CERCLA: Determining Ownership Liability for Possessory Interests in Real Property

Catherine Nampewo

Boston College Law School, catherine.nampewo@bc.edu

Follow this and additional works at: http://lawdigitalcommons.bc.edu/ealr

Part of the Environmental Law Commons

Recommended Citation
http://lawdigitalcommons.bc.edu/ealr/vol39/iss3/7

This Comments is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.
CERCLA: DETERMINING OWNERSHIP LIABILITY FOR POSSESSORY INTERESTS IN REAL PROPERTY

CATHERINE NAMPEWO*

Abstract: Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) as a response to disasters from toxic waste dumps. Under the statute, Congress intended to pass the costs of cleaning up hazardous waste to potentially responsible parties. To achieve this objective Congress created two distinct forms of liability under CERCLA: operator liability and owner liability. The statute, however, did not define ownership liability. As a result, various courts devised three approaches to determine ownership of possessory interests in property. The first approach relies on the common law definition of owner, the second approach looks to site control as the determining factor, and the last approach uses a five factor test to determine de facto ownership. This Comment argues that the first approach is superior in fulfilling the goals of CERCLA and protecting the environment.

INTRODUCTION

The events of August 2, 1978, altered the lives of hundreds of families living in the Love Canal suburb near Niagara Falls, New York. 1 State officials declared a health emergency and recommended the evacuation of pregnant women and children under the age of two living in the area. 2 Following heavy rains, a landfill 3 near the suburb exploded, causing chemicals to seep into homes and school grounds, which resulted in extensive damage to the area. 4 Congress responded to public anger

* Staff Writer, Boston College Environmental Affairs Law Review, 2011–12.


2 Id.

3 The landfill, which contained over 21,800 tons of toxic chemical waste buried in drums, was formerly operated by Hooker Chemicals and Plastics Operation. Id. The company later sold the property to the Niagara School Board for $1. Id.

4 Eckardt C. Beck, The Love Canal Tragedy, Env'tl. Prot. Agency (Jan. 1979), http://www.epa.gov/aboutepa/history/topics/lovecanal/01.html. There were reports of high numbers of miscarriages and birth defects in the area, as well as instances of children coming home with burns on their bodies. Id.
at these events\(^5\) by enacting the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980.\(^6\)

CERCLA created a multi-billion dollar fund, commonly referred to as Superfund, to remediate dangerous waste sites.\(^7\) Under the Act, the Environmental Protection Agency (EPA) must locate and analyze sites that are contaminated or under threat of contamination from hazardous substances, and place them on the National Priorities List.\(^8\) Since 1980, over one thousand sites have been identified nationwide, but less than one third have been cleaned up enough to warrant removal from the list.\(^9\)

In effect, the Act imposes retroactive strict liability on parties potentially responsible for pollution and forces them to pay cleanup costs.\(^10\) In so doing, CERCLA abides by the principle that parties who benefit from hazardous activities conducted on their property should pay for the ultimate cost of those activities.\(^11\) Nonetheless, courts have found it challenging to determine who meets the criteria for liability under CERCLA.\(^12\) The statute imposes liability on any entity that owned or operated a facility when harmful substances were released.\(^13\) Congress did not clearly define ownership in the statutory text, however, and the task has fallen to the courts.\(^14\)

Ownership determination is especially important because it fulfills CERCLA’s intent to make responsible parties internalize the costs of harming the environment.\(^15\) Owners are held liable because they are in the best position to prevent pollution on their property.\(^16\) Furthermore,

---

\(^5\) On August 7, 1978, President Carter declared a federal disaster and authorized emergency funds for the area. Hevesi, supra note 1. In the two subsequent years, nearly 1000 families were displaced as a result of these events. Sam Howe Verhovek, After 10 Years, the Trauma of Love Canal Continues, N.Y. Times, Aug. 5, 1988, at B1.


\(^7\) See Verhovek, supra note 5.


\(^9\) See id.


\(^11\) See id. at 326 (quoting United States v. FNC Corp., 572 F.2d 902, 907 (2d Cir. 1978)).

