DISCUSSION PAPER ON

CONTRACTOR INDEMNIFICATION AND EXEMPTION FROM LIABILITY FOR CLEANUP ACTIVITIES AT HAZARDOUS WASTE SITES

Prepared for
Department of Ecology, State of Washington
by
ICF Incorporated

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NOTICE

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I. INTRODUCTION

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA, or "Superfund") was established to alleviate the environmental and human health problems caused by abandoned hazardous waste sites. These problems have included surface water and ground water pollution, soil contamination, and noxious emissions into the atmosphere. Drinking water supplies have been contaminated, and in some instances, most notably Love Canal, New York and the "Dioxin sites" in Missouri, nearby residents have been relocated to safer areas.

The Superfund statute provides the federal government with two different methods it can employ to deal with potentially dangerous hazardous waste sites. Under section 106 of the Act, the federal government can require, either through administrative orders or through the federal courts, that parties responsible for the hazardous situation cleanup the problem to the government's satisfaction. Second, if they choose, the federal and/or state government with their own personnel, private contractors, or some combination of the two, can take response action themselves at the hazardous waste site. Thereafter, pursuant to section 107, the government can seek to recover its response costs as well as compensation for damages to natural resources from parties responsible for the hazard.

Only the federal government can pursue the first (compelling private party cleanup) of these two approaches under the federal Superfund. However, states as well as the federal government can file suit under Superfund in the federal courts to recover costs and damages to natural resources from responsible parties. In addition, the legislature is considering developing a compatible State cleanup statute.

Although the federal statute does not explicitly state what types of private parties may be liable and what standard of care they may be held to, a number of federal court decisions have held that Superfund imposes strict liability and joint and several liability on private parties responsible (if only in part) for hazardous waste site contamination. The same standard of liability is also under consideration for a State bill.

Because of court rulings imposing strict liability, generators and transporters of hazardous waste as well as site owners and operators, have been held liable under the federal Superfund even if their actions were found to be non-negligent. Under the principle of joint and several liability, one party (for example, a generator whose wastes were disposed at the site) might be held liable for the entire cost of cleanup despite the fact that many other generators and transporters were involved in waste disposal at the site.

For a discussion of the rationale for strict, joint and several liability, see "Discussion Paper on Strict, Joint and Several Liability", August, 1985, prepared for WDOE by ICF Incorporated.
Because of concerns caused by the concepts of strict liability and joint and several liability, parties considering performing cleanup at a site (contractors working for the federal or state government or for a private party, or the private party itself) are becoming increasingly apprehensive about undertaking cleanup activity without assurances that they will be held harmless for any damages caused as a result of their cleanup activity.

This paper addresses whether the State of Washington should hold harmless persons undertaking cleanup services and, if the question is answered in the affirmative, explores alternative methods for providing such protection. The paper is divided into five parts including this introduction. The second section provides background on the scope of the problem including a discussion of insurance difficulties associated with hazardous waste site cleanups and an examination of:

- Who should be held harmless;
- For what types of actions should parties be held harmless;
- For what costs and damages should parties be held harmless;
- How parties should be held harmless; and
- How, if at all, should hold harmless concepts be financed.

The third section presents possible options for addressing the hold harmless issue and the fourth section evaluates the options in terms of their advantages and disadvantages. Finally, the fifth section describes a recommended option and a rationale for the option and concludes with a discussion of the next steps to take to implement the recommendation.

II. BACKGROUND ON THE PROBLEM

This section of the paper is divided into five subsections, the first of which addresses the relationship of environmental liability insurance to the concept of indemnification from liability, and then discusses the increasing problems associated with environmental liability insurance.

II.a Environmental Liability Insurance and Contractor Indemnification

Hazardous waste site cleanup is extremely expensive. According to Environmental Protection Agency (EPA) figures, the average cost of remedial activity for sites on the Agency's National Priorities List (NPL) is $8.1 million dollars if there is no ground water cleanup required, or more than $12
million if ground water is also contaminated. In addition to being costly, hazardous waste site cleanup is usually a time-consuming, complex process, which typically is fraught with uncertainties. The process is especially difficult when ground water contamination exists, as is the case at most Washington sites.

Because of the time-consuming nature of the cleanup process, EPA and the states have endeavored to contract out nearly all actual cleanup work to private contractors. In addition, government agencies have sought, through negotiation and litigation, to require parties responsible for hazardous waste contamination (owners and operators of hazardous waste sites, and transporters and generators of hazardous substances) to remedy a significant portion of these sites.

