IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2008-CA-02045

REBEKAH ANGLE — APPELLANT-PLAINTIFF

VS.

KOPPERS INC., ET AL — APPELLEES-DEFENDANTS

APPEAL FROM THE CIRCUIT COURT OF GRENADA COUNTY
HONORABLE JOSEPH H. LOPER, JR., CIRCUIT JUDGE

BRIEF OF APPELLEES KOPPERS INC., BEAZER EAST, INC. AND THREE RIVERS MANAGEMENT, INC.

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Rebekah Angle, Appellant-Plaintiff
2. The Colom Law Firm, Counsel for Rebekah Angle
3. Lundy & Davis, Counsel for Rebekah Angle
4. Jerry P. Hughes, Jr., Counsel for Rebekah Angle
5. Carter C. Hitt, Counsel for Rebekah Angle
6. Koppers Inc., f/k/a Koppers Industries, Inc., Appellee-Defendant. Koppers Inc. is owned by Koppers Holdings Inc., a publicly traded company.
7. Beazer East, Inc., Appellee-Defendant. Beazer East, Inc., through various privately-held subsidiaries, is ultimately owned by HeidelbergCement AG, a German publicly traded company.
8. Three Rivers Management, Inc., Appellee-Defendant. Three Rivers Management, Inc., through various privately-held subsidiaries, is ultimately owned by HeidelbergCement AG, a German publicly traded company.
9. Illinois Central Railroad Company, Appellee-Defendant.
10. Christopher A. Shapley, Esq., BRUNINI, GRANTHAM, GROWER, HEWES, PLLC, Counsel for Koppers Inc., Beazer East, Inc. and Three Rivers Management, Inc.
11. Robert L. Gibbs, Esq., BRUNINI, GRANTHAM, GROWER, HEWES, PLLC, Counsel for Koppers Inc., Beazer East, Inc. and Three Rivers Management, Inc.
12. William Trey Jones, III, Esq. , BRUNINI, GRANTHAM, GROWER, HEWES, PLLC, Counsel for Koppers Inc., Beazer East, Inc. and Three Rivers Management, Inc.

13. Joseph Anthony Sclafani, Esq., BRUNINI, GRANTHAM, GROWER, HEWES, PLLC, Counsel for Koppers Inc., Beazer East, Inc. and Three Rivers Management, Inc.

14. Reuben V. Anderson, Esq., PHELPS DUNBAR, Counsel for Koppers Inc., Beazer East, Inc. and Three Rivers Management, Inc.

15. Jay Gore, III, Esq., GORE KILPATRICK & DAMBRINO, Counsel for Koppers Inc., Beazer East, Inc. and Three Rivers Management, Inc.

16. Cal R. Burnton, Esq., WILDMAN, HARROLD, ALLEN & DIXON LLP, Counsel for Koppers Inc., Beazer East, Inc. and Three Rivers Management, Inc.

17. Glenn F. Beckham, Esq., UPSHAW, WILLIAMS, BIGGERS, BECKHAM & RIDDICK, LLP, Counsel for Illinois Central Railroad.

18. Harris F. Powers, III, Esq., UPSHAW, WILLIAMS, BIGGERS, BECKHAM & RIDDICK, LLP, Counsel for Illinois Central Railroad.

In addition to the above-listed persons having a specific interest in this case, the Court has on file before it appeals in other cases involving the same defendants. All of these cases are stayed pending the outcome of this case. The attorneys for these cases are the same as for this case, and are listed above. The appellants in these cases are: Billy W. McKinney, Jessica McRee, John F. Bailey on behalf of the estate of Frankie Lynette Bailey, Linda Bailey, Anthony Barnes, Rhonda Michelle Herbert, S.D. Bobby Booker, Lewis Brooks, Edward Merriman, Ceola Moore on behalf of the estate of Tanzil Barnes, Lillie M. Burgess, Willie Collins Butler, Ethel Hooper Conley, Richard Crenshaw, Gloria Mae Beck Muhammad, Edward M. Penn, III, Tondria Dent, Willie M. Rhodes, Trebia Rogers, Emma Doris Johnson, James Johnson, Angela M. Skidmore, Wanda C. Sparks, Mary Carl Vann, Cussie A. Walker, Margaret Johnson, Wallace Johnson,

Larry Watt, Arthur O. Williams, Christy Jourdan, Sammie Knox, Stella Mae Mack, Frank P. Marscalco, Bettye McGee, Bettye McGee on behalf of the estate of Lloyd Mc Gee, Mattie A. Williams, Joyce A. Williamson, Khalim Khalis, Arneada Beck, and Richard Crenshaw on behalf of the estate of Linda C. Crenshaw.

This the 9th day of September, 2009.

Christopher A. Shapley

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Mississippi Rule of Appellate Procedure 34, Defendants request oral argument. Defendants believe that the Mississippi statute of limitations at issue here is clear on its face and that the Circuit Court correctly followed established Mississippi case law in rendering its decision in Defendants' favor. The interpretation of that statute urged by Plaintiff, however, would have wide-raging ramifications if accepted. Plaintiff's interpretation would in effect revive lawsuits for generations of people, who could resurrect their barred claims simply by asserting a newly-found awareness of the "wrongful cause" of their injuries. The Court's ruling in this appeal could also have a significant impact on hundreds, if not thousands, of similar pending toxic tort cases brought by this Plaintiff's counsel in connection with the wood-treating plant at issue in this case. (One such case has already been dismissed by the United States Court of Appeals for the Fifth Circuit on statute of limitations grounds. *See Barnes v. Koppers Inc., et al.*, 534 F.3d 357 (5th Cir. 2008).) For these reasons, Defendants believe that oral argument would be beneficial.

STATEMENT OF THE ISSUES

1. Whether the Circuit Court correctly found that under Miss. Code Ann. § 15-1-49 a cause of action accrues when a plaintiff has knowledge of the injury, not knowledge of the injury and its "wrongful cause."

2. Whether the Circuit Court correctly found that Plaintiff failed to meet her burden of establishing that the statute of limitations applicable to certain environmental actions under the Comprehensive Environmental Response,

Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9658, applied to Plaintiff's time-barred state law claims.

STATEMENT OF THE CASE

This case is one of several mass tort actions filed by the same plaintiffs' counsel on behalf of more than one thousand plaintiffs in various Mississippi State and Federal Courts.[1] Plaintiffs allege that various chemicals, primarily creosote and pentachlorophenol, were released from a wood-treating plant in Grenada, Mississippi (the "Grenada Plant") and affected their property and caused or exacerbated certain illnesses.

The Grenada Plant was built by the Ayer and Lord Tie Company in 1904. The facility to this day continues to treat railroad ties with creosote and telephone poles with either creosote or pentachlorophenol. One of its primary customers is Defendant-Appellee Illinois Central Railroad. Defendant-Appellee Koppers Inc. has owned the plant since 1988. Prior to Koppers Inc.'s acquisition, the Grenada Plant was owned by the unrelated company Koppers Company, Inc. That company is now known as Beazer East, Inc., also a Defendant-Appellee in this

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1 Four actions were commenced in Mississippi State courts on December 27, 2002, each filed in a different county: (1) *Walter Crowder, et al. v. Koppers Industries, Inc., et al.*, No. 2002-0225 on the Docket of the Circuit Court of Leflore County; (2) *Likisha Booker, et al. v. Koppers Industries, Inc., et al.*, No. 2002-0549 on the Docket of the Circuit Court of Holmes County; (3) *Lynette Brown, et al. v. Koppers Industries, Inc., et al.*, No. 2002-0479 on the Docket of the Circuit Court of Washington; and (4) *Benobe Beck, et al. v. Koppers Industries, Inc., et al.*, No. 251-03-30CIV on the Docket of the Circuit Court of Hinds County. Plaintiffs' Counsel commenced a fifth Mississippi State Court action on May 27, 2005, in the Circuit Court of Grenada County, Mississippi: *Rebekah C. Angle, et al. v. Koppers Inc., et al.*, No. 2005-299CVL. Plaintiffs' counsel also brought two Federal Court actions: *Fred Beck, et al. v. Koppers Industries, et al.*, Civil Action No. 3:03CV-60-P-D, filed on March 18, 2003; and *Hope Adams Ellis, et al. v. Koppers, Inc., et al.*, Civil Action No. 3:04CV-160-P-D, filed on August 24, 2004. The *Ellis* case alone contained 1130 plaintiffs.

lawsuit. Beazer East, Inc., which sold the name Koppers when it sold the Grenada Plant, has been involved in the environmental remediation of the Grenada Facility. The environmental cleanup activities have been performed by a sister company to Beazer East, Inc., Defendant-Appellee Three Rivers Management, Inc. (Koppers Inc., Beazer East, Inc., and Three Rivers Management, Inc., will hereinafter be referred to collectively as "Defendants.")

Plaintiff Rebekah Angle ("Plaintiff") filed her complaint in the Circuit Court of Grenada County, Mississippi, on March 17, 2006, alleging claims sounding in negligence, gross negligence, negligence per se, intentional tort, conspiracy, private conspiracy in violation of 42 U.S.C. § 1985(3), strict liability, trespass, nuisance and failure to warn. (R. 2-39.) Because the Complaint failed to include detailed information required by *Harold's Auto Parts, Inc. v. Mangialardi* and its progeny, the Circuit Court ordered Plaintiff to provide a more definite statement, more specifically "detailing the dates of alleged exposure and manifestation of injuries, the manner of any such exposure, and which chemicals caused the alleged injuries..." (R. 39A.)

On July 31, 2006, Plaintiff issued a Submission of Additional Information which disclosed that her alleged illnesses were diagnosed beginning in 1984 and ending not later than 2001, approximately five years before the filing of her Complaint:

> As a result of exposure to harmful chemicals from the Grenada wood treatment facility, Plaintiff has suffered:
>
> | Illness | Date of diagnosis |
> | --- | --- |
> | Infiltrating ductal carcinoma | |

of the breast	2001
Ovarian cysts	1999
DNC	1990
Hysterectomy	1994
Ovaries removed	2000
Lumpectomy	2001
Skin rashes	2000
Headaches	1984

(R. 169-173.)

On June 8, 2007, Defendants filed a motion for summary judgment in the Circuit Court. (R. 127-180.) Defendants argued that all of Plaintiff's claims sounding in general tort were barred by the three-year statute of limitations set forth in Section 15-1-49 of the Mississippi Code of Civil Procedure, because she did not file her lawsuit until well after three years after the diagnosis of her illnesses. (R. 127-129, 174-178.) Defendants argued that Plaintiff's remaining claim of intentional tort was similarly barred by the one-year statute of limitations set forth in Section 15-1-35 of the Mississippi Code of Civil Procedure. (R. 127-129, 177-178.)