\(^12\) See id. at 326.


\(^14\) See Commander Oil, 215 F.3d at 326–27.

\(^15\) See id. at 327.

\(^16\) See id. at 329.
ownership liability puts potential buyers on notice about the inherent costs of buying polluted property.¹⁷ This forces potential buyers to conduct an environmental appraisal before closing “to ensure that a potential acquisition is not encumbered by massive environmental liability.”¹⁸

In City of Los Angeles v. San Pedro Boat Works, the U.S. Court of Appeals for the Ninth Circuit struggled to determine whether a holder of a possessory interest in property is subject to CERCLA liability as an owner of that property.¹⁹ The court discussed three approaches used in deciding this issue, one from a previous Ninth Circuit case and two approaches adopted in other jurisdictions.²⁰ The first approach, used by the Ninth Circuit, looks to the common law definition of owner.²¹ The second approach, adopted by the United States District Court for the District of South Carolina, considers site control as a significant factor in determining ownership.²² Finally, the U.S. Court of Appeals for the Second Circuit applied a five-factor test to determine whether the holder of a possessory interest is a de facto owner for purposes of CERCLA liability.²³ The Ninth Circuit ultimately applied the common law approach, and this Comment argues that this is the best approach because it both preserves Congress’s intent in passing CERCLA and protects the environment.²⁴

I. Facts and Procedural History

The City of Los Angeles maintains the tidelands and submerged lands in the Los Angeles Harbor in trust for its citizens.²⁵ The Los Angeles Harbor Department oversees all the affairs in the Harbor District.²⁶ The city may lease the tidelands for purposes consistent with the trust.²⁷ In 1965, the Los Angeles Harbor Marine Corporation (L.A. Ma

---

¹⁷ See id.
¹⁸ See id. at 330.
¹⁹ 635 F.3d 440, 442, 447 (9th Cir. 2011).
²⁰ Id. at 447–49.
²¹ Id. at 447–48 (citing Long Beach Unified Sch. Dist. v. Dorothy B. Goodwin Cal. Living Trust, 32 F.3d 1364, 1368 (9th Cir. 1994)).
²² Id. at 448–49 (citing United States v. S.C. Recycling & Disposal Inc., 653 F. Supp. 984, 1003 (D.S.C. 1986)).
²³ Id. at 449 (citing Commander Oil, 215 F.3d at 330–31).
²⁴ See id. at 449, 451.
²⁵ Appellant’s Opening Brief at 9, City of Los Angeles v. San Pedro Boat Works, 635 F.3d 440 (9th Cir. 2011) (No. 08–56163) 2009 WL 2444653, at *7 (citing Cal. Pub. Res. § 6301 (1951)).
²⁷ Id. (citing City of Oakland v. Williams, 274 P. 328 (1929)).
rine) received Revocable Permit 936 for the restricted objective of running a boatworks at Berth 44 in the harbor.\textsuperscript{28} The permit gave the company control of nearly 3 acres of land and 1.6 acres of water, which it used for four years.\textsuperscript{29}

Toward the end of 1969, L.A. Marine assigned the permit to Pacific American Industries (PAI).\textsuperscript{30} In return, PAI agreed to fulfill all obligations and liabilities under the permit.\textsuperscript{31} The City approved the transaction and released L.A. Marine from its obligations.\textsuperscript{32}

At the same time that PAI acquired Permit 936, it created a subsidiary company named Pacific Boat Works.\textsuperscript{33} PAI then placed all of its assets, except Permit 936, in the subsidiary company.\textsuperscript{34} This subsidiary became known as San Pedro Boat Works (San Pedro).\textsuperscript{35}

A few months later the City of Los Angeles replaced PAI’s permit with Revocable Permit 1076.\textsuperscript{36} Shortly thereafter, with the City’s consent, PAI assigned Permit 1076 to its subsidiary San Pedro.\textsuperscript{37} This assignment, however, did not release PAI of its liability under the permit.\textsuperscript{38} Later, PAI sold its subsidiary, San Pedro, along with Permit 1076.\textsuperscript{39} In 1993, nearly twenty-three years after PAI assigned the Permit to San Pedro, BCI Coca-Cola Bottling Company of Los Angeles (BCI) bought PAI along with its outstanding assets and liabilities.\textsuperscript{40}

