waste Management, Inc. INTERNATIONAL DIRECTORY OF COMPANY HISTORIES, *supra* note 9. However, only six or seven of these firms offer a full environmental liability transfer using a more secure version of an IFC.

15. TRC's annual revenue, for example, was approximately \$450 million per year as of 2007. *Eliminating Toxic Waste Liabilities—A General Counsel's Dream*, METRO. CORPORATE COUNSEL, Dec. 2007, at 38, available at <http://www.metrocorp.counsel.com/pdf/2007/December/38.pdf> [hereinafter *Eliminating Toxic Waste Liabilities*].

16. See, e.g., Louise Story, *Wall Street Report Tries to Dissect Financial Meltdown*, N.Y. TIMES, Aug. 7, 2008, available at <http://www.nytimes.com/2008/08/07/business/07report.html>.

17. American International Group (AIG) is a major provider of insurance policies for IFCs. In September of 2009, the Government Accountability Office (GAO) reported that the federal government's bailout of AIG, totaling approximately \$182 billion as of July 2009, appears to have stabilized the insurance giant at this time. The federal government now owns approximately eighty percent of AIG. *American International Group Inc.*, N.Y. TIMES, Business, Oct. 31, 2009, available at http://topics.nytimes.com/top/news/business/companies/american_international_group/index.html.

While the ELT industry does not appear imperiled on the whole, the ramifications for AIG as a future underwriter of IFCs is unclear.

18. Other insurers that are able to offer comparable products are not facing the current difficulties of AIG. See generally Edmund L. Andrews & Peter Baker, *At A.I.G., Huge Bonuses After \$170 Billion Bailout*, N.Y. TIMES, Mar. 15, 2009, at A1 (outlining the financial crisis as applies to AIG).

facilitating compliance with accounting standards that require disclosing environmental liabilities.¹⁹

So far, when appropriate and done correctly, ELTs have been considered win-win solutions.²⁰ Foremost, ELTs bring cost-savings: IFCs are cheaper than time-and-materials cleanups, as demonstrated by a recent study by the U.S. Army showing that fixed-price contracts had an average savings of twenty-two percent below estimates submitted at the project's outset.²¹ Moreover, the ability to transfer environmental liabilities adds value by facilitating the redevelopment of contaminated properties, often benefiting the community as well as the private parties involved.²² To the extent that ELTs avoid cleanups in which the government bears the initial response cost, the public also benefits by not having to pay for the cleanup out of taxpayer dollars in the event that the government is unable to recover its expenditures or the site is abandoned in bankruptcy. ELTs also eliminate the transactional costs associated with litigating environmental enforcement actions,²³ conserving money spent on legal resources for both the government and private parties. Finally, IFCs are significantly faster than traditional cleanups.²⁴ The benefits and track record to date explain why practitioners predict that ELTs will be increasingly used in the future.²⁵

19. See Hill & Rogers, *supra* note 3, at 2065–66 (“[R]ecent accounting pronouncements that initially will take effect Dec. 15, 2008, require certain environmental liabilities to be recorded at their market value . . . and proposed disclosure rules would require companies to provide detailed quantitative and qualitative information about their environmental obligations [B]ecause the risk transfer is so complete, IFCs . . . provide a viable way to remove recognized environmental liabilities from the balance sheet.”).

20. See Bloom, *supra* note 13, at 42 (concluding that “all benefit” when liability buyouts are appropriate and conducted correctly).

21. U.S. ARMY ENVTL. CTR., TRACKING PERFORMANCE ON THE ARMY’S PERFORMANCE-BASED CONTRACTS, at 4 (May 16, 2006), available at <http://aec.army.mil/usaec/cleanup/pba00.html> (follow “Tracking Performance” hyperlink) (showing cost avoidance ranging from 21.3% to 33.8% percent). According to Hill and Rogers, this approximate twenty percent margin includes the cost of adding insurance. Hill & Rogers, *supra* note 3, at 2066.

22. See Bloom, *supra* note 13 (“Under the right circumstances, the environmental-liability assumption transaction can fix what had been to that point an uncertain contingent cost, can fuel a transaction that would not have occurred but for the liability buyout, can free up funds otherwise tied up as reserve, and can reestablish human capital to once again pay attention to the company’s core business.”).

23. See Hill, *supra* note 11, at 7 (citing a study by the GAO estimating that PRPs spend half of what the total cleanup costs again in litigation and transaction costs, whereas IFC can be completed without any litigation and minimal legal fees).

24. See *id.* (citing an estimate by the GAO that the EPA takes an average of seventeen to nineteen *years* to list and cleanup a Superfund site as compared to nineteen *months*, the time it took to complete the cleanup of the first Superfund site to use an IFC, the Portland-Bangor Waste Oil Facility, which was completed with no litigation and forty percent below estimated costs).

25. See ARTHUR J. HARRINGTON, ENVIRONMENTAL LIABILITY AND THE EMERGING ART FORM OF TRANSFERENCE: A COMPREHENSIVE GUIDE TO TRANSFERRING FINANCIAL RISK TO THIRD PARTIES

In examining the industry's development and the projections for its growth, this Note pays particular attention to the contractual mechanisms and regulatory structure that have enabled these transfers' success. Though ELTs have several current applications briefly noted here, this paper primarily considers ELTs in the context of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) liability,²⁶ which remains the dominant analytic paradigm.²⁷ This focus is due, in part, to the fact that ELTs were contemplated by a provision in CERCLA itself²⁸ and later arose in direct response to the inefficiencies produced by implementing CERCLA, as discussed in detail in Part II. State hazardous waste laws also frequently mirror CERCLA's liability structure, providing an additional rationale for this approach. It is worthwhile to note, however, that the ELT concept can be extended to encompass non-CERCLA applications as well. Several of these applications are mentioned briefly in Part IV, though an in-depth discussion is outside the scope of this paper.

Part III presents two case studies illustrating the basics of an IFC transfer in different settings. Part IV discusses the legal status of completed ELTs, an area flagged as potentially problematic by the literature at the fledgling industry's outset.²⁹ This section concludes by speculating on what has allowed the industry to achieve such success to date, as well as what lessons may be learned, if any, for structuring future legislation to enable similarly effective market solutions to what is both a private and, in some ways, public problem.