Joint and several liability principles, mentioned earlier, have a major impact on potential cleanup contractors, and to a significant extent as well on responsible parties contemplating cleanup. The range and cost of potential liability associated with hazardous waste site cleanup is substantial. Contractors may be subject to potential liability when remedial design or construction is performed improperly. In addition, however, given the uncertainties associated with ground water contamination, design and construction viewed as competent by all involved (the contractor and the supervising government agency) may, in the long term, turn out to be an inadequate remedy. In these situations, contractors and responsible parties undertaking cleanup may be sued and held liable by federal, state and local agencies, other responsible parties associated with the site, and private citizens adversely affected by the inadequate cleanup activity. In addition to the large number of potential plaintiffs, a broad interpretation of joint and several liability could, if the harm were considered indivisible, subject a cleanup contractor to liability many times greater than the costs required to correct an improper remedial design or construction.

Because of these substantial liabilities, cleanup contractors, like other companies in the construction field, necessarily carry insurance to protect against "errors and omissions" committed in the course of their business.

Without such insurance (or some similar protection) either or both of the following results would occur: the cost of cleanup would increase enormously; the number of competent and competitive contractors willing to perform hazardous waste site cleanup would decrease dramatically.

These factors affecting the cleanup contractor's need for insurance have not gone unnoticed by the underwriting community. In particular, the principle of joint and several liability, imposing the possibility of unquantifiable and virtually unlimited liability, cuts directly against the insurance industry's desire for certainty embodied in its use of actuarial tables designed to calculate liability.

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2 CERCLA Section 301(a)(1)(C) Final Report to Congress, December, 1984, prepared for EPA by ICF Incorporated.
In addition, the insurance industry has not been overly successful in limiting coverage to specific types of environmental incidents. For example, industry representatives cite the Jackson Township, New Jersey case as a matter of prime concern. In 1983, after Jackson Township was successfully sued by township residents for ground water contamination from the township-owned landfill, which had accepted hazardous wastes, the municipality sought to invoke the provisions of its insurance policy to satisfy its liability to the residents. The Hartford Insurance Group defended on the grounds that the policy covered environmental incidents only when they were "sudden and accidental." According to the insurer, ground water contamination, a slow to develop process caused by deliberate hazardous waste disposal at the landfill, was neither sudden nor accidental. The court, however, rejected the insurance company's arguments and required the payment of more than $17 million in claims.

In part because of the uncertainty and potentially huge liabilities involved, and because of major difficulties in limiting coverage to sudden and accidental situations, many insurance companies are pulling out of the environmental impairment liability field. Those few that remain are

3 The limited insurance coverage for hazardous waste cleanup contractors is only partly due to strict, joint and several liability. A number of other highly significant factors also have recently coalesced to restrict coverage. Among the more important reasons for the limited insurance coverage are:

- The recent decline in interest rates since the early 1980's has caused a substantial decline in profits from invested premiums, resulting, in turn, in a contraction of funds available for insurance (e.g., last year, when interest rates were down, investors lost $3.5 billion);

- Because of a desire to stay competitive, many insurers have written policies in the last several years that have proven to be unwise risks, thereby causing substantial losses for these insurers;

- Expansive judicial interpretations of policy language (e.g., rulings that "sudden and accidental" policy limitations may not preclude claims relating to gradual ground water contamination), have negatively affected insurance firms' revenues; and

- The insurance industry's growing recognition of the risks from handling hazardous substances (e.g., Bhopal, asbestos). In effect, even disregarding concerns about joint and several liability, the market is more realistically assessing the risks; and

- The breakdown, as a result of judicial decisions, of sovereign immunity defenses formerly available to municipalities.
dramatically increasing the premiums charged. This phenomenon seems to be part of an overall retrenchment in the industry, as insurance companies react to increasingly large judgments not only in the area of environmental impairment but in other fields as well, such as product liability, building construction, and legal, medical, and accounting malpractice, by increasing premiums and decreasing coverage. As a consequence, those considering cleanup activity (both outside contractors independent of any responsibility for past actions at the site and potentially responsible parties with prior involvement at the site) are increasingly insistent on some form of protection to hold them harmless from liability during and following site cleanup. The following subsections describe several of the key issues associated with the hold harmless concept as it relates to hazardous waste site cleanup.

II.b Who Should be Held Harmless?