Plaintiff's response in opposition to Defendants' motion contended that under Mississippi law, the limitations period was tolled until she discovered the wrongful cause of her injuries. (R. 184-194.) Plaintiff's response was based almost entirely on Judge Allen Pepper's holding in a similar case then-pending in the United States District Court for the Northern District of Mississippi, *Beck v. Koppers Inc.,* No. Civ.A. 303CV60-P-D, 2005 WL 2715910 (N.D. Miss. Oct. 21, 2005 – a holding that has since been reversed by the United States Court of Appeals for the Fifth Circuit. *See Barnes v. Koppers Inc., et al.*, 534 F.3d 357, 361 (5th Cir. 2008) (holding that plaintiff's claims were barred by the statute of

limitations because "[u]nder § 15-1-49, a cause of action accrues when the plaintiff has knowledge of the injury, not knowledge of the injury and its cause."). In the alternative, Plaintiff argued that the Mississippi statutes of limitations were pre-empted by the statute of limitations set forth in the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9658.

The Circuit Court rejected Plaintiff's arguments and granted Defendants' motion for summary judgment. (R. 127-129, 210-215.) It preliminarily found that Miss. Code Ann. § 15-1-35 was not applicable to the case because the intentional torts of which Plaintiff complains are not among those listed in that section, and that all of Plaintiff's claims are thus governed by the statute of limitations set forth in Section 15-1-49. (R. 212-213.) The Circuit Court then held that "[b]ased on a plain reading of M.C.A. § 15-1-49, and the decisions of the Mississippi Supreme Court and the U.S. Court of Appeals for the Fifth Circuit that have interpreted the statute, this court finds the statute of limitations began to run on the plaintiff's cause of action when she had knowledge of her [injuries], not when she had knowledge of these injuries...and their cause." (R. 214.) The Circuit Court further held that "the plaintiff has failed to offer sufficient proof that 42 U.S.C. § 9658 preempts Mississippi law." (*Id.*) As such, the Court entered summary judgment in Defendants' favor and against Plaintiff. (R. 216.) This appeal followed.

SUMMARY OF THE ARGUMENT

The Circuit Court correctly granted Defendants' motion for summary judgment based upon the three-year statute of limitations set forth in Miss. Code

Ann. § 15-1-49. That Section provides that "[a]ll actions for which no period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after." Miss. Code Ann. § 15-1-49(1). The statute recognizes a discovery rule for latent injuries, which provides that a "cause of action [for latent injury or disease] does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury." Miss. Code Ann. § 15-1-49(2) (emphasis added). The Circuit Court correctly held that a cause of action accrues under Section 15-1-49(2) when the plaintiff gains knowledge of her injuries or diseases. Thus, all of Plaintiff's claims are barred within three years of knowledge of injury.

The Circuit Court correctly interpreted the plain language of Section 15-1-49(2), which refers only to discovery of the injury, not to discovery of the cause of the injury. That ruling comports with this Court's clear statement in *Owens-Illinois, Inc. v. Edwards,* 573 So. 2d 704, 709 (Miss. 1990), that knowledge of a "cause" of an illness is *not an applicable factor* in determining when the statute of limitations begins to run under Miss. Code Ann. § 15-1-49. The ruling is also in line with the Fifth Circuit's recent decision in *Barnes*, which holds that "[u]nder § 15-1-49, a cause of action accrues when the plaintiff has knowledge of the injury, not knowledge of the injury and its cause." 532 F.3d at 361. Since Plaintiff learned of all of her alleged illnesses no later than 2001, approximately five years before the filing of her Complaint, her claims are time-barred.

If the Plaintiff were to prevail in this appeal, claims that have been barred for years and even decades could be resurrected. Indeed, in this case, Plaintiff

seeks to recover for, among other things, headaches that she allegedly suffered twenty-five years ago. (Appellee's Brief, p. 1.) Taken to its extreme, Plaintiff's insistence that the statute of limitations does not begin to run until a plaintiff has knowledge of the wrongful cause of his or her injury would allow a plaintiff to bring suit on behalf of her grandparents, or even great grandparents, decades after their passing, merely because they have been advised by a lawyer of the alleged "wrongful cause" of the death. Such a rule would undoubtedly lead to manipulation and fraud and is inconsistent with the fundamental purpose of a statute of limitations. The Mississippi legislature has determined that three years is an adequate time to discover a relationship between an injury and its cause, and that suit beyond that period should not be allowed. This Court should reject Plaintiff's invitation to graft a knowledge-of-causation requirement onto Section 15-1-49 where none exists.

The Circuit Court was also correct in determining that the CERCLA statute of limitations, found in 42 U.S.C. §9658(a)(1), could not save Plaintiff's time-barred claims. Neither Plaintiff's response to Defendants' summary judgment motion, nor her appellate brief, demonstrates – either factually or legally – why CERCLA should apply to the facts at hand. Plaintiff fails to prove how CERCLA, and its overarching focus on "abandoned" or "inactive" sites, governs claims arising from the operations of an active wood treating facility subject to Resource, Conservation and Recovery Act ("RCRA"), Clean Air and Clean Water Act permits. Further, Plaintiff fails to prove how she, who incurred no clean-up costs, has standing to avail herself of CERCLA and its tolling

provisions. Moreover, Plaintiff's burden of proof for availing oneself to CERCLA § 9658 remains unsatisfied. Plaintiff has not established that her claims arose from a "release" of "hazardous substances" into the "environment" so that defendants' "facility" falls within CERCLA. Finally, application of Section 9658 in this case would violate the Commerce Clause and Tenth Amendment of the United States Constitution. The Circuit Court's judgment was correct, and should be affirmed.

ARGUMENT

I. Standard of Review.

The Court applies a *de novo* standard of review to questions relating to the statute of limitations. *Ellis v. Anderson Tully Co.*, 727 So.2d 716, 718 (Miss.1998). Furthermore, "[t]his Court reviews grants of summary judgment under the de novo standard." *Bullard v. Guardian Life Ins. Co. of Am.*, 941 So.2d 812, 814 (Miss. 2006).

II. The Circuit Court Correctly Found That All of Plaintiff's Claims Are Barred By the Three-Year Statute of Limitations Set Forth in Miss. Code Ann. § 15-1-49

Pursuant to the express terms of Section 15-1-49, prior decisions of this Court and principles of statutory construction, the Mississippi statute of limitations begins to run as soon as the plaintiff discovers the injury or disease. No Mississippi Supreme Court case has ever held that knowledge of the *wrongful cause* of the injury or disease is required in order to commence the running of the statute of limitations. Such a rule would allow long-expired claims to be resurrected, simply by a plaintiff's claim of a newfound awareness of the alleged "cause" of the injury. The plain language of the statute belies such an

interpretation, and this Court should reject Plaintiff's invitation to graft a causation element onto Section 15-1-49 where none exists. Because Plaintiff admittedly discovered her injuries more than three years prior to filing suit, her claims are time-barred and the Circuit Court's award of summary judgment in Defendants' favor was proper.[2]

a. Under Miss. Code Ann. § 15-1-49(2), a cause of action accrues as soon as a plaintiff becomes aware of the injury.

i. Mississippi State and Federal courts and the Fifth Circuit have routinely held that a cause of action accrues when plaintiff becomes aware of the injury or disease, not the "wrongful cause" of the injury or disease.

Plaintiff's claims are barred by the three-year statute of limitations set forth in Section 15-1-49. That Section provides:

> (1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.
>
> (2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not

[2] With no supporting citations or case law, Plaintiff asserts that certain of her claims are salvaged by the one-year statute of limitations for intentional torts set forth in Section 15-1-35. Defendants argued in the Circuit Court that Plaintiff's intentional tort claim was barred by that section. (R. 127-129, 177-178.) The Circuit Court found instead that Section 15-1-35 did not apply, since the intentional torts of which Plaintiff complained were not among those listed in that Section, and that Section 15-1-49 governed each of Plaintiff's claims. (R. 212-213.) Plaintiff has not disputed the Circuit Court's interpretation. Regardless, Mississippi law is clear that there is no discovery rule for intentional torts. *See, e.g., Goleman v. Orgler,* 771 So. 2d 374, 377 (Miss. App. 2000) ("[I]t has long been the law in Mississippi that a cause of action involving an intentional tort begins to run from the time the individual is injured and not its discovery..."). Thus, Plaintiff's intentional tort claim is barred either by the one-year statute of limitations in Section 15-1-35, or the three-year statute of limitations in Section 15-1-49, as a cause of action accrues under both statutes on the date the plaintiff discovers the injury, not the injury and its wrongful cause.

> accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

Miss. Code Ann. § 15-1-49.

Consistent with the plain language of Section 15-1-49, Mississippi courts routinely have held that a cause of action accrues when the injury or disease is diagnosed. *See, e.g., Owens-Illinois, Inc. v. Edwards*, 573 So. 2d 704, 709 (Miss. 1990); *Schiro v. American Tobacco Co.*, 611 So. 2d 962, 965 (Miss. 1992) (holding cause of action accrued when plaintiff learned of her cancer diagnosis); *Pollard v. Sherwin-Williams Co.*, 955 So. 2d 764, 769 (Miss. 2007) ("This Court has determined that 'the cause of action accrues and the limitations period begins to run when the plaintiff can reasonably be held to have knowledge of the injury or disease.'")(internal citations omitted). This Court has never held that Section 15-1-49(2) tolls a plaintiff's claims until the discovery of both the injury *and its cause*. In fact, this Court has expressly rejected such a proposition by stating that knowledge of a "cause" of an illness, or any "causative relationship" between the injury and an injurious act, are *not applicable factors* in determining when the statute of limitations begins to run under Miss. Code Ann. § 15-1-49. *Edwards*, 573 So. 2d at 709.

In *Edwards*, an employee filed suit for personal injuries allegedly caused by exposure to asbestos. *Id.* at 705. Addressing whether his claims were time-barred, the trial court held that a common law discovery rule tolled the statute of limitations until "plaintiff can reasonably be held to have knowledge of the fact that he or she has been injured, the cause of the injury, and the causative relationship between the injury and the injurious act or product." *Id.* at 706. On

appeal, this Court specifically rejected the trial court's reliance on knowledge of the cause or causative relationship in determining whether the action was timely filed:

> The cause of action accrues and the limitations period begins to run when the plaintiff can reasonably be held to have knowledge of the injury or disease. Though the cause of the injury and the causative relationship between the injury and the injurious act or product may also be ascertainable on this date, these factors are not applicable under § 15-1-49(2) . . .

Id. at 709. Under Section 15-1-49, therefore, the three-year statute of limitations begins to run as soon as plaintiff becomes aware of the injury or disease.