WHEN BUYING & SELLING CONTAMINATED PROPERTY, at 98–99 (2006) (predicting that future environmental liability exposures (for example, from natural resource damages, chemical activities previously thought safe, or public demand for more financial transparency with contingent liabilities) will provide strong incentives for hedging these risks through innovative liability transfer devices); see also Hill & Rogers, *supra* note 3, at 2073 (suggesting several reasons why “IFCs should be poised for a significant increase in popularity”).

26. 42 U.S.C. §§ 9601–9675 (2006).

27. See generally Matthew J. Lawlor, Comment, *Super Settlements for Superfund: A New Paradigm for Voluntary Settlement?*, 27 B.C. ENVTL. AFF. L. REV. 123, 124 (1999) (providing an excellent discussion of the emergence of the liability transfer concept in anticipation of concluding the first such IFC, or “super settlement,” in 1999); see also Kenneth F. Gray, “*Super Settlements*”: *Early Release for all PRPs at Multiparty Superfund Sites?*, 12 NAT. RESOURCES & ENV'T 298, 298 (1998) (outlining the general structure of a “super settlement,” an early term for IFCs).

28. 42 U.S.C. § 9607(e)(1) (2006) (“Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.”).

29. See Lawlor, *supra* note 27, at 151–58 (questioning whether liability transfers will withstand judicial scrutiny, as well as whether the federal-state relationship between the EPA and state-administered site cleanups will prove problematic).

I. BACKGROUND TO PRIVATE INDEMNIFICATION AGREEMENTS

By the mid-1990s, dissatisfaction with remediation efforts under CERCLA created a potentially lucrative market opening for private remediation companies.³⁰ Congress's failure in 1995 to reauthorize funding for a critical piece of CERCLA's liability scheme³¹ opened the door for private-sector innovation able to realize CERCLA's public-interest goals in the process of turning a profit. The ELT industry sprang up to capitalize on inefficiencies produced by CERCLA's implementation and, in doing so, created a mechanism for structuring transfers that continues to find new applications today.

A. CERCLA's Liability Scheme

Congress enacted CERCLA in 1980 for the principle purpose of forcing cleanup of leaking hazardous waste sites, in large part as a response to growing public concern over a number of highly publicized hazardous waste exposures.³² CERCLA operates under the "polluter pays" principle by casting a wide net of liability around persons who have contributed to the release of hazardous substances into the environment. This net ensnares not only hazardous substance generators and transporters, but also the owners and operators of property used to treat, store, or dispose of hazardous substances.³³ Under section 107(a), these potentially responsible parties are liable for all response and remediation costs associated with removing hazardous substances from a site until it achieves compliance with a certain regulatory-use standard, thereby "closing" the case.³⁴

CERCLA's section 107 imposes strict liability on identified PRPs,³⁵ and federal courts have held PRPs jointly and severally liable unless the harm caused by the release of the hazardous substance is divisible and the parties

30. *Id.* at 125.

31. *Superfund Not Funded, Congressional Investigator Reports*, ENVTL. NEWS SERV., Feb. 23, 2004, <http://www.ens-newswire.com/ens/feb2004/2004-02-23-11.asp>.

32. The 1978 Love Canal emergency, which required that an entire neighborhood in New York evacuate their homes upon the discovery of underground hazardous waste contamination, is the iconic, but by no means isolated, incident.

33. *See* § 9607(a)(1)–(4).

34. *See id.* (a)–(c). PRPs are also liable for damages to natural resources, though few actions have been brought for natural resource damages to date. *But see* Kathleen Chandler Schmid, *The Depletion of the Superfund and Natural Resource Damages*, 16 N.Y.U. ENVTL. L.J. 483, 508, 510 (2008) (arguing that while federal funds are still necessary for most states to bring natural resource damage claims, some more affluent states have begun pursuing such claims on their own).

35. *See* § 9607(a).

can show a reasonable basis for apportioning damages.³⁶ The result is draconian but effective from the view of the government and the public: at least one party is on the hook for the cleanup costs, either by financing the remediation directly or reimbursing the government for its costs. The paying party or parties can then bring “contribution actions” against other PRPs for their individual shares, thus relieving the government of having to join all PRPs in the suit or prove their individual contributions to apportion damages.³⁷ In the event that liable PRPs could not be identified or were financially insolvent, orphaned sites or contributory shares were to be covered by CERCLA’s “Superfund,” a trust fund that was created from taxes on the oil and chemical industries but, as noted above, never adequately funded.

Two pieces of legislation enacted post-CERCLA significantly evolved its liability regime. To mitigate the harshness of strict liability, the Superfund Amendments and Reauthorization Act of 1986 (SARA) created an “innocent landowners” defense. Under this provision, “owners,” as defined by CERCLA’s section 107(a), are exempted from liability if they either involuntarily acquired contaminated property, or voluntarily acquired property without “reason to know” that hazardous substances had been disposed of on site.³⁸

Then, in 2002, the Small Business Liability Relief and Brownfields Revitalization Act (Brownfields Amendments) widened the exclusions by creating a “bona fide prospective purchaser” defense.³⁹ This defense protects owners of contaminated properties from liability if all disposal happened prior to their purchasing the land; if the owner neither contributed to the contamination nor is affiliated with any party who is potentially liable for the government’s cleanup response costs; and if the purchaser

36. *See, e.g.*, *United States v. Monsanto Co.*, 858 F.2d 160, 166–71 (4th Cir. 1988) (holding that defendants who fell within one of the four PRP classes were strictly liable once the requisite nexus with the waste site was established, and that joint and several liability is appropriate under CERCLA when the harm is “indivisible”); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268–69 (3d Cir. 1992) (inferring from CERCLA’s strict liability scheme that holding known polluters jointly and severally liable is appropriate under the purpose of the statute).

37. The Superfund Amendments and Reauthorization Act of 1986 (SARA) amended CERCLA to provide an explicit right to contribution; prior to SARA, courts had recognized an implied right under CERCLA. *See* Pub. L. No. 99–499, § 106, 100 Stat. 1648 (1999).

38. SARA affected this change by expanding section 107(b)(3)’s third-party exemption through redefining the term “contractual relationship” under section 101(35) rather than altering the definition of “owner” under section 107(a). *See* Pub. L. No. 99–499, 100 Stat. 1616(35)(A) (1999).