One of the first questions that needs to be addressed concerning protection from liability concerns who should be held harmless. Any or all of the following could be held harmless:

- "Independent" cleanup contractors,
- Potentially responsible parties when performing their own cleanup, and
- The State Trust Fund itself.

II.c What Types of Actions Should be Held Harmless?

Closely related to the question of who should be held harmless is the issue of what types of activities should be held harmless. This issue involves two separate but related considerations. First, a judgment needs to be made as to the legal standard required to qualify for hold harmless protection. Activities could be held harmless if they were:

- Non-negligent, or
- Negligent but not grossly negligent, or
- Grossly negligent.

Second, the State may wish to consider the range of situations that might qualify for hold harmless protection. For example, should independent contractors be held harmless:

- Only when they are retained as a contractor of the State, or

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* The Washington Post recently reported that premiums for liability insurance for accounting firms have increased by 200 percent or more in the last year and that some companies have stopped offering insurance to accountants. *Washington Post*, July 14, 1985, H4.
• When they are retained by a potentially responsible party in a State approved cleanup, or also,
• When they are retained by a potentially responsible party to cleanup without prior State approval.

Potentially responsible parties that may wish to conduct cleanup themselves without any independent contractor assistance could be held harmless:
• Without a requirement for prior State approval of the cleanup,
• Only with such prior State approval, or
• Under no circumstances.

II.d For What Costs and Damages Should Parties Be Held Harmless?

Costs and damages that could be subject to hold harmless provisions include those associated with remedial failures and third party tort actions. For remedial failures, hold harmless protection could occur when the remedial construction followed design specifications (with or without a requirement that state approval be obtained), but nonetheless failed to abate adequately the hazardous condition. A more liberal indemnification approach would hold harmless remedial failures even when the remedial design or construction was flawed.

Hold harmless protection could apply to any or all of the following damages typically sought in third party tort actions:
• medical and other out-of-pocket health-related costs,
• death benefits,
• pain and suffering,
• property damage, including repair, replacement, and/or, diminished real property values,
• economic loss, including loss of income or profits or tax revenues, and
• relocation costs.

II.e How Could Parties Be Held Harmless?

Contractors (or responsible parties performing cleanup activities) could be held harmless in either of the following two ways:
• Indemnification by the state government or a State administered fund, so that judgments levied for cleanup
related actions would be reimbursed (either wholly or in part), by the appropriate government entity; or

- A statutory exemption from liability that could be designed to hold harmless certain cleanup related actions.

II.f How, If At All, Could Hold Harmless Concepts Be Financed?

Holding harmless certain hazardous waste cleanup activity necessarily implies that individuals or entities other than the cleanup contractor will pay for specified costs or damages incurred in the course of cleanup. A wide variety of possible financing approaches exists.

One approach would be to establish a broad hold harmless framework for cleanup contractors, and maybe private parties, engaged in cleanup activity without a financing mechanism for purposes of reimbursement. This approach embodies the concept of a statutory exemption from liability mentioned above. The practical effect of this approach would require parties aggrieved by cleanup activities (the state, other responsible parties, businesses or private individuals) to bear such damages themselves because no method of obtaining financial redress would be available to them.

Another approach would be to create a State fund to be used in whole or in part for purposes of reimbursement. Such a fund could be financed through appropriate taxes on industry who generate and use hazardous substances, or through allocations from the state's general revenues, or through issuance of general obligation bonds to be repaid from general revenues or a combination of general revenues and dedicated industry taxes.

A portion of moneys in the fund not used for hold harmless purposes could be used for long-term site operation and maintenance (O&M) or other authorized contingency expenses or be returned to the general treasury if not required within a specified time. In the case of bond financing, the legislation establishing hold harmless conditions and authorizing the state to sell bonds would sanction bond sales only once valid claims from the fund were required (i.e., bonds would only be sold if and when they were needed).

Another of the many variations available from a financing standpoint could require that cleanup activities be insured through standard errors and omissions insurance, with the state fund available as a source of reinsurance for the participating underwriting community. Similarly, the State could assist in organizing a self-insurance fund to be funded by cleanup contractors. The liability of the self-insurers' mutual fund would be statutorily implemented to provide certainty. The State could agree to cover all liability (or a statutorily limited additional increment of liability) above the limit of liability of self-insurers coverage.
III. POSSIBLE IMPLEMENTATION OPTIONS FOR THE HOLD HARMLESS ISSUE

This section discusses the two major options for implementing hold harmless concepts. The indemnification option is addressed first, followed by a discussion of the statutory exemption from liability option.