The United States Court of Appeals for the Fifth Circuit squarely addressed this issue in its recent *Barnes* decision. In *Barnes,* the plaintiff filed suit against the same defendants as involved in this case, alleging that emissions from the Grenada Plant caused her mother's death from breast cancer. *Barnes,* 532 F.3d at 358-9. The District Court held that plaintiff's cause of action did not accrue until she knew of both her injury and its cause. *Id.* at 360. Relying on this Court's decision in *Edwards* and the plain language of Section 15-1-49, the Court of Appeals reversed and rendered judgment in defendants' favor, holding that "[u]nder § 15-1-49, a cause of action accrues when the plaintiff has knowledge of the injury, not knowledge of the injury and its cause." *Id.* at 361.

Consistent with *Edwards* and *Barnes*, this Court's recent decision in *Sutherland v. Estate of Ritter*, 959 So. 2d 1004 (Miss. 2007), further supports the Circuit Court's entry of summary judgment in Defendants' favor. In *Sutherland,* the Court addressed confusion in prior cases regarding whether a cause of action

accrues under Section 15-1-49 even though a plaintiff may not know that his alleged injury was caused by wrongful conduct. After recognizing that the express terms of Section 15-1-49 specifically concern whether the plaintiff has discovered "the injury", the Court confirmed that knowledge of potential causation is irrelevant outside the context of a medical malpractice action. *Id.* at 1008-9.

Given the differences in language used in the two statutes, the *Sutherland* Court pointedly emphasized that the discovery rule for medical malpractice cases is "different." *Id.* at 1008. As Section 15-1-49 focuses on the discovery of the injury, and not the discovery of the "act, omission or neglect" that caused the injury, it is plain that the statute of limitations in Section 15-1-49 begins to run when the plaintiff learns of the injury, and not the "wrongful cause" of the injury. *See State Indus. Prods. Corp. v. Beta Tech., Inc.*, No. 08-60620, 2009 WL 1930038, at *2 (5th Cir. July 7, 2009) ("Importantly, under § 15-1-49 (2), the cause of action accrues once a party discovers its *injury* – regardless of whether the party has also discovered the cause of the injury."); *Wells v. Radiator Specialty Co.*, 413 F. Supp. 2d 778, 779 (S.D. Miss. 2006) (expressly rejecting argument that plaintiff's claims were tolled until plaintiff discovered causal relationship between illness and exposure to benzene, and stating that "[t]he legislature has determined that three years is an adequate time to discover a relationship between an injury and its cause and that suit beyond that period should not be allowed. *This is peculiarly a legislative function upon which courts should not intrude.*") (emphasis added); *Fowler v. First Chem. Corp.*, No.

2:05cv16-KS-MTP, 2006 WL 2527317 (S.D. Miss. Aug. 30, 2006) (same analysis and conclusion).[3]

ii. Principles of statutory construction directly support Defendants' contention that the statute begins to run when plaintiff becomes aware of the injury or disease.

Edwards, *Barnes* and *Sutherland* rely upon rules of statutory construction that directly support Defendants' argument that the statute begins to run when plaintiff becomes aware of the injury or disease. The *Edwards* Court compared the language chosen by the legislature for Section 15-1-49 to that used in the medical malpractice statute of limitations - Miss. Code. Ann. § 15-1-36. The Court noted that the medical malpractice statute of limitations not only requires knowledge of the injury, but also knowledge of the "act, omission or neglect" that caused the injury (i.e., knowledge of the causative relationship). In contrast, the Court noted that the unambiguous language of Section 15-1-49 contains no provision requiring knowledge of the "cause of the injury" or the "causative relationship" between the injury and the "injurious act."

Implicit in this Court's decision in *Edwards* was the fact that the language chosen by the legislature for the medical malpractice statute, compared to the

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[3] *See also Schiro v. Am. Tobacco Co.*, 611 So.2d 962, 965 (Miss. 1992) (relying on *Edwards* to determine plaintiff's cause of action accrued when she learned of her cancer diagnosis, not the date of knowledge of the disease's cause); *Wilbanks v. A.H. Robins Co., Inc.*, No. 98-60393, 1999 WL 800019, at *1 (5th Cir. Sept. 15, 1999) (relying on *Edwards* to expressly reject plaintiff's argument that limitations did not begin to run until she knew that her injuries were illegally caused by the defendant's product, and holding that "[s]he need only know of the injury itself."); *Pounds v. Rogersol, Inc.*, No. 3:07-cv-554-WHB-LRA, 2009 WL 607429, at *5 (S.D. Miss. March 5, 2009) (relying on *Edwards* to hold that plaintiff's claims accrued when decedent first had knowledge of her injury, and expressly rejecting plaintiff's claims that the statute of limitations was tolled until the wrongful cause of the injury was determined).

language chosen for the general statute of limitations applicable to the present case, is key to understanding the legislature's intent. The adoption of the medical malpractice statute in 1976 demonstrated that the legislature knew how to draft a statute requiring knowledge of the "act, omission or neglect" before the commencement of the statue of limitation. *See Arant v. Hubbard*, 824 So. 2d 661, 615 (Miss. 2002) (stating that it is presumed "the legislature, when it passes a statute, knows the existing laws.") By omitting similar language when it later adopted the discovery rule applicable to the present case, the legislature's different intent is manifested by the omission of the language requiring knowledge as to the cause or causation relationship. *See City of Natchez v. Sullivan*, 612 So. 2d 1087, 1089 (Miss. 1992) (holding that "the omission of language from a similar provision on a similar subject indicates that the legislature had a different intent in enacting the provisions, which it manifested by the omission of the language.") Such is the distinction recognized in *Edwards*.

Further supporting Defendants' argument is the fact that the legislature included a provision in the medical malpractice statute mandating that no cause of action based upon medical malpractice could be brought "more than seven (7) years after the alleged act, omission or neglect occurred" – no matter when the plaintiff discovered the cause of the injury. Miss. Code. Ann. § 15-1-36. This statute of repose demonstrates the legislature's recognition of the problems inherent with allowing an open-ended statute of limitations under which a plaintiff could file a lawsuit decades after the alleged negligence by merely claiming recent discovery of causation. By comparison, Section 15-1-49

applicable here contains no separate statute of repose. Based upon the rules of statutory construction, this omission further confirms the legislature's intent not to allow the statute of limitations to toll indefinitely until prospective plaintiffs obtain knowledge of the "cause of the injury" or the "causative relationship."

The *Barnes* and *Sutherland* Courts explicitly acknowledge this distinction between the language in Sections 15-1-49 and 15-1-36. In response to the plaintiff's contention that the statute of limitations in Section 15-1-49 did not begin to run until plaintiff discovered the wrongful cause of the injury, the *Barnes* Court stated:

> **The firmest rebuke to this interpretation is the language of the statute itself, which refers only to discovery of the injury, not to discovery of its cause.** The latent discovery statute differs markedly from Mississippi's limitations provision governing medical malpractice suits, which commences only when the negligent act "shall or with reasonable diligence might have been first known or discovered ...." That the medical malpractice provision refers to discovery of the "neglect" as opposed to the "injury" evidences the legislature's ability to craft a discovery rule like that advocated by Barnes, and reinforces the limited scope of the latent discovery provision [set forth in Section 15-1-49(2)].

Barnes, 534 F.3d at 360 (emphasis added); *see also Sutherland,* 959 So. 2d at 1008 (comparing the language in Section 15-1-49 with that in Section 15-1-36, and concluding that "[t]he discovery rule for medical negligence cases, however, is different" because it focuses on discovery of negligence, rather than discovery of the injury).

The plain language of Section 15-1-49, this Court's prior decisions and principles of statutory construction all support the contention that a cause of

action accrues under Section 15-1-49(2) when the plaintiff discovers the injury, not the cause of the injury. Because Plaintiff admittedly discovered her injuries more than three years before filing suit, the Circuit Court correctly concluded that her claims are barred.

b. The cases cited by Plaintiff do not overcome the plain language of Section 15-1-49 or the clear directive in this Court's prior decisions that a cause of action accrues when plaintiff becomes aware of the injury or disease.

Plaintiff cites a litany of Mississippi cases, but none overcomes the plain language of Section 15-1-49 or the clear directive in this Court's prior decisions that a cause of action under that Section accrues when the plaintiff learns of the injury or disease. For instance, in *Smith v. Sneed*, 638 So. 2d 1252, 1253 (Miss. 1994), the Court, interpreting a prior version of Section 15-1-49, held that a common law discovery rule tolled the statute of limitations in a legal malpractice action until "the client learns or through the exercise of reasonable diligence should learn of the negligence of his lawyer." The Court rejected the Circuit Court's determination that the statute began to run at the time the injury was sustained. *Id.* at 1256-7.

It is important to recognize that the *Smith* Court was interpreting the version of Section 15-1-49 that applied at the time the plaintiff filed his suit in 1988, which provided: "All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after." *See Smith,* 638 So. 2d at 1254. That version of Section 15-1-49 did not contain any provision that would toll the statute until the plaintiff discovered the injury. Thus, focusing on the inherently undiscoverable

nature of the injury in a legal malpractice action, which it analogized with a medical malpractice action, the *Smith* Court applied a common law discovery rule to plaintiff's claims. At no point did the *Smith* Court apply the discovery rule because plaintiff was unable to discover the "wrongful cause" of the injury. Instead, the sole focus in *Smith* was whether the common law discovery rule applied to legal malpractice claims to toll the running of the statute until a plaintiff discovered the injury itself – that is, the lawyer's conduct – not the wrongful cause of the injury.

The next case cited by Plaintiff, *Donald v. Amoco*, 735 So. 2d 161 (Miss. 1999), actually disproves her argument. Specifically, *Donald* concerned allegations of property damage stemming from radioactive waste buried in pits detectable only through the use of a survey meter. While the complaint was filed almost five years after plaintiff acquired the property, the Court held that the "injury" at issue was inherently undiscoverable and, therefore, qualified as a "latent injury" under Section 15-1-49(2). Specifically, *Donald* focused on the unforeseen nature of the injury, which the plaintiff could not perceive "until it was readily apparent as traceable radioactive waste by use of a survey meter." *Id.* at 168. In the very quote selected by the Plaintiff, the *Donald* Court applied the discovery rule because it was unrealistic for the plaintiff to "*perceive the secret injury*" at the time of the wrongful act. *Donald*, 735 So. 2d at 168 (emphasis added). At no point does *Donald* apply the discovery rule because plaintiff was unable to discover the *cause* of the injury. Instead, the sole focus in *Donald* was

whether the latent injury discovery rule applied, not whether knowledge of causation was relevant.