39. The Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107–118, § 222 (2002).

performed due diligence prior to the sale.⁴⁰ Both amendments sought to facilitate the redevelopment of contaminated properties, to which CERCLA's strict liability for innocent landowners had acted as a powerful deterrent.

Settlements were envisioned as a key element in CERCLA's remedial scheme, both to expedite cleanup and avoid expensive, protracted litigation.⁴¹ CERCLA's section 122 provides a number of devices to promote settlement and reduce transaction costs, including: *de minimis* settlements (expedited settlements for small-volume waste contributors); nonbinding, preliminary allocations of responsibility issued by the EPA; and covenants protecting PRPs who settle from suit by the federal government in any future action related to the site.⁴² CERCLA's section 113(f)(2) on contribution provides an important complement to section 122's settlement provisions by absolving parties who settle their liability with the federal or state government from being held liable for contribution claims from *other* PRPs on the same matter.⁴³ These provisions reflect the emphasis placed on CERCLA's settlement mechanism as the preferred means of resolving liability and recovering or allocating cleanup costs.

Despite the hopes hung on CERCLA's imposition of strict liability and the continued need for cleanup of hazardous waste sites, the ambitions that drove CERCLA's creation and repeated amendment have not come to fruition. Separate from criticisms of CERCLA's design are the realities of its performance: high cleanup costs,⁴⁴ high transactional costs,⁴⁵ and extremely slow progress to site closure.⁴⁶ Chronic under-funding continues

40. The statute requires buyers to have made "all appropriate inquiry" within the meaning of CERCLA's section 101(35). 42 U.S.C. § 9601(35)(B) (2006).

41. *See id.* § 9622(a) (directing settlement agreements "[w]henver practicable and within the public interest").

42. ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW IN A NUTSHELL 202 (6th ed. 2004).

43. 42 U.S.C. § 9613(f)(2) (2006) ("A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.").

44. The average site cleanup cost was estimated at between \$15.38 million and \$18.25 million in 1992 dollars. *See* ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY 852 (1998).

45. *Id.* at 855 (relying on a 1992 study by the Rand Corporation, which estimated that legal transaction costs accounted for approximately twenty percent of total private party Superfund expenditures between 1984 and 1989); *see also* Hill, *supra* note 11, at 7 (citing a 1994 GAO study estimating that PRPs spend as much as one dollar in litigation and transaction costs for every two dollars they spend on the actual cleanup).

46. *See* GAO, SUPERFUND, TIMES TO COMPLETE SITE LISTING AND CLEANUP, GAO/RCED-98-74 (Feb. 4, 1998), available at www.gao.gov/archive/1998/rc98074t.pdf.

to cripple CERCLA's effectiveness, with no end in sight: CERCLA's dedicated taxes from oil and gas expired in 1994 and reauthorization has lapsed since. Though appropriations from the federal budget have been used to fund the Superfund, this substitution falls short on principle and money alike.⁴⁷ Relying on taxpayer monies not only defeats the "polluter pays" principle, but has proved insufficient to cover the expenditures needed to comply with remediation schedules for sites currently on the National Priorities List (NPL).⁴⁸ Properties that should be added to the NPL are not, and recent federal practice has been to decline to pursue site remediation where financially solvent PRPs are not available to assume the cost.⁴⁹ The result is that many contaminated sites remain untreated. In addition to precluding redevelopment and the opportunity to generate positive community benefits, this stagnation has obvious public health and environmental ramifications.

Apart from the issue of CERCLA's implementation, CERCLA's structure is itself paradoxically problematic and enabling. On the one hand, CERCLA's liability scheme inherently creates an incentive for PRPs to sue other PRPs in order to spread the costs. Historically, Superfund cleanups lagged as lawsuit after lawsuit was filed, taking 9.4 years on average to achieve site closure *after* being listed on the NPL.⁵⁰ This inefficiency is a byproduct of CERCLA's design, and it ultimately created the opportunity for private entrepreneurship to find a market solution to costly and intractable lawsuits.

At the same time, however, CERCLA expressly allowed for this possibility in its indemnification provision.⁵¹ Section 107(e)(1) states that "[n]othing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section."⁵² Indeed, by the 1990s private companies were beginning to experiment with new liability arrangements that were compatible with the

47. See Schmid, *supra* note 34, at 511–12 (examining Superfund's budget statistics and federal appropriations from 1995 to 2004 to show that discretionary appropriations have been less than the revenues historically generated through the pre-1994 taxes).

48. *Id.* at 512 (stating that \$1.22 billion was allocated to the Superfund in 2007 and that costs for current NPL sites range from between \$1.4 and \$1.7 billion annually).

49. *Id.* at 512–13 (citing NAT'L ADVISORY COUNCIL FOR ENVTL POLICY & TECH., SUPERFUND FINAL REPORT 21 (2004)).

50. See GAO, SUPERFUND, TIMES TO COMPLETE, *supra* note 46.

51. 42 U.S.C. § 9607(e)(1) (2006).

52. *Id.* (referring to the beginning of subpart (e)(1), which establishes the government's right to pursue the owner of a contaminated site despite any private indemnification agreement). See Hill & Rogers, *supra* note 3, at 2068 ("Thus, while an IFC generally will not legally bar future government suits, CERCLA expressly allows private party indemnities such as those provided by an IFC, and, to date, none of these indemnities appears to have failed.").

existing legal and regulatory structure, but which could facilitate the settlements CERCLA had envisioned while streamlining the remediation process.⁵³ The ELT concept thus hatched. Its realization, however, took more than apparent legal feasibility. Market forces and developments in the remediation and insurance industries converged to create an environment ripe for the emergence of IFCs.⁵⁴

B. Insured Fixed-Price Cleanups

As the remediation market matured throughout the 1980s and early 1990s, the companies performing remediation services on a time-and-materials basis gradually gained enough experience to start confidently estimating a site's total cleanup costs at the outset.⁵⁵ These companies' ability to accurately assess costs, sometimes even prior to any regulatory action, enabled the liability buyout firms to offer parties a fixed-fee cleanup price.⁵⁶ Notably, no transferor in an IFC to date has ever had to pay more than the contract price.⁵⁷ Some buyout firms also developed or acquired remediation companies in order to better control the remediation process and offer packaged services.⁵⁸

ELTs have been especially effective in several situations, one of which is the seller-buyer hypothetical in the introduction.⁵⁹ The other primary application is with enforcement actions for cleanup costs of a contaminated site where the regulatory agency is required to deal with a large number of low-volume contributing PRPs. In this instance, consolidating liability in the buyout firm (to the extent that individual PRPs agree to transfer their liability) saves litigation costs for all parties, significantly streamlines site

53. See Lawlor, *supra* note 27, at 125 (introducing the "super" settlement [ELT] concept in 1999 as a then-recent response to the gridlock of traditional Superfund negotiations).