III.a Indemnification

One possible indemnification approach is contained in Senate Bill 51, a bill to extend and amend CERCLA, introduced by Senator Stafford. Washington State could provide for similar indemnification in State law. Senate Bill 51 would amend CERCLA Section 107(e) by adding a new subparagraph that reads as follows:

The Administrator [of EPA] may, in contracting or arranging for response action to be undertaken under this Act, agree to hold harmless and indemnify a contracting party against claims, including the expenses of litigation or settlement, by third persons for death, bodily injury or loss of or damage to property arising out of performance of a cleanup agreement to the extent that such claim does not arise out of the negligence of the contracting party.

The Committee report accompanying Senate Bill 51 notes:

The potential for being held jointly and severally liable for injury or property damage under existing law may discourage competent contractors who would otherwise offer their services and expertise to respond to releases at specific sites.

Indemnification under this provision may cover claims for death, bodily injury, and property damage, and may include the expenses of litigation that would arise as a result of the contractor's conducting activities under contract with the agency or the States. Indemnification cannot extend to contractors where the injury or damage was caused by a negligent action of the contractor.

The decision to extend such indemnification is discretionary with the Administrator. Indemnification does not arise without a specific contractual arrangement that extends such protection.

Should the contractor indemnification provision of Senate Bill 51 be enacted into law, several definitional issues will need to be resolved, including the meaning of the phrase "performance of a cleanup agreement," and the scope of the phrase "damage to property." Other significant implementation issues include funding for indemnification, especially if such funds are not budgeted or appropriated, and on whom the burden of proof will lie concerning the issue of contractor negligence or non-negligence. Finally,
there is the issue of the scope of the indemnification -- it is unclear from Senate Bill 51 if the State cost share of federally-funded sites would be covered; in addition, State legislation would clearly be required to cover sites not cleaned up under CERCLA jurisdiction.

The present EPA position on contractor indemnification is also instructive. For example, the most recently executed contract for remedial investigation/feasibility studies at NPL sites (REM II contract) requires the contractor to carry general liability insurance but does not require errors and omissions, or "professional" insurance. Further, EPA has agreed to indemnify the cleanup contractor for claims in excess of policy limits if such errors and omissions insurance is purchased. Interestingly, the Agency's agreement to indemnify does not require that a certain minimum level, or any amount at all, of errors and omissions insurance be obtained. The Agency will not, however, reimburse the contractor for any deductible amounts required by the policy if one is purchased.

The Agency also notes that, despite the fact that it has agreed to indemnify the contractor, "reimbursement for any liabilities under this contract clause will not exceed appropriations available at the time such liabilities are represented by final judgments or by settlements approved in writing by the Government. This agreement to reimburse the Contractor for certain liabilities will not be interpreted as implying that Congress will, at a later date, appropriate funds sufficient to meet deficiencies."

Although the proposed amendment to CERCLA mentioned above would not indemnify contractors for negligent actions, the REM II contract contains no such restrictions, excluding instead liabilities that result "from willful misconduct or lack of good faith..."

III.b Statutory Exemption from Liability

S.51 also contains a provision that would statutorily exempt state and local governments (but not cleanup contractors) from liability for certain (i.e., emergency) hazardous substance response activities. The proposed amendment would add a new subparagraph (2) to Section 107(d) of the federal Superfund that would read as follows:

No State or local government shall be liable under this title for costs or damages as a result of non-negligent actions taken in response to an emergency created by the release of a hazardous substance, pollutant or contaminant generated by or from a facility owned by another person.5

5 It should be noted that this exemption, if enacted into law, may not protect State and local governments from liability under other statutes or common law.
The committee report explains that:

[under current law, there may be disincentive for State and local governments to respond to emergencies covered by CERCLA because the same liability standards may be applied to these entities as is applied to private parties who are responsible for a spill or other release of a hazardous substance, pollutant or contaminant.

Under this amendment, when a State or local government takes an emergency action to abate a hazard in a non-negligent way, that government will not be subject to the liability provisions applicable to the parties that created the hazard.

Note that although "emergency" is not defined, it is apparently intended to cover a fairly narrow range of hazardous waste site cleanup situations.

A somewhat similar provision can be found in California's Hazardous Substance Account Act (i.e., California's cleanup fund). Section 25358.1(e) of that Act reads:

The Department [the State Department of Health Services], and any person authorized by the Department to enter upon any lands for the purpose of taking removal or remedial action pursuant to this chapter, shall not be held liable, in either a civil or criminal proceeding, for trespass or for any other acts which are necessary to carry out the corrective action.