In 1995, the City’s investigation of Berth 44 revealed a variety of contaminants, including “volatile organic compounds, petroleum hydrocarbons . . . copper, lead, mercury, and chromium.”\textsuperscript{41} In order to recover cleanup costs at Berth 44, the City filed a complaint against po-

\textsuperscript{28} San Pedro, 635 F.3d at 444. A boatworks is “[a] facility used for the repair, maintenance, and rebuilding of ships on boats.” Id.
\textsuperscript{29} Id.
\textsuperscript{30} Appellant’s Opening Brief, supra note 25, at 10.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} See id. at 11.
\textsuperscript{36} Appellant’s Opening Brief, supra note 25, at 9. Under Revocable Permit 1076, the City and PAI were held to the same contractual obligations as those under Revocable Permit 936. Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id. at 11–12.
\textsuperscript{39} Id. at 12.
\textsuperscript{40} San Pedro, 635 F.3d at 445
\textsuperscript{41} Id.
Potentially responsible parties, including BCI, PAI, and San Pedro.\footnote{Id.} San Pedro filed for bankruptcy in 2002.\footnote{Appellant's Opening Brief, \textit{supra} note 25 at 14.}

In its fourth amended complaint, the City argued that BCI was liable under CERCLA because it acquired PAI's assets and liabilities, therefore making BCI a successor-in-interest.\footnote{See \textit{San Pedro}, 635 F.3d at 443, 445--46.} Moreover, BCI was liable as an owner because “(1) [PAI] was a CERCLA ‘owner’ because it held title to assets used at Berth 44, [and] (2) [PAI] was a CERCLA ‘owner’ because it held Revocable Permits from the City to do business at Berth 44.”\footnote{Id. at 446.}

Without any particular instruction on what ownership means under CERCLA, a jury considered whether PAI was an owner of the boatworks at Berth 44.\footnote{Id.} The jury found that PAI was not an owner of the boatyard business and the court entered final judgment in favor of BCI Coca-Cola.\footnote{Id. at 446.}

On appeal the City argued that PAI was an owner of the boatworks at Berth 44 during the ten month period before it assigned its permit to San Pedro.\footnote{Id.} As a result, PAI and its successor-in-interest should be held liable for the clean-up since BCI assumed PAI's liabilities.\footnote{Id.}

\section*{II. \textbf{Legal Background}}

The issue for the Ninth Circuit was whether revocable permits—mere possessory interests—were sufficient to consider PAI an owner of the property under CERCLA.\footnote{See City of Los Angeles v. San Pedro Boat Works, 635 F.3d 440, 442--43 (9th Cir. 2011).} The Ninth Circuit considered three approaches and ultimately adopted the approach used in \textit{Long Beach Unified School District v. Dorothy B. Goodwin California Living Trust.}\footnote{See \textit{id.} at 447--49.} That analysis looks to both the common law and the state law where the relevant property is located to determine ownership.\footnote{Long Beach Unified Sch. Dist. v. Dorothy B. Goodwin Cal. Living Trust, 32 F.3d 1364, 1368 (9th Cir. 1994).}
In *Long Beach*, a school district bought land from two trusts.\textsuperscript{53} A company previously leased the land and used it to hold a toxic waste pit.\textsuperscript{54} The school district brought a CERCLA action in the United States District Court for the Central District of California against the trusts, the company, and two other defendants who owned an easement to run a pipeline across the property.\textsuperscript{55} Both the trusts and the company which contaminated the property settled, agreeing to contribute to the cleanup costs, while the pipeline owners did not.\textsuperscript{56} Although the pipelines did not leak toxic waste on the property, the school district argued that as easement holders across the contaminated site the pipeline owners were property owners under CERCLA.\textsuperscript{57} The Ninth Circuit, on appeal, concluded that Congress did not seek “to impose liability on everyone who has any interest at all in land containing a toxic waste facility,” and held that an easement holder is not an owner for purposes of CERCLA liability.\textsuperscript{58} The court noted CERCLA’s ambiguous statutory language, and determined that this evidenced a legislative intent that the terms retain their ordinary meanings.\textsuperscript{59} The court, therefore, looked to the common law meaning of an easement, which “is merely the right to use someone’s land for a specified purpose, such as a driveway, a drainage ditch or even a pipeline.”\textsuperscript{60} This, the court held, was different from ownership of the property for CERCLA liability.\textsuperscript{61} The court also referenced the fact that California common law courts have consistently distinguished ownership of an easement from ownership of that land.\textsuperscript{62} The court concluded that this was sound public policy because many land titles are subject to easements throughout the country.\textsuperscript{63} As a result, subjecting easement holders to CERCLA liability would hold non-polluting actors, such as telephone and electric companies, liable, thereby disregarding CERCLA’s objectives.\textsuperscript{64}