54. HARRINGTON, *supra* note 25, at 81–83 (discussing contributory factors such as the adoption of new regulatory use-based standards, market demand, and the emergence of remediation insurance policies).

55. *Id.* at 81.

56. *Id.*

57. Hill & Rogers, *supra* note 3, at 2066 (basing assertion on professional familiarity with hundreds of IFCs). Because IFCs are private transactions, not all data is publicly available.

58. For example, the liability buyout firm TRC has added subsidiaries to widen its service base to include preparing remedial designs and performing environmental assessments, site cleanups, and monitoring services. INTERNATIONAL DIRECTORY OF COMPANY HISTORIES, *supra* note 9.

59. See HARRINGTON, *supra* note 25, at 84–85 (outlining "ideal" risk scenarios where quantifying the remediation risk allows it to be factored into a sales transaction between a property seller and buyer). This quantification enables the parties to the sale to sidestep the problem of regulatory delay in approving the remediation plan, which would typically assist the parties in "fixing" the liability risk. A fixed-fee contract provided by a private remediation firm allows the parties either to modify the sale price accordingly, or transfer the liability to the remediation firm itself.

administration, and often presents less risk of insolvency among the parties.⁶⁰ The fact that LBFs can obtain insurance policies to cover cleanup cost overruns as well as their ongoing exposure—policies that are much less likely to be issued to individual PRPs—adds a layer of financial security.⁶¹ From the government’s perspective, these financial assurances favor transferring the risk to the buyout firm.

It is important to note that IFCs are not a panacea, however. Insured, fixed-price cleanups are best suited to sites where the expected cleanup will approach or exceed approximately five million dollars, since below this amount the margin is not great enough for the buyout firm to justify taking the risk.⁶² Situations that present high transaction costs, such as a large number of low-volume PRPs, also favor using an IFC for cost savings and efficiency.⁶³ The need for cost certainty in order to facilitate an outside transaction may also be a factor, as in the case of a merger, acquisition, or sale.⁶⁴

Whether using an IFC is appropriate depends on the specifics of the site and the needs of the parties. Alternatives include using a fixed cleanup price without the insurance for smaller jobs, which firms may be willing to do if they can “fold the risks into an existing umbrella or other portfolio-type of policy,” or are willing to self-insure in low-risk, low-cost cleanups.⁶⁵ Another, more limited, option is to structure private-party indemnities, usually used in a single seller-buyer situation.⁶⁶ Neither of these alternatives generates the same benefits that an IFC does, and a more detailed analysis of the pros and cons of each is beyond the scope of this paper. The key point is that IFCs are not appropriate for all sites, but when they are well-suited and done properly, these devices have produced excellent results.

1. Incentives Driving the Industry

ELTs are driven by business interests. The buyout firms are motivated by profit opportunities, and the transferors by a desire to shed a risk that is

60. These advantages are most readily realized when up-front payments are required.

61. HARRINGTON, *supra* note 25, at 83.

62. Hill, *supra* note 11, at 8. Insurance can also be hard to obtain under this amount, and the premium the firm would pay plus the costs of due diligence in assessing the site may make it financially unviable. Hill & Rogers, *supra* note 3, at 2073.

63. Hill, *supra* note 11, at 8.

64. *Id.*

65. Hill & Rogers, *supra* note 3, at 2073.

66. *Id.*

adversely affecting their business in some way.⁶⁷ From the transferor's perspective, property conveyance opportunities, bankruptcy and dissolution needs, merger and acquisition transactions, and regulatory enforcement exposure can all drive transfers and provide situations amenable to liability buyouts.⁶⁸ In the most comprehensive risk transfers, or those in which the buyout firm assumes all of the transferor's environmental liability for the site,⁶⁹ the LBF will fully indemnify the transferor (the PRP or the seller) for all future liabilities associated with the site. This includes unforeseen exposures, such as the discovery of unknown contaminants or damage to other properties from migrating toxins. This indemnification—in addition to the set cleanup cost—is the major benefit to using an *insured* fixed-price contract.

Such “full-service” ELTs provide a regulatory or “case closure” result rather than a limited scope of remediation work, and they include whatever services are required to meet regulatory-use standards and maintain compliance.⁷⁰ In some cases, the cost for achieving regulatory closure has been reduced significantly because of the willingness of environmental agencies to adopt cleanup standards contingent on the site's future use. This change from the previous mandate, which required that *all* traces of contamination be removed regardless of the site's intended end-use and apart from the risk actually posed to public health, has resulted in significant savings in remediation costs and more brownfield redevelopment.⁷¹

A maximum ELT includes “all remedial and long-term monitoring, operation, and maintenance requirements, covering both known and unknown pollution conditions existing at the time the buyout transaction is executed.”⁷² Significantly, the buyout firm also indemnifies the transferor from any liability in the event of a regulatory “re-opener,” an option the regulatory agency retains if additional contaminants are discovered or the standards of cleanup become more stringent after the regulatory sign-off.⁷³

67. Bloom, *supra* note 13, at 38.

68. *Id.*

69. The transferor may choose to transfer all or part of its environmental liability, depending on its needs and cash flow. *Id.* at 39.

70. *Id.* at 38.

71. HARRINGTON, *supra* note 25, at 81–83.

72. Bloom, *supra* note 13, at 39.

73. Though important from an environmental and public health standpoint, statutory “reopener” clauses have proven problematic by scaring PRPs away from transferring their liability for fear that such transfers will be futile despite the indemnification provided by the liability buyout firm. Though the EPA sometimes issues “comfort letters” assuring PRPs of the unlikelihood of further regulatory action, EPA still retains its right to “reopen” the case. Some state environmental agencies, such as New Jersey's Department of Environmental Protection, have recognized the beneficial function

As a technical matter, even an IFC, the most comprehensive transfer mechanism, does not legally bar the government from pursuing the transferor at a later date. In other words, “despite the contractor’s indemnity and the insurer’s policy, the government retains the right to pursue the owner” under CERCLA section 107(e)(1).⁷⁴ However, reopeners are rare. According to a 2003 survey, only twelve reopeners were found out of 11,497 sites that had achieved “no further action” status.⁷⁵ Consequently, ELTs still offer the transferor a functional “walk-away,”⁷⁶ thereby freeing it to focus on its business activities.