For the last several months, however, California has been involved in a major controversy with some of its cleanup contractors concerning the possible limiting affect that Section 25366(c) of the same Act may have on Section 25358.1(e). Section 25366(c) states:

Except as provided in Section 25360, 25361, 25362 and 25363 [concerning recovery actions against potentially responsible parties], nothing in this chapter shall affect or modify in any way the obligations of liability of any person under any other provision of state or federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action.

Because of the apparent conflict between these two provisions, the extent of hold harmless protection offered to California cleanup contractors remains very much unresolved. Amendments to the statute, designed to clarify the issue, have been introduced, and at least one major contractor (Fluor Technology, Inc.), has refused to enter into a cleanup contract with the state because of these ambiguities.
IV. EVALUATION OF OPTIONS

Exhibit 1 presents a matrix of options available on two of the key hold harmless issues: who should be held harmless and what actions should be held harmless.

The greater the number of types of parties and actions that are held harmless the more likely it is that the following results will occur:

Advantages

- The number of parties willing to perform cleanup activity will in all likelihood increase;
- The length of time required for cleanup activity should decrease; and
- The costs borne by the covered parties to perform cleanup should not increase as rapidly as without such protection and this savings should, at least in part, be reflected in contract bids for cleanup work.

Disadvantages

- The standard of care employed in performing cleanup may be reduced; and
- The potential financial liability of the State will increase. The amount of liability exposure the State would assume is unknown, but it could be substantial (e.g., tens or hundreds of millions of dollars).

On the other hand, the fewer the number of parties and actions held harmless, the more likely it is that the following results will occur. Note that even a small number of parties and actions held harmless represents an increase (from zero) of parties and actions presently held harmless.

Advantages

- The standard of care employed in performing cleanup may be enhanced; and
- The potential liability of the State will be reduced.

Disadvantages

- The number of parties willing to perform cleanup activity will decrease;
# Exhibit 1

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When Retained By PRP for Cleanup Without Prior State Approval
• The length of time required for cleanup probably will increase; and
• The costs to perform cleanup probably will increase, possibly substantially.

Decisions on who should be held harmless and what actions should be held harmless should be made in conjunction with an assessment of the two methods for implementing hold harmless concepts; that is (1) indemnification, and (2) a statutory exemption from liability. If the factors considered for hold harmless protection such as the parties, actions, and damages, were otherwise equal, then the two implementation options should be evaluated in terms of:

- Attractiveness to the cleanup industry;
- Extent of the State's financial exposure;
- Flexibility given to the State; and
- Equity considerations.

The advantages and disadvantages of both implementation options are outlined briefly below based on these considerations.

**Indemnification**

An indemnification process would provide that the state (rather than the party performing cleanup), make payments to successful plaintiffs when the conditions for indemnification had been met. The State would need to establish the conditions for indemnification. The conditions could either be established generically or on a site-by-site basis (the latter method is employed in the U.S. Senate's S.51). Further, indemnification concepts normally would require the cleanup contractor to defend its performance against aggrieved plaintiffs and, if the defense were unsuccessful, petition the State for indemnification. The State would then determine whether, and if so to what extent, it would indemnify the liabilities of the contractor. Depending on the wording of indemnification provisions in the State's statute, regulations and/or contract, the cleanup contractor might or might not be given an opportunity to seek judicial relief when the State refused to indemnify the contractor.

**Advantages**

- Indemnification provides the state with substantial flexibility. For example, the state can:
  -- Enter into indemnification agreements on a site-by-site basis;
  -- Establish an upper limit on the amount of its indemnity; and
Refuse to provide future indemnification if cleanup activities are unsatisfactory.

- The costs and damages associated with unsatisfactory performance can be borne more equitably than when activities are exempted from liability by statute.

- State indemnification can be curtailed as the private insurance market again begins to offer the desired coverage.

**Disadvantages**

- Because indemnification is a somewhat less certain method of avoiding or limiting liability than a statutory exemption, cleanup contractors are likely to view it less favorably than a statutory exemption. As a result, contractors may seek to cover some of this uncertainty through higher charges for their services.

- Because the State will be paying out costs when indemnification conditions are met, its financial exposure could be substantial, and in any event, greater than in the statutory exemption approach.