Plaintiff also selectively quotes from several cases discussing the medical malpractice statute of limitations, without disclosing the quotations' reference to the inapplicable statute, even though this Court has explicitly held that Section 15-1-49 and the medical malpractice statute of limitations are "different." *Sutherland,* 959 So. 2d at 1008. For instance, Plaintiff cites to *Smith v. Sanders,* 485 So. 2d 1051, 1052-53 (Miss. 1986), for the proposition that "under Mississippi law, legal, actionable injury includes both knowledge of the loss, and the actionable activities giving rise to the loss." (Appellant's Brief, p. 8.) However, *Sanders* is a medical malpractice case analyzing the medical malpractice statute of limitations, with no reference to Section 15-1-49. Likewise, Plaintiff cites *PPG Architectural Finishes v. Lowery,* 909 So. 2d 47, 50-52 (Miss. 2005), for the proposition that "the plaintiff did not have to file suit until she discovered that her injuries were caused by exposure to paint fumes." (Appellant's Brief, p. 8.) However, the discussion in *Lowery* is based primarily on a discussion of the medical malpractice statute of limitations. *See Lowery,* 909 So. 2d at 50 (discussing *Sweeney v. Preston*, 642 So. 2d 332, 333 (Miss. 1994)).

This Court's recent *Sutherland* decision serves to resolve the confusion created by some of its prior cases – including *Lowery* – regarding the stark differences between Section 15-1-49 and the medical malpractice statute. *See Sutherland,* 959 So.2d at 1007-9 (noting "ambiguities which we have created in our prior decisions" and discussing, *inter alia,* its opinion in *Lowery*).

Recognizing that its "use of the term 'latent injury' in previous cases has led to confusion and misunderstanding of the discovery rule," the Court sought to clarify the law by emphasizing that the medical malpractice statute is "different" from Section 15-1-49 because of its unique focus on discovery of negligence, rather than injury. *Id.* at 1008. Plaintiff's attempt to conflate Section 15-1-49 and Section 15-1-36 into a single statute of limitations requiring knowledge of causation cannot stand in light of this Court's clear directive in *Sutherland* that these statutes are "different," and must be treated as such.

Plaintiff sows further confusion by citing cases which do not support her contention that the statute of limitations set forth in Section 15-1-49 was tolled until she became aware of the cause of her injury. *See, e.g., Punzo v. Jackson County, Mississippi,* 861 So.2d 340 (Miss. 2003) (interpreting the statute of limitations in the Mississippi Tort Claims Act, with no reference to Section 15-1-49); *Barnes v. Singing River Hosp. Sys.,* 733 So. 2d 199 (Miss. 1999) (same); *Pickens v. Donaldson,* 748 So. 2d 684 (Miss. 1999) (same); *Staheli v. Smith,* 548 So. 2d 1299 (Miss. 1989) (interpreting the statute of limitations for defamation actions set forth in Miss. Code Ann. § 15-1-35, with no reference to Section 15-1-49).

In short, Plaintiff has failed to cite a single case that overcomes the plain language of Section 15-1-49, which references only the injury, or this Court's clear and specific statement in *Edwards* and subsequent cases. Under Section 15-1-49, a cause of action accrues and the statute of limitations begins to run when

the plaintiff discovers the injury or disease, not the wrongful cause of the injury or disease.

c. This Court should reject Plaintiff's invitation to graft a causation element onto Section 15-1-49 where none exists.

Plaintiff urges the Court to adopt a "principled reading" of Section 15-1-49 and graft a discovery rule involving "causation" onto that statute. (Appellant's Brief, pp. 5, 9.) Taken to its extreme, Plaintiff's insistence that a cause of action does not accrue under Section 15-1-49 until a plaintiff has knowledge of the wrongful cause of his or her injury would allow a plaintiff to bring suit on behalf of her grandparents, or even great grandparents, decades after their passing by merely asserting recent awareness of the alleged "cause" of their death. No Mississippi Supreme Court case has ever held that knowledge of the cause of the disease is required in order to commence the running of the statute of limitations. Such a rule would undoubtedly lead to manipulation and fraud and is inconsistent with the fundamental purpose of a statute of limitations. *See, e.g., Cole v. State,* 608 So. 2d 1313, 1317-18 (Miss. 1992) ("These statutes are founded upon the general experience of society that valid claims will be promptly pursued and not allowed to remain neglected. They are designed to suppress assertion of false and stale claims, when evidence has been lost, memories have faded, witnesses are unavailable, or facts are incapable of production because of the lapse of time.").

Pursuant to the express terms of the statute and this Court's prior decisions, it is clear that a cause of action accrues, and the statute of limitations begins to run, when the plaintiff learns of his or her injury. Uncertainty regarding the *cause* of the injury does not toll the limitations period. It is up to the

legislature, and not the courts, to address any perceived unfairness in the statute. As the *Edwards* Court noted, "it is the legislature's prerogative to change or amend the present statute or enact a new one." 573 So. 2d at 708; *see also Wells*, 413 F. Supp. 2d at 779 ("The legislature has determined that three years is an adequate time to discover a relationship between an injury and its cause and that suit beyond that period should not be allowed. *This is peculiarly a legislative function upon which courts should not intrude.*") (emphasis added).

Since Plaintiff admittedly discovered her injuries more than three years prior to filling suit, her claims are time-barred and the Circuit Court's award of summary judgment in Defendants' favor was proper.

III. The Circuit Court Correctly Found That Plaintiff Failed To Show That The CERLCA Statute of Limitations Was Applicable To Her Claims.

Seeking to escape this Court's prior decisions and the unambiguous language of Miss. Code Ann. § 15-1-49, Plaintiff offers a one and-a-half page argument (devoid of any support, significant authority or discussion) that invokes a provision in a federal statute with absolutely no connection to this case. (Appellant's Brief, pp. 11-12.) However, the federal limitation period set forth in Section 9658 is not applicable to the Grenada Plant, which is an existing wood treating plant subject to a Resource Conservation and Recovery Act ("RCRA") permit. Moreover, Plaintiff has pled no claims under CERCLA, nor has she established that her claims arose from a "release" of "hazardous substances" into the "environment" so that Defendants' "facility" falls within CERCLA. Even if this Court were to find that Section 9658 resurrects Plaintiff's time-barred state law claims, its application in this case would be unconstitutional.

a. Section 9658 does not apply because this is not a CERCLA case.

i. Plaintiff has not met her burden of proving that her claims fall under CERCLA.

Plaintiff has failed to meet her burden of proving that CERCLA applies to her stale state law claims. *See Barnes,* 534 F.3d at 365 ("[T]he plaintiff must, as the proponent of a defense to the state statute of limitation, carry her burden to prove that she is entitled to the benefit of the discovery rule."). Instead, Plaintiff attempts to place the burden on Defendants to *disprove* the applicability of CERCLA preemption here. (*See* Appellant's Brief, p. 12 ("[Defendants did not] prove that [Plaintiff's] injuries did not arise out of exposure to 'hazardous substance(s)...pollutant(s) or contaminant(s), released into the environment...'") However, the law is clear that "the party asserting federal preemption of state law...bears the burden of persuasion." *Barnes,* 534 F.3d at 363 (*citing AT&T Corp. v. Pub. Util. Comm'n of Texas,* 373 F.3d 641, 645 (5th Circ. 2004); *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 255 (1984)). As the *Barnes* Court explained, in order to meet this burden, Plaintiff "must prove that her claims arose from a 'release' of 'hazardous substances' into the 'environment,' as well as other case-specific preconditions establishing that the defendant's 'facility' falls within CERCLA." *Barnes,* 534 F.3d at 365.[4]

As an initial matter, there is no evidence that the Grenada Plant meets the CERCLA definition of a "facility." Plaintiff fails to demonstrate how CERCLA

[4] Even in *McDonald v. Sun Oil Co.,* 548 F.3d 774 (9th Cir. 2008), one of the three cases cited by Plaintiff, the Court specifically found that the plaintiffs had incurred "cleanup costs" under CERCLA. *McDonald,* 548 F.3d at 784. Here, Plaintiff has made no such showing.

applies to an existing wood treating plant subject to a RCRA permit. Plaintiff fails to consider, let alone counter, CERCLA's express focus on "inactive" and "abandoned...Superfund sites" as opposed to "existing" sites. *See Barnes,* 534 F.3d at 363 ("[T]he statute's regime of notification, remediation and shared cleanup liability has been characterized by this court as pertaining to 'abandoned,' not 'existing' sites."); *Cox v. City of Dallas,* 256 F.3d 281, 296 n.25 (5th Cir. 2001) (noting that the distinction between the RCRA and CERCLA statutes is that, while both deal with waste, RCRA concerns existing and active sites and CERCLA deals with abandoned waste sites) (*citing* O'Reilly, et al., *RCRA and Superfund* § 2.02, at 2-3 (stating that "CERCLA applies to abandoned sites, and RCRA deals with today's generators.")).[5] The Grenada Plant, however, is no Superfund site, and there is no evidence that it has ever been listed on the National Priorities List. It has never been the subject of any CERCLA orders or compliance actions. Rather, it is an active wood treating plant that has been the subject of a RCRA permit since 1988. Aside from simply ignoring the limitations imposed upon CERCLA's definition of a "facility," the record and Plaintiff's appellate brief are completely devoid of *any* factual or legal analysis to support a conclusion that the Grenada Plant is a CERCLA "facility" such that Plaintiff can avail herself of CERCLA's tolling provisions.

Likewise, Plaintiff has failed to establish that any "release," as defined by CERCLA, has occurred, apparently assuming that her wholly conclusory

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[5] *See also McClellan Ecological Seepage Situation v. Perry,* 47 F.3d 325, 331 (9th Cir. 1995) (holding that CERCLA only covers inactive sites); *Covalt v. Carey Canada, Inc.,* 860 F.2d 1434, 1437 (7th Cir. 1988) ("[T]he Superfund act is about inactive hazardous waste sites.").

allegations "that her injuries arose out of the discharge into the environment of numerous harmful chemicals" is sufficient. (Appellant's Brief, p. 11.) CERCLA, however, specifically disallows a contribution action stemming from any "federally permitted release," which it defines as a discharge pursuant to a permit issued under any of a variety of federal environmental laws. 42 U.S.C. §§9607 (j); 9601 (10); *see also Covalt,* 860 F.2d at 1437 (stating that CERCLA "does not regulate emissions from existing sources (the subject of the Clean Air and Clean Water Acts)"). Plaintiff fails to prove the existence of claims arising from "releases" other than those which are "federally permitted" and, therefore, exempt from CERCLA's provisions.