From the perspective of the liability buyout firm, IFCs have the potential to be lucrative deals. Most immediately, IFCs offer the firm a chance to recover savings if it can achieve the remediation goals for less than the contract’s fixed price.⁷⁷ However, competition in the industry keeps firms from padding their estimates, and the transferor is free to reject bids that are too high. The structure of a true IFC acts as a check on moral hazards. The firm deposits the client’s money into an escrow account, less a small portion of working capital upfront, and is only reimbursed as the remediation work is performed, and then only for reasonable and necessary expenses as approved by the regulators in charge of the site administration.⁷⁸ If the firm’s cleanup costs exceed the escrow funds, the firm’s insurer will cover spillover costs up to the limit of the insurance policy that the firm purchased for the cleanup. However, if this occurs, the firm makes no profit from the cleanup and jeopardizes the availability of project coverage in the future.⁷⁹

that ELTs serve and have accordingly started providing more satisfactory “no further action” assurances to PRPs. See Dennis M. Toft & Todd W. Terhune, *NJDEP Approves the Use of Risk Transfer Tools to Facilitate Brownfields Transactions*, N.J. LAWYER MAG., available at http://wolffsamson.client.tagonline.com/news/articles/publish/article_48.shtml.

74. Hill & Rogers, *supra* note 3, at 2067–68.

75. Robert A. Simmons et al., *Quantifying Long-term Environmental Regulatory Risk for Brownfields: Are Reopeners Really an Issue?*, 46 ENVTL. PLANNING & MGMT. 257, 266 (2003).

76. Bloom, *supra* note 13, at 37–38 (explaining that a PRP’s statutory liability “can never truly be absolved,” but that through a series of contractual indemnities and insurance mechanisms, a functional equivalent of a true “walk away” can be achieved).

77. HARRINGTON, *supra* note 25, at 84 (“Basically, if the remediation firm is able to realize innovative techniques to obtain closure for a cost less than the fixed-fee contract, the benefit of the contract price over the actual costs inures to the engineering firm as a reward for its innovative and entrepreneurial activity.”).

78. Bloom, *supra* note 13, at 41 (distinguishing these guaranteed contracts held in trust or by an escrow agent from “self-insured retention” policies where the client pays the remediation contractor directly). In the latter scenario, the contractor uses the funds to pay its own insurance premium to secure spill-over coverage above \$x amount in expenditures, takes its profit cut, and then performs the services until it runs out of money. This structure creates no incentive for the contractor to perform remediation services quickly or efficiently since it has already paid itself and the insurer will absorb spillover.

79. HARRINGTON, *supra* note 25, at 83.

IFCs can be profitable in other ways as well. If the firm acquires title to the contaminated property, it may be able to resell the property after cleanup for substantially more than its pre-remediation value. Firms may also receive tax credits for redeveloping brownfield sites, which may be transferrable depending on the project's home-state laws.⁸⁰ Though not all projects offer these additional profit opportunities, the tax credits in particular incentivize redevelopment.

That IFCs are profit-motivated does not mean that they are any less effective, legal, or productive for the parties involved.⁸¹ The regulatory sign-off certifying that the site meets the proper cleanup standard serves as quality assurance—as does the fact that the firm remains on the line for any future obligations associated with the site. Moreover, because any profit is withheld until certification, the buyout firm has an incentive to conclude the remediation swiftly. This result is desirable from the perspective of the state or federal agency involved in administering the site, as well as from a redevelopment angle. When structured correctly, ELTs thus have the rare potential to benefit all parties involved.

2. Contract Provisions

ELT contracts can vary greatly because they are tailored to the specific needs of the particular transaction and site. Many IFCs share some general features, however. The following chart summarizes some typical contract provisions, as outlined by attorney Arthur J. Harrington in a recent practitioner's guide to risk transfers in the context of real estate transactions.⁸²

80. U.S. ENVTL. PROT. AGENCY, EPA 560-F-08-312, BROWNFIELDS TAX INCENTIVES GUIDELINES (Nov. 2008), available at <http://www.epa.gov/brownfields/tax/index.htm>.

81. See Hill, *supra* note 11, at 6 (“IFCs are not only legal—as evinced by the court’s entry of the PBWO [Portland Bangor Waste Oil Facility] decree—but they promote existing EPA and SEC policies and goals.”).

82. See generally HARRINGTON, *supra* note 25, at 87–93 (providing detailed explanations and examples of key contract provisions).

Sample Contract Provisions⁸³

Provision	Function	Sample language
“Baseline Remediation Definition”	Defines the desired remediation result sufficient to support the end use for the site in compliance with regulatory-use standards.	“‘Baseline Remediation’ means . . . perform remediation of preexisting pollution conditions under applicable environmental law to the extent necessary to support commercial uses with exposure scenarios equivalent to those of a [e.g.] shopping center . . . installed and maintained to act as the functional equivalent of a barrier to human exposure”
“Definition of Case Closure”	Specifies the regulatory event that will conclude the active remediation work.	“‘Case Closure’ means obtaining a case closure letter from the [state regulatory agency] in accordance with and defined in [cite the case closure regulatory requirement] specific to contamination release incidents, confirming that no further action is necessary for achieving baseline site conditions.”
“Definition of ‘Preexisting Pollution Conditions’”	Defines the scope of contaminants covered.	“‘Preexisting Pollution Conditions’ means the pollution conditions existing on the effective date, including without limitation, the effects of continuing release or passive migration . . . and without regard to whether such conditions were known or unknown to the remediation contractor on the effective date.”