\textsuperscript{53} *Id.* at 1365–66.
\textsuperscript{54} *Id.* at 1366.
\textsuperscript{55} *Id.*
\textsuperscript{56} *Id.*
\textsuperscript{57} *Id.* at 1368.
\textsuperscript{58} *Long Beach*, 32 F.3d at 1369, 1370.
\textsuperscript{59} See *id.* at 1368.
\textsuperscript{60} *Id.*
\textsuperscript{61} *Id.* at 1370.
\textsuperscript{62} *Id.*
\textsuperscript{63} See *id.* at 1369.
\textsuperscript{64} *Long Beach*, 32 F.3d at 1369.
The Ninth Circuit also discussed the site control test adopted in United States v. South Carolina Recycling and Disposal, Inc. In that case, the corporate lessee negotiated a lease with the property owners to house raw chemicals and other materials on the property. Later, several individuals associated with the lessee also started storing hazardous wastes at the site. These individuals incorporated into a waste management company and, two years later, assumed the lease in full from the original corporate lessee. Both companies continued to store harmful wastes on the property during this two year period, leading to an environmental hazard at the site.

The court found that aside from its own involvement in the activity at the site, the original lessee “maintained control over and responsibility for the use of the property and, essentially, stood in the shoes of the property owners.” The court reasoned that site control is significant in determining ownership under CERCLA. Consequently, the original lessee, along with the property owners, was an owner for purposes of imposing CERCLA liability. The court also noted that although the lessee sublet a portion of the land to another company to run a waste disposal facility, this did not reduce its responsibility under CERCLA. Instead, this reinforced the case against the original lessee because it permitted others to use property under its control in a way that “endangers third parties or which creates a nuisance.”

Finally, the Ninth Circuit considered the approach used by the Second Circuit Court of Appeals in Commander Oil Corp. v. Barlo Equipment. In that decision, the court devised a five-factor test that focuses on whether the lessee’s status is one of a de facto owner of the facility. The case involved a three party relationship in which the property owner leased land to another party, which then subleased that property to a third party. When the local Department of Health discovered pol-

---

65 San Pedro, 635 F.3d at 448.
67 Id.
68 Id.
69 Id.
70 Id. at 1003.
71 See id.
73 See id.
74 Id.
75 San Pedro, 635 F.3d at 449.
77 See id. at 324–25.
olution on the property, the property owners cleaned it up and then sued both the lessee and sub-lessee for contribution under CERCLA. The court found the intermediary lessee liable as an owner because of its control over the property, and entered judgment against it for one-fourth of the cleanup costs.

The Second Circuit reversed and found that owner liability under CERCLA applies only to those lessees that have "the requisite indicia of ownership" and are, therefore, de facto owners. An example would be that of a lessee with a ninety-nine year lease. The court found that the lessee here did not have such adequate characteristics of ownership, and therefore was not liable as an owner under the statute.