Plaintiff also ignores the limitations imposed on the term "environment" as it is used by CERCLA. She fails to identify a single alleged exposure location, much less prove each location's compatibility with CERCLA's definition of "environment" – an essential step in carrying her burden to prove that preemption is appropriate. There is no evidence in the record or in her appellate brief explaining how CERCLA applies to her claims. Accordingly, this Court should affirm the Circuit Court's order granting summary judgment in Defendants' favor.[6]

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[6] Moreover, Plaintiff's lack of standing to assert any CERCLA claim raises unanswered questions concerning CERCLA's applicability to the present action. For instance, there is no evidence that Plaintiff could ever assert a CERCLA cost recovery action for cleanup costs associated with the Grenada Plant. Plaintiff points to no evidence that she incurred the necessary "response costs" for asserting a CERCLA claim. *See* 42 U.S.C. § 9607(a); *Taira Lynn Marine Ltd. No. 5, LLC v. Jays Seafood, Inc.,* 444 F.3d 371, 381-82 (5th Cir. 2006) (reversing district court's denial of defendant's motion for summary judgment on a CERCLA claim because plaintiffs failed to allege that they incurred response

ii. Plaintiff has pled no claims under CERCLA.

Likewise, Plaintiff makes no attempt to explain how Section 9658 can apply in the absence of a CERCLA claim. While there is no controlling Mississippi precedent on this issue, most other courts have found CERCLA claims to be necessary conditions precedent to invoking Section 9658:

> [T]he wording of § 9658 and its incorporation of the terms of CERCLA and the CERCLA definition of those terms indicate that **the provision was limited to application in the situation where a state cause of action exists in conjunction with a CERCLA cause of action.**

Knox v. AC&S, Inc., 690 F. Supp. 752, 757-58 (S.D. Ind. 1988) (emphasis added, internal citations and quotations omitted).[7] *See also Becton v. Rhone-Poulenc,*

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costs). Moreover, the relief provided under CERCLA, recovery of response costs, does not redress the various physical injuries that Plaintiff allegedly suffered. Plaintiff has no standing to bring a CERCLA cost recovery action. Likewise, plaintiff is precluded from bringing a CERCLA citizen suit, which may be commenced "against any person...who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter." §310 CERCLA, 42 U.S.C. § 9659. There is no evidence that the Grenada Plant has ever violated *any* CERCLA standard, regulation, requirement, or order, as required to bring a CERCLA citizen suit.

[7] Courts have generally been reluctant to apply Section 9658 in non-CERCLA cases. Even those that have not applied the reasoning employed in *Knox* directly have often found other distinguishing fact issues to avoid holding that Section 9658 applies to actions that assert State claims without an accompanying CERCLA claim. *See, e.g., First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862 (4th Cir. 1989) (finding that Congress did not intend § 9658 to pre-empt state statutes of repose in asbestos actions); *Covalt v. Carey Canada, Inc.*, 860 F.2d 1434 (7th Cir. 1988) (Section 9658 did not apply to hazardous substances encountered in the workplace as part of ongoing operations); *but see O'Connor v. Boeing North American, Inc.*, 311 F.3d 1139 (9th Cir. 2002) (not requiring underlying CERCLA claim to apply § 9658 based on "plain language" of the statute).

Inc., 706 So.2d 1134, 1137 (Ala. 1997) ("Most federal courts have limited § 9658 to situations where an underlying CERCLA claim has been made . . . ").[8]

Similarly, in *Electric Power Board of Chattanooga v. Westinghouse Electric Co.*, 716 F. Supp. 1069 (E.D. Tenn. 1988), the court stated:

> CERCLA seeks to provide funds for toxic clean-up and enforcement of federal and state laws regarding such disposal activities, **but only where there is also an underlying cause of action under CERCLA.** In this case, **[Plaintiff] has asserted no cause of action under this Act, but seeks only to have the benefit of one of its provisions to avoid the statute of repose.** Principles of statutory construction compel this Court to consider [Plaintiff's] argument in light of the underlying purpose and intent of the statute. For these reasons, the Court declines to hold that § 9658 alters the statutory time limitation for filing property damage claims such as this.

716 F. Supp. at 1081 (emphasis added, internal citations omitted).[9]

As explained in *Knox*, despite its reference to "state law," Section 9658 does not operate independently of CERCLA. It does not operate in a vacuum, but comes into play only when a state law claim for personal injury or property damage is filed in conjunction with an underlying CERCLA claim. Absent a CERCLA claim, courts cannot even determine whether Section 9659 applies. For example, CERCLA's plain language requires that, in order for federal preemption

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[8] *But see Barnes,* 534 F.3d at 365 (concluding that it is not a prerequisite that a CERCLA suit be pending or that plaintiff's state law injury claims be filed in conjunction with a CERCLA suit in order for a plaintiff to avail him or herself to CERCLA's tolling provisions, but that plaintiff must "carry her burden to prove that she is entitled to the benefit of the discovery rule.").

[9] See also *Rivas v. Safety-Kleen Corp.*, 98 Cal. App. 4th 218, 235 (Cal. Ct. App. 2002) (explaining that, in adopting CERCLA, Congress was not concerned with individual attempts to recover for personal injury).

of the state accrual date, there must be a "**release,**" as defined under CERCLA (§9601(22)), of a "**hazardous substance**" (§9601(14)), or "**pollutant or contaminant**" (§9601(33)) from a "**facility**" (§9601(9)), into the "**environment.**" (§9601(8)). Each of these terms has a specific statutory definition under CERCLA. As a practical matter, unless these criteria are alleged and proven, a court cannot determine the applicability of Section 9658. *See The Burlington Northern & Santa Fe R.R. Co. v. Poole Chemical Co., Inc.*, No. Civ.A.5:04-CV-047-C, 2004 WL 1926322 at *10-12 (N.D. Tex. Aug. 27, 2004) (Section 9658 did not apply where only state law product liability claims, and no CERCLA cause of action, were asserted and defendant did not meet the definition of a liable party under § 9607 of CERCLA).

Plaintiff relies primarily on *Tucker v. So. Wood. Piedmont Co.*, 28 F.3d 1089 (11th Cir. 1994), in support of her contention that CERCLA applies to her time-barred state law claims. (Appellant's Brief, p. 12.) However, as the *Barnes* Court noted in refusing to follow it, *Tucker* offers no discussion or analysis of how Section 9658 applied to preempt the state statute of limitations at issue in that case. *Barnes,* 534 F.3d at 363; *see also Becton,* 706 So.2d at 1140 ("[N]o issue was raised in *Tucker* as to whether § 9658 would apply in the absence of underlying CERCLA claims or CERCLA hazardous waste."). And, as the *Barnes* Court noted, the *Tucker* assumption that Section 9658 applies broadly, regardless of whether the plaintiff has proven the requisite CERCLA elements, "ignores the statutory exemptions from CERCLA and the definitions themselves, and runs

afoul of the principle that terms included in a statute must have consistent meanings throughout." *Id.*

Kowalski v. Goodyear Tire & Rubber Co., 841 F. Supp. 104 (W.D.N.Y. 1994), also cited by Plaintiff on the CERCLA issue, likewise illustrates the difficulty in selectively applying only a snippet of CERCLA to a non-CERCLA case. First, the *Kowalski* court misinterpreted Section 9658 as providing "an additional remedy, not one confined to actual CERCLA actions." *Id.* at 108. Section 9658 does not provide an *additional* federal remedy. Rather, it provides no remedy at all, serving instead to revive otherwise defunct state causes of action, in limited instances where state claims are pled in conjunction with a CERCLA claim.

Reading CERCLA as a whole, Congress apparently did not find it necessary to state the obvious: for CERCLA to apply to a particular case, *the case must be brought under CERCLA. Kowalski's* holding disregards the basic premise that, in order for a federal statute to override state law, such intent must be made explicit. *Cf. Bates v. Dow Agrosciences LLC*, 125 S. Ct 1788, 1801 (2005) ("In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest'."); *see also Knox*, 690 F. Supp. at 757-58 ("Nothing in the language of [CERCLA] indicates that it was intended to have the broad sweeping effect which plaintiff advances in this case").

Accordingly, this Court should follow the majority of the courts and find that a CERCLA claim is a necessary predicate for invoking Section 9658 to revive otherwise stale state law claims.

b. It would be unconstitutional to apply Section 9658 to the facts of this case.

If this Court finds that Plaintiff is not required to plead a claim under CERCLA for Section 9658 to revive her stale state law claims, or at the very least carry her burden to prove that she is entitled to the benefit of that Section, the overt constitutionality of Plaintiff's CERCLA argument still must pass traditional Commerce Clause and Tenth Amendment analyses under the United States Constitution. However, application of Section 9658 in this case would constitute impermissible intrusion into the realm of state government by federal lawmakers.

i. If Section 9658 were applied to the facts of this case, it would cause an improper exercise of Congress' authority under the Commerce Clause.

While the Commerce Clause gives Congress broad authority to regulate activity with true economic impacts on an interstate basis, this power is not without limits, and must be curtailed where Congress seeks to impose its authority on non-economic matters pertaining only to state or local matters. The Supreme Court has long held that the scope of Congress' power to regulate interstate commerce ". . . must be considered in light of our dual system of government and may not be extended so as . . . effectively obliterate the distinction between what is national and what is local and create a completely centralized government." *U.S. v. Lopez*, 514 U.S. 549, 557 (1995) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

CERCLA is an exercise of Congress' power to regulate activity involving the release of hazardous substances because the problem caused by disposal of such wastes "is often not susceptible of local solution." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 3 (1989). However, this does not mean that every particular aspect of CERCLA is necessarily a proper exercise of Congress' Commerce Clause authority. CERCLA was *not* enacted to compensate private parties for harms resulting from exposure to hazardous substances. Section 9658 is a distinct and anomalous section of CERCLA that has nothing to do with the statute's overall purpose of providing a national framework for remediation of hazardous substance sites. Reliance on an overall regulatory scheme is insufficient to justify a particular regulatory aspect where, as here, the specific provision at issue "is not an *essential* part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561 (emphasis added).

As promulgated in 1980, the overriding purpose of CERCLA was to provide a national framework to address the perceived crisis created by unregulated disposal of hazardous and toxic substances. *See, e.g., Electric Power Board of Chattanooga v. Westinghouse Electric Co.*, 716 F. Supp. 1069 (E.D. Tenn. 1988). CERCLA provides a statutory cause of action for governmental entities and private party litigants to recover costs associated with *remediation* of contaminated properties. 42 U.S.C. §§ 9607, 9613. It is clear that "by specifically limiting recovery to the enumerated remedies, Congress was manifesting its intent to limit the federal interest to clean-up and compliance

costs." *Polcha v. AT&T Nassau Metals Corp.*, 837 F. Supp. 94, 96 (MD. Penn. 1993). Notably, Congress considered, but rejected, a version of the bill that included causes of action for economic damages and personal injury. *See Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1535-36 (10th Cir. 1992). To this day, CERCLA contains no federal toxic tort cause of action, and Section 9658 is the only aspect of CERCLA with any relationship whatsoever to state law tort claims.