83. *Id.*

<p>“Remediation Guarantee of Contractor”</p>	<p>Guarantees the contract’s performance at a fixed fee sufficient to obtain site closure regardless of costs.</p>	<p>“Contractor guarantees that it will fulfill all of its obligations under this agreement as necessary to achieve project completion, regardless of the expense, difficulty or time to complete same, or the limits, expiration, cancellation or lapse of the policy.”</p>
<p>“Early Termination of the Contract”</p>	<p>Defines the manner in which the contract can be terminated prior to project completion and contemplates potential remedies for both client and contractor.</p>	<p>“The client should have the ability to terminate the agreement for a material breach and receive all payments made but not expended to a third party remediation account”</p>
<p>“Indemnification Obligations”</p>	<p>Providing indemnity for the benefit of the client against specified claims.</p>	<p>[Contractor agrees to indemnify client for the following]: “b. Any breach of the agreement by the contractor d. Any failure of the contractor to perform its services covered by the fixed-fee remediation contract”</p>

These sample provisions are merely skeletal. Other necessary provisions include payment procedures, dispute resolution procedures (usually mediation or arbitration), client obligations pertaining to site access and payment, and security for the firm’s performance. Restrictive covenants may also run with the property, such as maintaining an impervious surface over contamination.⁸⁴ If the regulatory sign-off required the use of engineering controls such as a parking lot or building to provide a physical cap, or institutional controls such as deed restrictions, the firm is obligated to maintain these containment mechanisms in perpetuity.⁸⁵

84. *Id.* at 88.

85. *See generally* Toft, *supra* note 73.

The firm's obligations can thus be extensive and ongoing. As a result, the liability buyout firm is required to provide additional financial assurances prior to the regulator's approval of the ELT.⁸⁶ Though a thorough discussion of the rules governing these financial assurances is beyond the scope of this paper, it is significant to note that this is currently the only regulated part of these transactions. The ELT itself is purely contractual and is not regulated on either the state or federal level.

3. The Firm's Environmental Insurance Policies

As previously noted, the buyout firm negotiates for a site-specific environmental insurance policy from a major insurer as part of structuring the IFC.⁸⁷ The purpose of this policy is to collateralize the risk the buyout firm assumes. When underwritten properly, an insurance policy provides assurance that the buyout firm will have sufficient funds available to it for the full performance of its contractual obligations.⁸⁸ Ideally, the scope of the coverage tracks the scope of liability transferred, but the two transactions are independent.

Ideally, the insurance component is comprised of two types of policies: a "cleanup cost cap" and a "pollution legal liability" policy.⁸⁹ The cost cap protects the remediation company if costs exceed their original estimation, providing a financial backstop to the risk assessment. Typically, the firm will insure the project for no less than a one hundred percent cost overrun.⁹⁰ Thus, for example, if the firm calculates that the remediation will cost five million dollars, it will purchase at least the same in insurance, thereby ensuring it has available at least ten million, or double what it anticipates needing. In a true result-oriented remediation contract, this "cost cap" insurance also covers revisions to the work plan driven by regulatory changes as required to reach case closure.⁹¹

86. Currently, the federal or state agency involved in the site administration must consent to the LBF becoming a permittee or signatory to a consent order in order for the firm to contractually assume a PRP's obligations. Typically, these decrees contain specific financial assurance requirements to ensure that the firm has sufficient funds available to it to fulfill the regulatory obligations attached to the consent order. *See Hill, supra* note 11, at 7 (noting that the state, the EPA, or sometimes a court must approve an IFC prior to its performance).

87. Four insurance companies typically underwrite these policies: AIG, XL, Zurich, and Chubb. HARRINGTON, *supra* note 25, at 65.

88. Bloom, *supra* note 13, at 40.

89. The proprietary names for these products vary. "Cleanup cost caps" are also commonly referred to as "remediation stop loss" policies, for example. *See HARRINGTON, supra* note 25, at 65.

90. Bloom, *supra* note 13, at 40.

91. *Id.*

Pollution legal liability policies, by contrast, are entirely independent of the underlying remediation contract. Instead, the buyout firm purchases insurance to cover other environmental liabilities associated with the site as a whole.⁹² Coverage often extends to any cleanup activities outside the scope of work necessary to achieve regulatory closure for the area of the site under contract. These policies can act as “catch-alls” and may include coverage for third-party cleanup, bodily injury, and property damage claims, as well as for business interruption, liability for offsite disposal and migrating pollutants, and for natural resource damages.⁹³ Significantly, pollution policies may also be written to insure against regulatory reopeners, as discussed previously.⁹⁴ This protection has greatly appealed to transferors looking to shed their future exposure.

The combined coverage of both types of insurance policies has been integral in facilitating the use of ELTs. These products protect both parties from the likelihood that cost overruns will overwhelm the firm and thereby jeopardize its ability to perform its contractual obligations. For the firm, these policies sufficiently limit its financial risk so as to keep the incentive structure behind IFCs intact. While the continued underwriting ability of at least one major insurer remains somewhat uncertain,⁹⁵ it appears improbable that the environmental insurance industry will disappear. So long as comparable products remain available, IFCs are likely to continue apace.

II. CASE STUDIES

IFCs are increasingly used in a variety of settings and include clients as big as the U.S. Army, the U.S. Air Force, and the Department of Defense.⁹⁶ Popular transaction deals include risk transfers for real estate or brownfield sites; Superfund or complex litigation cost recoveries; discontinued industrial operations; and bankruptcies.⁹⁷ A brief description of two recent IFC projects illustrates a few of its different applications.

92. The coverage is contingent on the scope of the liability transferred to the LBF. *See id.* (describing various aspects of a liability buy-out structure).

93. *Id.*

94. *Id.* at 41.

95. *See Andrews, supra* note 18.

96. *See Hill & Rogers, supra* note 3, at 2065–74. In 2007, one liability buyout firm alone had 98 active remediation sites, \$520 million in aggregate clean-up obligations, and approximately \$1.25 billion in insurance backing, estimated at about \$6 billion in asset value. *Eliminating Toxic Waste Liabilities, supra* note 15.

97. *Eliminating Toxic Waste Liabilities, supra* note 15.