The Second Circuit considered five factors in determining de facto ownership:

(1) whether the lease is for an extensive term and admits of no rights in the owner/lessor to determine how the property is used; (2) whether the lease cannot be terminated by the owner before it expires by its terms; (3) whether the lessee has the right to sublet all or some of the property without notifying the owner; (4) whether the lessee is responsible for payment of all taxes, assessments, insurance, and operation and maintenance costs; and (5) whether the lessee is responsible for making all structural and other repairs.

The court also noted that while these factors were important, they were not exclusive, and other factors specific to the case may be considered.

III. Analysis

In San Pedro Boat Works, the court applied the Long Beach approach and looked to the common law to determine ownership. The court found that "the holder of a permit for specific use of real property is not the ‘owner’ of that real property, where . . . the fee title owner retained power to control the permittee’s use of the real property."
court compared a permit to other possessory interests such as licenses, leases, and easements, and argued that such interests exist as a result of exclusive use of land “unaccompanied by the ownership of a fee simple or life estate in the property.” Ownership interest, therefore, remains in the fee title owner of real property. Consequently, the court held that as a revocable permit holder, PAI was not an owner of the boatworks. As a result, BCI Coca-Cola—the successor-in-interest to PAI—was not liable because the City of Los Angeles retained fee title to the property.

The court emphasized that PAI had a limited set of rights during its ten-month possession of the permits. In support of their position, the court noted that the City could terminate the permits if it provided appropriate notice, and PAI was not able to transfer their permit unless the City approved. Furthermore, PAI could neither modify the use of the property without the City’s consent, nor could it use the property to obtain a loan. Ultimately, the court argued that PAI, as a permittee, lacked the essential qualities of ownership, and thus was not liable as owners under CERCLA.

This approach is superior both for fulfilling the overall goals of CERCLA and for protecting the environment. It is better than the site control test and the de facto ownership test for two reasons. First, it is an easy, straightforward analysis for determining ownership, and it provides potential investors in property with clear expectations with regard to CERCLA liability. Second, this approach does not stretch the definition of ownership to resolve issues that can be determined under operator liability. Consequently, the test upholds congressional intent to enact two different forms of liability. Such deference to legislative intent is necessary to promote the principle of separation of powers enshrined in the Constitution.

---

87 Id. at 449–50 (quoting Bd. of Supervisors of Modoc v. Archer, 96 Cal. Rptr. 379, 386 (Ct. App. 1971)).
88 See id.
89 Id. at 452.
90 Id.
91 San Pedro, 635 F.3d at 451.
92 Id.
93 Id.
94 Id.
95 See id. at 444.
96 Id. at 449.
97 See San Pedro, 635 F.3d at 451–52.
98 See id.
The *Long Beach* analysis uses the original common law definition of ownership and, therefore, does not extend CERLCA ownership liability to entities with less than a fee simple title or life estate interest in the property. It is a simple and straightforward rule that helps lower courts navigate the inherent statutory ambiguities regarding the assignment of liability among potentially responsible parties. This clarity is essential to ease some of the uncertainty resulting from different judicial approaches to liability determinations in Superfund cases.

For example, the de facto ownership test used in *Commander Oil* is imprecise and may result in different interpretations. The test considers five factors that could be used to determine whether a lessee is a de facto owner of the property for purposes of CERCLA liability. The Second Circuit, however, indicated that while these factors are important they are not conclusive to resolving the ownership question. The court pointed to other situations where the lessee may be held liable as an owner, especially in situations where the lessee, either through subleases or other sale and lease agreements, maintains more legal rights to the property than the actual owner.

The de facto ownership test, therefore, is not limited to the five factors, and instead invites a consideration of other factors peculiar to each case that could affect ownership determinations. Such a test is subject to manipulation during litigation and could result in substantially different outcomes in cases with similar facts.