Plaintiff's interpretation and application of Section 9658 to this case would mean that Congress intended to substitute a federal accrual date for state causes of action based on state tort law. Such an application "plows thoroughly new ground" and "represents a sharp break" with traditional respect for an area where states long have been sovereign. *Lopez*, 514 U.S. at 563-64. Thus, Plaintiff's interpretation of Section 9658 fails the Commerce Clause test given the facts of this case.[10]

ii. The application of Section 9658 to the facts of this case would cause an unconstitutional intrusion into States' sovereignty under the Tenth Amendment.

Plaintiff's contention that Section 9658 should be applied to this case seeks to erase the well-established line separating the powers of state and federal government provided by both the Tenth Amendment and concepts of federalism. Even if Congress had the power to directly regulate intrastate activity by means of promulgating *a federal cause of action* for personal injury and/or property damage (and deciding what type of "discovery rule," if any, was appropriate to apply), it has not chosen to do so. Plaintiff's interpretation of Section 9658 means

[10] *But see Freier v. Westinghouse Electric. Corp.*, 303 F.3d 176, 200-03 (2nd Cir. 2002).

Congress directed a compulsory change in *state law*. Such an interpretation, if followed, would override the Mississippi legislature's decision concerning a state cause of action and would violate the Tenth Amendment.

Tenth Amendment analysis "requires courts to examine not only whether Congress has the raw power to regulate, but also whether Congress' chosen method of regulation interferes with state sovereignty." *U.S. v. Lewis*, 936 F. Supp. 1093, 1101 (D.R.I. 1996) (citing *Acorn v. Edwards*, 81 F.3d 1387, 1393 (5th Cir. 1996)). The Constitution does not permit Congress to override a state's legislative process by means of preempting the limitations period of a state cause of action. *See Acorn*, 81 F.3d at 1394 (finding that Congress' attempt to force states to enact plans to deal with lead contamination in drinking water was "an unconstitutional intrusion upon the States' sovereign prerogative to legislate as it sees fit").

The Tenth Amendment prohibits Congress from usurping state law to effectuate its own legislative schemes. Federal actions that ". . . would 'commandeer' state governments into the service of federal regulatory purposes . . . would for this reason be inconsistent with the Constitution's division of authority between state and federal governments." *New York v. United States*, 505 U.S. 144, 176 (1992). Even where Congress has the constitutional authority to mandate or prohibit certain acts, "it lacks the power directly to compel the State to require or prohibit those acts." *Id.* at 166. Contrary to Plaintiff's argument, therefore, Congress did not seek to preempt the field of toxic tort law and did not attempt to establish a federal framework for providing such plaintiffs recovery

under CERCLA. Such an interpretation of Section 9658 would cause it to be unconstitutional and must not be accepted.[11]

CONCLUSION

Because Plaintiff failed to file her lawsuit within three years after she gained knowledge of her alleged illnesses, each of her claims is barred by the limitations period set forth in Section 15-1-49. This Court should reject Plaintiff's invitation to graft a discovery rule relating to causation onto Section 15-1-49 where none exists. Instead, the Court should apply the plain meaning of the statute and follow its prior decisions, which have uniformly stated that a cause of action accrues and the statute of limitations begins to run when the plaintiff learns only of the injury, and not the cause of the injury. Therefore, Koppers Inc., Beazer East, Inc. and Three Rivers Management, Inc. respectfully request that this Court affirm the judgment of the Circuit Court granting summary judgment in their favor and against Plaintiff on all of Plaintiff's claims.

This the 9th day of September, 2009.

Respectfully submitted,

Koppers Inc., Beazer East, Inc. and Three Rivers Management, Inc.

By: Chris Shapley
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[11] *But see Freier v. Westinghouse Electric. Corp.*, 303 F.3d 176, 200-03 (2nd Cir. 2002).

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CERTIFICATE OF SERVICE

I, Christopher A. Shapley, do hereby certify that I have this day caused to be served by United States Mail, postage prepaid, a correct copy of the foregoing instrument to the following persons:

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This the 9th day of September, 2009

Chris Shapley

Christopher A. Shapley

Miss. Code Ann. § 15-1-49. Actions without prescribed period of limitation; actions involving latent injury or disease

(1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.

(2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

(3) The provisions of subsection (2) of this section shall apply to all pending and subsequently filed actions.

Miss. Code Ann. § 15-1-35. Actions for certain torts

All actions for assault, assault and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words concerning the person or title, for failure to employ, and for libels, shall be commenced within one (1) year next after the cause of such action accrued, and not after.

Miss. Code Ann. § 15-1-36. Actions for medical malpractice

(1) For any claim accruing on or before June 30, 1998, and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered.

(2) For any claim accruing on or after July 1, 1998, and except as otherwise provided in this section, no claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, institution for the aged or infirm, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date the alleged act, omission or neglect shall or with reasonable diligence might have been first known or discovered, and, except as described in paragraphs (a) and (b) of this subsection, in no event more than seven (7) years after the alleged act, omission or neglect occurred:

(a) In the event a foreign object introduced during a surgical or medical procedure has been left in a patient's body, the cause of action shall be deemed to have first accrued at, and not before, the time at which the foreign object is, or with reasonable diligence should have been, first known or discovered to be in the patient's body.

(b) In the event the cause of action shall have been fraudulently concealed from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence should have been, first known or discovered.

(3) Except as otherwise provided in subsection (4) of this section, if at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person to whom such claim has accrued shall be six (6) years of age or younger,

then such minor or the person claiming through such minor may, notwithstanding that the period of time limited pursuant to subsections (1) and (2) of this section shall have expired, commence action on such claim at any time within two (2) years next after the time at which the minor shall have reached his sixth birthday, or shall have died, whichever shall have first occurred.

(4) If at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person to whom such claim has accrued shall be a minor without a parent or legal guardian, then such minor or the person claiming through such minor may, notwithstanding that the period of time limited pursuant to subsections (1) and (2) of this section shall have expired, commence action on such claim at any time within two (2) years next after the time at which the minor shall have a parent or legal guardian or shall have died, whichever shall have first occurred; provided, however, that in no event shall the period of limitation begin to run prior to such minor's sixth birthday unless such minor shall have died.

(5) If at the time at which the cause of action shall or with reasonable diligence might have been first known or discovered, the person to whom such claim has accrued shall be under the disability of unsoundness of mind, then such person or the person claiming through him may, notwithstanding that the period of time hereinbefore limited shall have expired, commence action on such claim at any time within two (2) years next after the time at which the person to whom the right shall have first accrued shall have ceased to be under the disability, or shall have died, whichever shall have first occurred.

(6) When any person who shall be under the disabilities mentioned in subsections (3), (4) and (5) of this section at the time at which his right shall have first accrued, shall depart this life without having ceased to be under such disability, no time shall be allowed by reason of the disability of such person to commence action on the claim of such person beyond the period prescribed under Section 15-1-55, Mississippi Code of 1972.

(7) For the purposes of subsection (3) of this section, and only for the purposes of such subsection, the disability of infancy or minority shall be removed from and after a person has reached his sixth birthday.

(8) For the purposes of subsection (4) of this section, and only for the purposes of such subsection, the disability of infancy or minority shall be removed from and after a person has reached his sixth birthday or from and after such person shall have a parent or legal guardian, whichever occurs later, unless such disability is otherwise removed by law.

(9) The limitation established by this section as to a licensed physician, osteopath, dentist, hospital or nurse shall apply only to actions the cause of which accrued on or after July 1, 1976.

(10) The limitation established by this section as to pharmacists shall apply only to actions the cause of which accrued on or after July 1, 1978.

(11) The limitation established by this section as to podiatrists shall apply only to actions the cause of which accrued on or after July 1, 1979.

(12) The limitation established by this section as to optometrists and chiropractors shall apply only to actions the cause of which accrued on or after July 1, 1983.

(13) The limitation established by this section as to actions commenced on behalf of minors shall apply only to actions the cause of which accrued on or after July 1, 1989.

(14) The limitation established by this section as to institutions for the aged or infirm shall apply only to actions the cause of which occurred on or after January 1, 2003.

(15) No action based upon the health care provider's professional negligence may be begun unless the defendant has been given at least sixty (60) days' prior written notice of the intention to begin the action. No particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered. If the notice is served within sixty (60) days prior to the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended sixty (60) days from the service of the notice for said health care providers and others. This subsection shall not be applicable with respect to any defendant whose name is

unknown to the plaintiff at the time of filing the complaint and who is identified therein by a fictitious name.

42 U.S.C. § 9658. Actions under State law for damages from exposure to hazardous substances

(a) State statutes of limitations for hazardous substance cases

(1) Exception to State statutes

In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

(2) State law generally applicable

Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

(3) Actions under section 9607

Nothing in this section shall apply with respect to any cause of action brought under section 9607 of this title.

(b) Definitions

As used in this section--

(1) Subchapter I terms

The terms used in this section shall have the same meaning as when used in subchapter I of this chapter.

(2) Applicable limitations period

The term "applicable limitations period" means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought.

(3) Commencement date

The term "commencement date" means the date specified in a statute of limitations as the beginning of the applicable limitations period.

(4) Federally required commencement date

(A) In general

Except as provided in subparagraph (B), the term "federally required commencement date" means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.

(B) Special rules

In the case of a minor or incompetent plaintiff, the term "federally required commencement date" means the later of the date referred to in subparagraph (A) or the following:

(i) In the case of a minor, the date on which the minor reaches the age of majority, as determined by State law, or has a legal representative appointed.

(ii) In the case of an incompetent individual, the date on which such individual becomes competent or has had a legal representative appointed.

42 U.S.C. § 9601. Definitions

For purpose of this subchapter--

(1) The term "act of God" means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.

(2) The term "Administrator" means the Administrator of the United States Environmental Protection Agency.

(3) The term "barrel" means forty-two United States gallons at sixty degrees Fahrenheit.

(4) The term "claim" means a demand in writing for a sum certain.

(5) The term "claimant" means any person who presents a claim for compensation under this chapter.

(6) The term "damages" means damages for injury or loss of natural resources as set forth in section 9607(a) or 9611(b) of this title.

(7) The term "drinking water supply" means any raw or finished water source that is or may be used by a public water system (as defined in the Safe Drinking Water Act [42 U.S.C.A. § 300f et seq.]) or as drinking water by one or more individuals.