A. New York Brownfield Redevelopment

In one of the biggest brownfield redevelopment projects in the country, an LBF facilitated a real estate transaction between a public utility and a prospective purchaser by assuming complete environmental liability for a contaminated ten-acre, one billion-dollar piece of waterfront property in Manhattan.⁹⁸ The owner, a major public utility, had operated a steam and power generating plant on the site for more than 150 years, resulting in major contamination from coal and fuel oil, urban fill, and PCBs.⁹⁹ Described as a “developer’s dream,” the prospective buyer was nevertheless unable to accept the uncertain but substantial liability risks associated with the site.¹⁰⁰ Moreover, neither the owner nor the prospective buyer anticipated being able to resolve the environmental liabilities swiftly enough to secure regulatory approval in time to meet the developer’s schedule.¹⁰¹

After assessing the site, the firm negotiated an insured fixed-price cleanup with the utility that guaranteed compliance with the regulatory standards for a mixed-use development.¹⁰² Covered by a cost-cap insurance policy,¹⁰³ the firm assumed all remediation costs, including those associated with decommissioning the site, removing asbestos and lead paint, and demolishing the plant.¹⁰⁴ In this case, the case closure “event” concluding the active remediation phase was defined in the contract as the regulatory review and delivery of the “clean” property to the developer.¹⁰⁵

The maintenance phase for this IFC includes indemnifying the developer from all future pollution-liability exposures. To mitigate the threat of a reopener to the developer, the firm negotiated a voluntary consent order with the regulatory agencies whereby the agencies agreed to pursue the firm, and not the developer, in the event additional remediation

98. *Id.*

99. TRC Exit Strategy Program, Site Solutions, *Corporate Divestiture and Redevelopment of Prime Manhattan Real Estate Made Possible by TRC Exit Strategy*, http://www.trcexitstrategy.com/site_solutions_4a.html (last visited Dec. 21, 2009) [hereinafter *Corporate Divestiture*].

100. *Id.*

101. *Id.*

102. *Id.*

103. Environmental Expert.com, *US \$50.8m Brownfield Remediation Contracts Signed*, BUSINESS WIRE, (Dec. 28, 2008), <http://www.environmental-expert.com/resultEachPressRelease.aspx?cid=28518&codi=32621&lr=1&word=brownfield%2bremediation>.

104. *Corporate Divestiture*, *supra* note 99.

105. *Id.*

becomes necessary.¹⁰⁶ Under its contract with the utility, the firm must continue annual monitoring and perform any maintenance required for the site to remain in regulatory compliance. By involving the local Community Board and New York City Council, the firm also ensured that its closure plans had municipal support.¹⁰⁷ When finished, a massive brownfield in a prime location will be converted into five million square feet of office, residential, and retail space. This redevelopment demonstrates an IFC's utility when well suited to the site.

B. California Superfund Site

This particular IFC arose in response to CERCLA liability. In this situation, adjoining landfills had managed the disposal of municipal solid and hazardous wastes, chemicals, and oil for almost half a century.¹⁰⁸ As new housing developments eventually cropped up in the surrounding area, contamination from the landfill site was discovered leaking into the groundwater. Pursuant to state hazardous waste laws, the State of California initiated an enforcement action against the landfill owners and operators, as well as the businesses that had disposed of industrial waste at the site.¹⁰⁹ Prior to the buyout firm's offer, progress on the site had been deadlocked for ten years due to the complexity of the liability and the number of lawsuits between the PRPs.¹¹⁰

Using an IFC, the buyout firm assumed the liability of all the PRPs and was able to begin site cleanup. In this case, the most effective solution was for the firm itself to obtain title to the property. This streamlined the State's site administration and gave the firm complete control over the remediation. Within a year a physical barrier capping the landfill had been engineered, eliminating further leakage.¹¹¹ In conjunction with the State and municipality, the firm continues to develop a plan to remediate the pre-existing contamination and redevelop the site for a designated end-use.¹¹²

In this situation, preventing further leakage was the immediate objective. A complete buyout through a statutory settlement procedure enabled the firm to become the sole responsible party, which in turn gave it

106. *Id.*

107. *Id.*

108. TRC Companies, Inc., *California Superfund Site, Solid & Hazardous Waste Landfill*, <http://www.trcsolutions.com/content/project.aspx?csuid=96c1bcae-97b6-4b47-b7d7-db415c9df2a1&pud=36930502-5b2f-4010-ae92-7cff9abf80e9> (last visited Dec. 21, 2009).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

the flexibility necessary to implement an initial stopgap remediation plan. Though every remediation is unique and requires structuring the contract accordingly, these two projects exemplify the scenarios that most frequently lend themselves to effective resolution through the use of IFCs.

III. LEGAL IMPLICATIONS & PROJECTED GROWTH

Now a decade old, ELTs appear to have glided over the speculative legal bumps in the road projected at their outset.¹¹³ No IFC indemnity has yet failed,¹¹⁴ and no legal challenges have arisen to date. Whether a court would find a claim following a transfer of ownership valid would likely depend on the firm's ability to see the remediation project to completion. However, as positive experiences with IFCs continue to accumulate, regulatory agencies appear increasingly willing to work with buyout firms to facilitate transfers.¹¹⁵ That the EPA and various state departments of environmental protection have been willing to recognize existing IFCs suggests that they are becoming an enduring part of the legal landscape, and for good reason. Regulators may be more flexible in letting the industry structure IFCs because they are gaining a solvent entity (the buyout firm) where none may have existed before, and this entity *voluntarily assumes the liability* for a contaminated site.

Environmental liability transfers are currently unregulated. Whether they should be regulated and to what degree, if so, remain open questions. Because the type and scope of the risk being transferred dictates the contract price, the buyout firm has a strong incentive to uncover the liabilities associated with the site in order to adequately gauge the firm's potential exposure. IFCs thus require transparency and comprehensive due diligence.¹¹⁶ The nature of the transaction promotes a fair valuation of the

113. See Lawlor, *supra* note 27, at 150, 152 (questioning whether liability transfers will withstand judicial scrutiny, and predicting that "in the end . . . the Super Settlement [ELT] concept is likely to be viewed as merely an innovative and potentially very useful twist on [CERCLA's] settlement process").

114. Hill & Rogers, *supra* note 3, at 2068.

115. See Toft, *supra* note 73, at 52; see also Dennis Hamish, *From the State's Perspective*, NAT'L ENVTL ENFORCEMENT J. 11 (Sept. 2003) (recommending that "our sister states and the U.S. EPA consider such an [IFC] approach in an appropriate case"). Dennis Hamish is an Assistant Attorney General in the State of Maine Attorney General's Office representing Maine's Department of Environmental Protection. Working with buyout firms may mean, in part, taking affirmative steps prior to the completion of the remediation, such as issuing "comfort" letters or other no-further-action assurances to reassure the parties. Many PRPs may demand such assurance before considering an IFC a viable option for managing their exposure.