The *Long Beach* approach, however, provides a simple analysis that ensures predictability. Predictability is beneficial for public policy reasons, as property investors can foresee the likelihood of liability as owners in environmental contamination cases. As a result, investors can better prepare for environmental contingencies. This could

---

100 *San Pedro*, 635 F.3d at 449.
102 Id.
103 See *San Pedro*, 635 F.3d at 449.
105 See id.
106 See *id.* at 331.
107 See id.
108 *San Pedro*, 635 F.3d at 449.
110 See id.
111 See id.
promote the free movement of property among different entities and may ultimately foster efficient use of resources.\textsuperscript{112}

Furthermore, predictability helps protect the environment since fee title and life estate holders are on notice of their potential liability for any harmful contamination on their property.\textsuperscript{113} Consequently, they could take reasonable steps to limit the damage resulting from CERCLA liability through different strategies.\textsuperscript{114} For example, the owner could include an indemnification clause in the lease that limits their potential CERCLA liability.\textsuperscript{115} If the owner is found liable under CERCLA for contamination on the property, they could then bring an action against the polluting lessee or permittee.\textsuperscript{116} An owner could also exercise due care to prevent contamination on the property by specifying the rights of the tenant in the property and by monitoring the activity taking place on the property.\textsuperscript{117} These measures ultimately promote environmental health while holding property owners accountable for the hazardous activity that takes place.\textsuperscript{118}

Additionally, the \textit{Long Beach} approach is better than the de facto ownership approach and the site control test because it maintains the two independent bases of liability—owner and operator liability.\textsuperscript{119} CERCLA imposes liability on any owner or operator of a facility at the time of disposal of any hazardous substance.\textsuperscript{120} According to the Supreme Court, “an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.”\textsuperscript{121} The site control test, however, imposes liability based on a party’s exercise of “control and responsibility for the use of the property.”\textsuperscript{122} By using control over the facility as the basis for imposing liability, the site control test for ownership is similar.

\textsuperscript{112} See id.
\textsuperscript{113} See San Pedro, 635 F.3d at 449.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id. at 831.
\textsuperscript{118} See id. at 832.
\textsuperscript{119} See San Pedro, 635 F.3d at 451–52.
to the test for operator liability. As a result, the site control test conflates operator liability with owner liability.

Such a construction fails to fulfill Congress’s legislative intent to create two distinct forms of liability. By relying on that construction, the courts create a new law that uses ownership as the sole basis for liability. The function of the courts in interpreting statutes, however, is “to construe the language so as to give effect to the intent of Congress.” In so doing, the courts perform their role under the Constitution—to interpret the law—while the power to enact the law is reserved for the legislative branch, thus upholding the doctrine of separation of powers. As noted by the Supreme Court, “the principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.” Adherence to that principle is essential to the preservation of liberty since it acts as a check on “the encroachment or aggrandizement of one branch at the expense of the other.”

The Long Beach test, however, adheres to the principle of separation of powers because it preserves the two separate forms of liability under CERCLA. This approach limits ownership liability to the title holder of real property that either pollutes his own property or lets another contaminate his land. Ultimately the owner of a possessory interest who is in fact responsible for the pollution will be held liable under the operator prong of CERCLA.

**Conclusion**

The determination of ownership under CERCLA is crucial to the allocation of liability to those parties responsible for pollution. Congress intended to hold owners accountable for pollution on their property not only because they benefit from the hazardous activity, but also

---

124 Id.
125 Id. at 328.
126 See id. at 328–29.
128 Marbury v. Madison, 5 U.S. 137, 175 (1 Cranch).
130 Id. at 122.
131 See San Pedro, 635 F.3d at 451–52.
132 Id. at 451.
133 Id.
134 See supra notes 15–18 and accompanying text.
because they are in the best position to prevent pollution.\textsuperscript{135} Consequently, it is important for the courts to adopt an approach for the determination of ownership that best fulfills this intent.\textsuperscript{136} Of the three tests used by courts to define ownership for possessory interests, the \textit{Long Beach} common law approach is superior.\textsuperscript{137} This test provides predictability and preserves operator and ownership liability as originally intended by Congress.\textsuperscript{138}

\textsuperscript{136} See id.
\textsuperscript{137} See supra notes 85–133 and accompanying text.
\textsuperscript{138} See supra notes 85–133 and accompanying text.