(8) The term "environment" means (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.], and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

(9) The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous

substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

(10) The term "federally permitted release" means (A) discharges in compliance with a permit under section 1342 of Title 33, (B) discharges resulting from circumstances identified and reviewed and made part of the public record with respect to a permit issued or modified under section 1342 of Title 33 and subject to a condition of such permit, (C) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 1342 of Title 33, which are caused by events occurring within the scope of relevant operating or treatment systems, (D) discharges in compliance with a legally enforceable permit under section 1344 of Title 33, (E) releases in compliance with a legally enforceable final permit issued pursuant to section 3005(a) through (d) of the Solid Waste Disposal Act [42 U.S.C.A. § 6925 (a) to (d)] from a hazardous waste treatment, storage, or disposal facility when such permit specifically identifies the hazardous substances and makes such substances subject to a standard of practice, control procedure or bioassay limitation or condition, or other control on the hazardous substances in such releases, (F) any release in compliance with a legally enforceable permit issued under section 1412 of Title 33 of section 1413 of Title 33, (G) any injection of fluids authorized under Federal underground injection control programs or State programs submitted for Federal approval (and not disapproved by the Administrator of the Environmental Protection Agency) pursuant to part C of the Safe Drinking Water Act [42 U.S.C.A. § 300h et seq.], (H) any emission into the air subject to a permit or control regulation under section 111 [42 U.S.C.A. § 7411], section 112 [42 U.S.C.A. § 7412], Title I part C [42 U.S.C.A. § 7470 et seq.], Title I part D [42 U.S.C.A. § 7501 et seq.], or State implementation plans submitted in accordance with section 110 of the Clean Air Act [42 U.S.C.A. § 7410] (and not disapproved by the Administrator of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections, (I) any injection of fluids or other materials authorized under applicable State law (i) for the purpose of stimulating or treating wells for the production of crude oil, natural gas, or water, (ii) for the purpose of secondary, tertiary, or other enhanced recovery of crude oil or

natural gas, or (iii) which are brought to the surface in conjunction with the production of crude oil or natural gas and which are reinjected, (J) the introduction of any pollutant into a publicly owned treatment works when such pollutant is specified in and in compliance with applicable pretreatment standards of section 1317(b) or (c) of Title 33 and enforceable requirements in a pretreatment program submitted by a State or municipality for Federal approval under section 1342 of Title 33, and (K) any release of source, special nuclear, or byproduct material, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.], in compliance with a legally enforceable license, permit, regulation, or order issued pursuant to the Atomic Energy Act of 1954.

(11) The term "Fund" or "Trust Fund" means the Hazardous Substance Superfund established by section 9507 of Title 26.

(12) The term "ground water" means water in a saturated zone or stratum beneath the surface of land or water.

(13) The term "guarantor" means any person, other than the owner or operator, who provides evidence of financial responsibility for an owner or operator under this chapter.

(14) The term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does

not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

(15) The term "navigable waters" or "navigable waters of the United States" means the waters of the United States, including the territorial seas.

(16) The term "natural resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]) any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe.

(17) The term "offshore facility" means any facility of any kind located in, on, or under, any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel.

(18) The term "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under, any land or nonnavigable waters within the United States.

(19) The term "otherwise subject to the jurisdiction of the United States" means subject to the jurisdiction of the United States by virtue of United States citizenship, United States vessel documentation or numbering, or as provided by international agreement to which the United States is a party.

(20)(A) The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to

bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

(B) In the case of a hazardous substance which has been accepted for transportation by a common or contract carrier and except as provided in section 9607(a)(3) or (4) of this title, (i) the term "owner or operator" shall mean such common carrier or other bona fide for hire carrier acting as an independent contractor during such transportation, (ii) the shipper of such hazardous substance shall not be considered to have caused or contributed to any release during such transportation which resulted solely from circumstances or conditions beyond his control.

(C) In the case of a hazardous substance which has been delivered by a common or contract carrier to a disposal or treatment facility and except as provided in section 9607(a)(3) or (4) of this title, (i) the term "owner or operator" shall not include such common or contract carrier, and (ii) such common or contract carrier shall not be considered to have caused or contributed to any release at such disposal or treatment facility resulting from circumstances or conditions beyond its control.

(D) The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

(E) Exclusion of lenders not participants in management

(i) Indicia of ownership to protect security

The term "owner or operator" does not include a person that is a lender that, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect the security interest of the person in the vessel or facility.

(ii) Foreclosure

The term "owner or operator" does not include a person that is a lender that did not participate in management of a vessel or facility prior to foreclosure, notwithstanding that the person--

(I) forecloses on the vessel or facility; and

(II) after foreclosure, sells, re-leases (in the case of a lease finance transaction), or liquidates the vessel or facility, maintains business activities, winds up operations, undertakes a response action under section 9607(d)(1) of this title or under the direction of an on-scene coordinator appointed under the National Contingency Plan, with respect to the vessel or facility, or takes any other measure to preserve, protect, or prepare the vessel or facility prior to sale or disposition,

if the person seeks to sell, re-lease (in the case of a lease finance transaction), or otherwise divest the person of the vessel or facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.

(F) Participation in management

For purposes of subparagraph (E)--

(i) the term "participate in management"--

(I) means actually participating in the management or operational affairs of a vessel or facility; and

(II) does not include merely having the capacity to influence, or the unexercised right to control, vessel or facility operations;

(ii) a person that is a lender and that holds indicia of ownership primarily to protect a security interest in a vessel or facility shall be considered to participate in management only if, while the borrower is still in possession of the vessel or facility encumbered by the security interest, the person--

(I) exercises decision-making control over the environmental compliance related to the vessel or facility, such that the person has undertaken responsibility for the hazardous substance handling or disposal practices related to the vessel or facility; or

(II) exercises control at a level comparable to that of a manager of the vessel or facility, such that the person has assumed or manifested responsibility--

(aa) for the overall management of the vessel or facility encompassing day-to-day decision-making with respect to environmental compliance; or

(bb) over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the vessel or facility other than the function of environmental compliance;

(iii) the term "participate in management" does not include performing an act or failing to act prior to the time at which a security interest is created in a vessel or facility; and

(iv) the term "participate in management" does not include--

(I) holding a security interest or abandoning or releasing a security interest;

(II) including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition that relates to environmental compliance;

(III) monitoring or enforcing the terms and conditions of the extension of credit or security interest;

(IV) monitoring or undertaking 1 or more inspections of the vessel or facility;

(V) requiring a response action or other lawful means of addressing the release or threatened release of a hazardous substance in connection with the vessel or facility prior to, during, or on the expiration of the term of the extension of credit;

(VI) providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the vessel or facility;

(VII) restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;

(VIII) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or

(IX) conducting a response action under section 9607(d) of this title or under the direction of an on-scene coordinator appointed under the National Contingency Plan, if the actions do not rise to the level of participating in management (within the meaning of clauses (i) and (ii)).

(G) Other terms

As used in this chapter:

(i) Extension of credit

The term "extension of credit" includes a lease finance transaction--

(I) in which the lessor does not initially select the leased vessel or facility and does not during the lease term control the daily operations or maintenance of the vessel or facility; or

(II) that conforms with regulations issued by the appropriate Federal banking agency or the appropriate State bank supervisor (as those terms are defined in section 1813 of Title

12 or with regulations issued by the National Credit Union Administration Board, as appropriate.

(ii) Financial or administrative function

The term "financial or administrative function" includes a function such as that of a credit manager, accounts payable officer, accounts receivable officer, personnel manager, comptroller, or chief financial officer, or a similar function.

(iii) Foreclosure; foreclose

The terms "foreclosure" and "foreclose" mean, respectively, acquiring, and to acquire, a vessel or facility through--

(I)(aa) purchase at sale under a judgment or decree, power of sale, or nonjudicial foreclosure sale;

(bb) a deed in lieu of foreclosure, or similar conveyance from a trustee; or

(cc) repossession,

if the vessel or facility was security for an extension of credit previously contracted;

(II) conveyance pursuant to an extension of credit previously contracted, including the termination of a lease agreement; or

(III) any other formal or informal manner by which the person acquires, for subsequent disposition, title to or possession of a vessel or facility in order to protect the security interest of the person.

(iv) Lender

The term "lender" means--

(I) an insured depository institution (as defined in section 1813 of Title 12);

(II) an insured credit union (as defined in section 1752 of Title 12);

(III) a bank or association chartered under the Farm Credit Act of 1971 (12 U.S.C. 2001 et seq.);

(IV) a leasing or trust company that is an affiliate of an insured depository institution;

(V) any person (including a successor or assignee of any such person) that makes a bona fide extension of credit to or takes or acquires a security interest from a nonaffiliated person;

(VI) the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Agricultural Mortgage Corporation, or any other entity that in a bona fide manner buys or sells loans or interests in loans;

(VII) a person that insures or guarantees against a default in the repayment of an extension of credit, or acts as a surety with respect to an extension of credit, to a nonaffiliated person; and

(VIII) a person that provides title insurance and that acquires a vessel or facility as a result of assignment or conveyance in the course of underwriting claims and claims settlement.

(v) Operational function

The term "operational function" includes a function such as that of a facility or plant manager, operations manager, chief operating officer, or chief executive officer.

(vi) Security interest

The term "security interest" includes a right under a mortgage, deed of trust, assignment, judgment lien, pledge, security agreement, factoring agreement, or lease and any other right accruing to a person to secure the repayment of money, the performance of a duty, or any other obligation by a nonaffiliated person.

(21) The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

(22) The term "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant), but excludes (A) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.], if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act [42 U.S.C.A. § 2210], or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer.

(23) The terms "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C.A. § 5121 et seq.].

(24) The terms "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to

removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

(25) The terms "respond" or "response" means remove, removal, remedy, and remedial action; all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

(26) The terms "transport" or "transportation" means the movement of a hazardous substance by any mode, including a hazardous liquid pipeline facility (as defined in section 60101(a) of Title 49), and in the case of a hazardous substance which has been accepted for transportation by a common or contract carrier, the term "transport" or "transportation" shall include any stoppage in transit which is temporary, incidental to the transportation movement, and at the ordinary operating convenience of a common or contract carrier, and any such stoppage shall be considered as a continuity of movement and not as the storage of a hazardous substance.

(27) The terms "United States" and "State" include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction.

(28) The term "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

(29) The terms "disposal", "hazardous waste", and "treatment" shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C.A. § 6903].

(30) The terms "territorial sea" and "contiguous zone" shall have the meaning provided in section 1362 of Title 33.

(31) The term "national contingency plan" means the national contingency plan published under section 1321(c) of Title 33 or revised pursuant to section 9605 of this title.

(32) The terms "liable" or "liability" under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of Title 33.

(33) The term "pollutant or contaminant" shall include, but not be limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring; except that the term "pollutant or contaminant" shall not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of paragraph (14) and shall not include natural gas, liquefied natural gas, or synthetic

gas of pipeline quality (or mixtures of natural gas and such synthetic gas).