116. See Toft, *supra* note 73, at 51.

liability,¹¹⁷ which is necessarily site-specific. The dynamic between players in an IFC is fundamentally different than those involved in bundling and reselling mortgage securities because the same party that performs the valuation also incurs the risk. Thus, there is no incentive to improperly value the liability, since the firm cannot pass the risk through to other parties. However, while regulation may not be necessary to avoid moral hazards, some measure of oversight may create a more uniform process for structuring IFCs from state to state.

ELTs are poised for new applications, including managing liability for natural resource damages as well as environmental contingencies on corporate balance sheets.¹¹⁸ With regard to natural resource damages, PRPs may be liable for contaminated riverbeds and groundwater, destroyed habitat, species loss, and other harms to natural resources under CERCLA or some state hazardous waste laws.¹¹⁹ Original to CERCLA,¹²⁰ this cause of action enables trustees such as federal and state governments and Indian tribes to sue for such damages, which are determined by the amount required to restore the natural resource to its previous state or replace it if restoration proves impossible.¹²¹ Though this liability has existed since CERCLA's enactment, these damages have been historically underutilized.¹²² There is some evidence that this trend is changing, however.¹²³ Like any other type of liability, an uptick in regulatory enforcement actions creates a market. To the extent that natural resource damages are increasingly used as remedies, the ELT industry will track this growth.

The more prominent application, however, likely concerns the maturation of accounting standards post-Enron.¹²⁴ Though the 2002 Sarbanes-Oxley Act does not explicitly address corporate *environmental*

117. Hill & Rogers, *supra* note 3, at 2070 (“The fair value of a liability is the price that would be paid to transfer the liability in an orderly transaction between market participants. . . . A quoted price for the identical liability in an active market is the best evidence of fair value.”).

118. See HARRINGTON, *supra* note 25, at 97–99 (discussing emerging liabilities).

119. See Schmid, *supra* note 34, at 483 (contrasting natural resource damages to common law remedies, which only require polluters to stop the release of the harmful substance and compensate the public for its *economic* loss). Economic damages rarely capture the full spectrum of loss and are thus usually inadequate to allow for restoration.

120. 42 U.S.C. § 9607(a)(4)(A) (2006).

121. See Schmid, *supra* note 34, at 484.

122. *Id.* at 519–20 (noting an increase in the number and award size of natural resource damage claims after 1995).

123. HARRINGTON, *supra* note 25, at 97 (“States such as New Jersey are actually engaging lawyers in the private sector to prosecute natural resource damage claims against responsible parties for contamination and their revenue enhancement for such states.”).

124. See *id.* at 99 (stating that public desire for fiscal transparency will likely be a moving force behind new forms of environmental liability risks); see also Bloom, *supra* note 13, at 38.

disclosures, practitioners now stress the importance of viewing these disclosure obligations in light of the Enron-era scandals.¹²⁵ Recent enforcement actions by the Securities and Exchange Commission support this view.¹²⁶ Currently, certain environmental liabilities must be recorded at their market value on corporate balance sheets,¹²⁷ and proposed new disclosure standards could expand this scope to include all environmental contingencies.¹²⁸ By allowing for fair market valuation and transfer, IFCs could enable a company to comply with accounting requirements while ridding its balance sheet of these liabilities. As accounting standards evolve, IFCs may become an increasingly attractive, transparent way to manage corporate environmental contingencies.

CONCLUSION

In the late 1990s those studying the concept of environmental liability transfer anticipated that the practice would become increasingly popular.¹²⁹ This prediction has indeed borne out. Increased use of IFCs in particular is likely to continue because of the advantages they offer, so long as cost-cap and pollution liability insurance policies remain available. Bringing in a solvent party willing to assume the liability is too good a backstop for regulators to pass up. IFCs will continue to thrive so long as they remain the most efficient solution to a problem affecting business interests.

Other than watching how current economic forces shape new applications, the apparent success of ELTs may be instructive in other ways. Foremost, the industry's rise invites further inquiry into what factors enable

125. See Mitchell F. Crusto, *Endangered Green Reports: "Cumulative Materiality" in Corporate Environmental Disclosure After Sarbanes-Oxley*, 42 HARV. J. ON LEGIS. 483, 484 (2005) ("Although Sarbanes-Oxley has not yet mandated that the U.S. Securities and Exchange Commission . . . amend the environmental disclosure rules, the legal context within which they must now be read has changed significantly.") (citing, e.g., Andrew N. Davis & Stephen J. Humes, *Environmental Disclosures After Sarbanes-Oxley*, PRAC. LAW, June 2004, at 19, 20); see also Philip E. Karmel, *SEC Disclosure Requirements for Environmental Liabilities and the Impact of the Sarbanes-Oxley Act*, in PRACTICING LAW INSTITUTE, REAL ESTATE LAW AND PRACTICE COURSE HANDBOOK SERIES, NEW SOLUTIONS TO ENVIRONMENTAL PROBLEMS IN BUSINESS & REAL ESTATE DEALS 293, 298 (Practicing Law Institute ed., 2003).

126. Hill & Rogers, *supra* note 3, at 2069 (noting that there have been three recent SEC enforcement actions against public companies for alleged manipulation of environmental reserves in their corporate accounting).

127. *Id.* at 2070 (referring to new merger and acquisition accounting rules beginning in 2009).

128. *Id.* (referencing the June 2008 Proposed Statement of Accounting Standards, *Disclosure of Certain Loss Contingencies*).

129. See Lawlor, *supra* note 27, at 160 ("It is likely that the Super Settlement concept will be put into widespread use across the United States as its advantages become better known.").

market solutions to respond to space carved out by particular statutory structures and regulatory flexibility. Is it desirable, or possible, to design for these features in other legislative contexts? In the case of ELTs, while CERCLA's inefficiencies were not intended, section 107(e)(1) did expressly provide for the private indemnification agreements that laid the legal foundation for transfers. As the industry matures, both the contracts' durability and the degree of satisfaction with the remediation outcomes will undoubtedly continue to inform this discussion.

Whether the story of the ELT industry yields transferable lessons, such as how to incentivize transparency or structure future legislation to realize market solutions, remains to be seen. Nevertheless, ELTs, especially those conducted through insured fixed-price cleanup contracts, provide an interesting model for study and an effective practical tool. Creative and ethical use of these devices will determine the bounds of their utility.