- Establishing an indemnification procedure may be more complex than developing a statutory exemption.

**Statutory Exemption**

The Legislature could determine that certain parties or classes of cleanup actions would not be liable for costs or damages arising from the cleanup action. Such a provision, possibly modeled along the lines of proposed CERCLA Section 107(d)(2) for local and state emergency responses contained in S.51, would preclude recovery of costs or damages against exempted parties or classes of cleanup actions. Generally, a statutory exemption provides greater certainty that liability can be avoided or limited than does an indemnification approach. This greater certainty occurs because, with a statutory exemption from liability, a cleanup contractor need only establish, in one proceeding, the appropriateness of the exemption to its particular fact situation. On the other hand, an indemnification approach generally would require the cleanup contractor to defend its actions in a judicial proceeding, and, if held liable, to then petition the state for indemnification.

**Advantages**

- The cleanup community likely would favor a statutory exemption provision if it covered both emergency and non-emergency cleanup actions, thus marginally increasing the pool of available cleanup contractors from the number available in the indemnification approach.
Because the State would not be paying out costs for successful third party plaintiff actions (as it would in the indemnification approach), the State's financial exposure should be smaller than if it were to indemnify cleanup contractors.

Implementation of a statutory exemption approach would be relatively simple and straightforward.

Disadvantages

- The approach is considerably less flexible than the indemnification approach -- altering the scope of the exemption necessarily would require an amendment of the statute. If private insurance again became available, Washington would not provide an attractive market unless the exemption were repealed. The contracting community would at that time probably oppose repeal.

- The statutory exemption may produce substantial inequities -- costs or damages caused by exempt cleanup activities would have to be borne by the aggrieved parties.

- If the costs or damages reflected failure of a State-funded remedy, the costs of remedial repair or replacement would again fall to the State, just as in the case of indemnification.

In evaluating these two approaches, the State may choose to implement the indemnification approach, the statutory exemption approach, or some combination of the two.

In addition, the State may want to consider either or both of two overlays that could be used in conjunction with the indemnification or the statutory exemption approach. One of these overlays would impose a statute of limitations to limit the risk exposure of the State to a predetermined number of years. The second overlay would require the contractor to purchase insurance (or perhaps to self-insure) up to a required limit. Any deductibles included within the policy would be paid by the contractor but the State would (if the claim otherwise qualified), reimburse the contractor for amounts in excess of the policy limits.

V. RECOMMENDATIONS

This section sets out several decision steps the State may want to evaluate as it considers the proper approach to take on hold harmless issues and hazardous waste site cleanup.
First, using Exhibit 1 as a guide, the State should determine who should be held harmless and what actions should be held harmless. Some decisions here should be relatively clearcut. For example, the State may consider it inappropriate to hold harmless grossly negligent actions. On the other hand, the decision as to whether to hold harmless actions that are negligent but not grossly negligent may involve competing tradeoffs and therefore be more difficult to make.

Once the State identifies those parties and actions to hold harmless, it should then address the issue of whether to proceed with the indemnification or exemption approach. Because of the substantially greater flexibility involved, and because it provides for a more equitable allocation of costs when damages occur, indemnification may be the option of choice.

Regardless of the implementation approach selected, the State may want to explore in more detail statute of limitations concepts in conjunction with the chosen approach.

As mentioned earlier, a statute of limitations provision may be a useful method of limiting the State's potential financial liability in hold harmless situations. Issues that would need to be addressed concerning a statute of limitations include:

- the length of time within which a claim must be filed;
- whether different types of claimants (i.e., individuals, potentially responsible parties, the State Trust Fund), would have different filing deadlines; and
- what the beginning point should be for purposes of activating the statute of limitations.

This last issue is especially complex. One possible "trigger" for the running of the statute of limitations would be completion of cleanup activity and receipt of final payment by the contractor. This approach more easily defines the start-date of the statute and also substantially restricts the overall liability of the State. On the other hand, the approach may not be particularly equitable because in many instances the damage caused by faulty cleanup activity may not be discovered until considerably after the cleanup activity ceased.

To account for this latter problem, the statute could be designed to commence running when the aggrieved party becomes aware of (or reasonably should become aware of) the damage caused by the cleanup contractor. Defining this commencement date will not always be easy and, in any event, this approach will expose the state to considerably greater exposure than the receipt of payment approach.

As a final point, especially if an indemnification approach is chosen, the State will need to evaluate the funding mechanisms outlined herein and select an approach that best meets its anticipated goals.