(34) The term "alternative water supplies" includes, but is not limited to, drinking water and household water supplies.

(35)(A) The term "contractual relationship", for the purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:

(i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.

(iii) The defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that the defendant has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title, provides full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action at the facility), is in compliance with any land use restrictions established or relied on in connection with the response action at a facility, and does not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a response action.

(B) Reason to know

(i) All appropriate inquiries

To establish that the defendant had no reason to know of the matter described in subparagraph (A)(i), the defendant must demonstrate to a court that--

(I) on or before the date on which the defendant acquired the facility, the defendant carried out all appropriate inquiries, as provided in clauses (ii) and (iv), into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices; and

(II) the defendant took reasonable steps to--

(aa) stop any continuing release;

(bb) prevent any threatened future release; and

(cc) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance.

(ii) Standards and practices

Not later than 2 years after January 11, 2002, the Administrator shall by regulation establish standards and practices for the purpose of satisfying the requirement to carry out all appropriate inquiries under clause (i).

(iii) Criteria

In promulgating regulations that establish the standards and practices referred to in clause (ii), the Administrator shall include each of the following:

(I) The results of an inquiry by an environmental professional.

(II) Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility.

(III) Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed.

(IV) Searches for recorded environmental cleanup liens against the facility that are filed under Federal, State, or local law.

(V) Reviews of Federal, State, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility.

(VI) Visual inspections of the facility and of adjoining properties.

(VII) Specialized knowledge or experience on the part of the defendant.

(VIII) The relationship of the purchase price to the value of the property, if the property was not contaminated.

(IX) Commonly known or reasonably ascertainable information about the property.

(X) The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation.

(iv) Interim standards and practices

(I) Property purchased before May 31, 1997

With respect to property purchased before May 31, 1997, in making a determination with respect to a defendant described in clause (i), a court shall take into account--

(aa) any specialized knowledge or experience on the part of the defendant;

(bb) the relationship of the purchase price to the value of the property, if the property was not contaminated;

(cc) commonly known or reasonably ascertainable information about the property;

(dd) the obviousness of the presence or likely presence of contamination at the property; and

(ee) the ability of the defendant to detect the contamination by appropriate inspection.

(II) Property purchased on or after May 31, 1997

With respect to property purchased on or after May 31, 1997, and until the Administrator promulgates the regulations described in clause (ii), the procedures of the American Society for Testing and Materials, including the document known as 'Standard E1527-97', entitled 'Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process', shall satisfy the requirements in clause (i).

(v) Site inspection and title search

In the case of property for residential use or other similar use purchased by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this subparagraph.

(C) Nothing in this paragraph or in section 9607(b)(3) of this title shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 9607(a)(1) of this title and no defense under section 9607(b)(3) of this title shall be available to such defendant.

(D) Nothing in this paragraph shall affect the liability under this chapter of a defendant who, by any act or omission, caused or

contributed to the release or threatened release of a hazardous substance which is the subject of the action relating to the facility.

(36) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(37)(A) The term "service station dealer" means any person--

(i) who owns or operates a motor vehicle service station, filling station, garage, or similar retail establishment engaged in the business of selling, repairing, or servicing motor vehicles, where a significant percentage of the gross revenue of the establishment is derived from the fueling, repairing, or servicing of motor vehicles, and

(ii) who accepts for collection, accumulation, and delivery to an oil recycling facility, recycled oil that (I) has been removed from the engine of a light duty motor vehicle or household appliances by the owner of such vehicle or appliances, and (II) is presented, by such owner, to such person for collection, accumulation, and delivery to an oil recycling facility.

(B) For purposes of section 9614(c) of this title, the term "service station dealer" shall, notwithstanding the provisions of subparagraph (A), include any government agency that establishes a facility solely for the purpose of accepting recycled oil that satisfies the criteria set forth in subclauses (I) and (II) of subparagraph (A)(ii), and, with respect to recycled oil that satisfies the criteria set forth in subclauses (I) and (II), owners or operators of refuse collection services who are compelled by State law to collect, accumulate, and deliver such oil to an oil recycling facility.

(C) The President shall promulgate regulations regarding the determination of what constitutes a significant percentage of the gross revenues of an establishment for purposes of this paragraph.

(38) The term "incineration vessel" means any vessel which carries hazardous substances for the purpose of incineration of such

substances, so long as such substances or residues of such substances are on board.

(39) Brownfield site

(A) In general

The term "brownfield site" means real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.

(B) Exclusions

The term "brownfield site" does not include--

(i) a facility that is the subject of a planned or ongoing removal action under this subchapter;

(ii) a facility that is listed on the National Priorities List or is proposed for listing;

(iii) a facility that is the subject of a unilateral administrative order, a court order, an administrative order on consent or judicial consent decree that has been issued to or entered into by the parties under this chapter;

(iv) a facility that is the subject of a unilateral administrative order, a court order, an administrative order on consent or judicial consent decree that has been issued to or entered into by the parties, or a facility to which a permit has been issued by the United States or an authorized State under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), the Federal Water Pollution Control Act (33 U.S.C. § 1321), the Toxic Substances Control Act (15 U.S.C. § 2601 et seq.), or the Safe Drinking Water Act (42 U.S.C. § 300f et seq.);

(v) a facility that--

(I) is subject to corrective action under section 3004(u) or 3008(h) of the Solid Waste Disposal Act (42 U.S.C. 6924(u), 6928(h)); and

(II) to which a corrective action permit or order has been issued or modified to require the implementation of corrective measures;

(vi) a land disposal unit with respect to which--

(I) a closure notification under subtitle C of the Solid Waste Disposal Act (42 U.S.C. 6921 et seq.) has been submitted; and

(II) closure requirements have been specified in a closure plan or permit;

(vii) a facility that is subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the United States, except for land held in trust by the United States for an Indian tribe;

(viii) a portion of a facility--

(I) at which there has been a release of polychlorinated biphenyls; and

(II) that is subject to remediation under the Toxic Substances Control Act (15 U.S.C. 2601 et seq.); or

(ix) a portion of a facility, for which portion, assistance for response activity has been obtained under subtitle I of the Solid Waste Disposal Act (42 U.S.C. § 6991 et seq.) from the Leaking Underground Storage Tank Trust Fund established under section 9508 of Title 26.

(C) Site-by-site determinations

Notwithstanding subparagraph (B) and on a site-by-site basis, the President may authorize financial assistance under section 9604(k) of this title to an eligible entity at a site included in clause (i), (iv), (v), (vi), (viii), or (ix) of subparagraph (B) if the President finds that financial assistance will protect human health and the environment, and either promote economic development or enable the creation of, preservation of, or addition to parks, greenways, undeveloped property, other recreational property, or other property used for nonprofit purposes.

(D) Additional areas

For the purposes of section 9604(k) of this title, the term "brownfield site" includes a site that--

(i) meets the definition of "brownfield site" under subparagraphs (A) through (C); and

(ii)(I) is contaminated by a controlled substance (as defined in section 802 of Title 21);

(II)(aa) is contaminated by petroleum or a petroleum product excluded from the definition of "hazardous substance" under this section; and

(bb) is a site determined by the Administrator or the State, as appropriate, to be--

(AA) of relatively low risk, as compared with other petroleum-only sites in the State; and

(BB) a site for which there is no viable responsible party and which will be assessed, investigated, or cleaned up by a person that is not potentially liable for cleaning up the site; and

(cc) is not subject to any order issued under section 6991b(h) of this title; or

(III) is mine-scarred land.

(40) Bona fide prospective purchaser

The term "bona fide prospective purchaser" means a person (or a tenant of a person) that acquires ownership of a facility after the date of the enactment of this paragraph and that establishes each of the following by a preponderance of the evidence:

(A) Disposal prior to acquisition

All disposal of hazardous substances at the facility occurred before the person acquired the facility.

(B) Inquiries

(i) In general

The person made all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices in accordance with clauses (ii) and (iii).

(ii) Standards and practices

The standards and practices referred to in clauses (ii) and (iv) of paragraph (35)(B) of this section shall be considered to satisfy the requirements of this subparagraph.

(iii) Residential use

In the case of property in residential or other similar use at the time of purchase by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements of this subparagraph.

(C) Notices

The person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility.

(D) Care

The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to--

(i) stop any continuing release;

(ii) prevent any threatened future release; and

(iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.

(E) Cooperation, assistance, and access

The person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at a vessel or facility (including the

cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response actions or natural resource restoration at the vessel or facility).

(F) Institutional control

The person--

(i) is in compliance with any land use restrictions established or relied on in connection with the response action at a vessel or facility; and

(ii) does not impede the effectiveness or integrity of any institutional control employed at the vessel or facility in connection with a response action.

(G) Requests; subpoenas

The person complies with any request for information or administrative subpoena issued by the President under this chapter.

(H) No affiliation

The person is not--

(i) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through--

(I) any direct or indirect familial relationship; or

(II) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or

(ii) the result of a reorganization of a business entity that was potentially liable.

(41) Eligible response site

(A) In general

The term "eligible response site" means a site that meets the definition of a brownfield site in subparagraphs (A) and (B) of paragraph (39) of this section, as modified by subparagraphs (B) and (C) of this paragraph.

(B) Inclusions

The term "eligible response site" includes--

(i) notwithstanding paragraph (39)(B)(ix) of this section, a portion of a facility, for which portion assistance for response activity has been obtained under subtitle I of the Solid Waste Disposal Act (42 U.S.C. 6991 et seq.) from the Leaking Underground Storage Tank Trust Fund established under section 9508 of Title 26; or

(ii) a site for which, notwithstanding the exclusions provided in subparagraph (C) or paragraph (39)(B) of this section, the President determines, on a site-by-site basis and after consultation with the State, that limitations on enforcement under section 9628 of this title at sites specified in clause (iv), (v), (vi) or (viii) of paragraph (39)(B) of this section would be appropriate and will--

(I) protect human health and the environment; and

(II) promote economic development or facilitate the creation of, preservation of, or addition to a park, a greenway, undeveloped property, recreational property, or other property used for nonprofit purposes.

(C) Exclusions

The term "eligible response site" does not include--

(i) a facility for which the President--

(I) conducts or has conducted a preliminary assessment or site inspection; and

(II) after consultation with the State, determines or has determined that the site obtains a preliminary score sufficient for possible listing on the National Priorities List, or that the

site otherwise qualifies for listing on the National Priorities List; unless the President has made a determination that no further Federal action will be taken; or

(ii) facilities that the President determines warrant particular consideration as identified by regulation, such as sites posing a threat to a sole-source drinking water aquifer or a sensitive ecosystem.