

CERCLA
Maintenance & Logistics Command Atlantic
General Law Branch (lg)
COMPREHENSIVE ENVIRONMENTAL RESPONSE,
COMPENSATION, AND LIABILITY ACT
(CERCLA)
credits

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I. INTRODUCTION

The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675, commonly referred to as "CERCLA" or "Superfund," was enacted by Congress in 1980. CERCLA was designed primarily to respond to situations involving the past disposal of hazardous substances. It complements, and in some cases overlaps with, the Resource Conservation and Recovery Act (RCRA), which regulates on-going hazardous waste handling and disposal. CERCLA refers to the actions it mandates to address inactive hazardous waste sites as "response actions." There are two basic response actions: "removals" and "remedial actions." A removal action is usually taken in response to an imminent danger to human health or the environment. Remedial actions, on the other hand, are long-term cleanups designed to permanently address the threat posed by contamination at a site. While removals may only take weeks, remedial actions may take years or even decades to complete.

A. COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT
(CERCLA)

CERCLA is the primary federal law addressing the problem of releases of hazardous substances into the environment. It was significantly amended in 1986 by SARA. Federal agencies are required to comply with CERCLA and the NCP (42 U.S.C. § 9620(a)(1)). It requires the federal government and other responsible parties to clean up inactive hazardous waste sites. CERCLA requires a response where necessary to protect human health and the environment when there is a release of a hazardous substance into the environment or when there is a release of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare. Given this broad authority, CERCLA applies to most federal facility releases or threatened releases of hazardous substances, pollutants, or contaminants.

B. THE NATIONAL CONTINGENCY PLAN (NCP)

The NCP sets forth the procedures that must be followed by the U.S. Environmental Protection Agency (EPA), private parties, and federal facilities for selecting and conducting CERCLA response actions. The EPA first promulgated the NCP in 1973. Almost all of the current version of the NCP was promulgated in 1990.

The NCP sets forth the responsibilities of the National Response Teams, Regional Response Teams, On Scene Coordinators, Remedial Project Managers, and others that take part in responses to releases, describes how coordination among these various groups is to occur, establishes methods and criteria for determining the

appropriate extent of response, and outlines the procedures to be followed in performing cleanups.

C. EXECUTIVE ORDER 12580

In Executive Order 12580 the President specifically delegated his CERCLA authority to DoD in regard to releases on and from DoD's facilities and vessels (§ 2d). He has conditioned this delegation by requiring DoD to follow CERCLA in general, and CERCLA § 120, which is applicable to federal facilities, in particular. This delegation of authority applies to the Coast Guard.

II. OVERVIEW OF CERCLA'S PROVISIONS

As noted above, CERCLA was extensively amended in 1986. However, CERCLA's major emphasis has remained the cleanup of inactive hazardous waste sites and the distribution of cleanup costs among the parties who generated and handled hazardous substances at these sites.

A. IMPORTANT CERCLA TERMS

An understanding of CERCLA's key terms and phrases is essential in interpreting both the remedial and liability features of CERCLA. Among the most critical terms are those discussed below.

1. Applicable or Relevant and Appropriate Requirements (ARARs)

In order to determine how clean a site must be after remediation, CERCLA requires that cleanup actions use contaminant standards from other environmental laws when they are "applicable" or "relevant and appropriate" requirements, known as ARARs. Restoration activities must comply with all federal standards, requirements, and criteria as well as any more stringent state requirements whether they are chemical, action, or location specific. See 40 CFR 300.5.

2. "Hazardous Substance"

CERCLA is designed to address problems and redress complaints associated with releases of "hazardous substances." "Hazardous substances" under CERCLA are defined by reference to substances that are listed or designated under other environmental statutes. They include "hazardous wastes" under RCRA, "hazardous substances" defined in § 311 of the Clean Water Act, "toxic pollutants" designated under § 307 of the Clean Water Act, hazardous air pollutants listed under § 112 of the Clean Air Act, substances designated under § 102 of CERCLA which "may present substantial danger to public health or welfare or the environment," and imminently hazardous chemical substances or mixtures that EPA has addressed under § 7 of the Toxic Substances Control Act (TSCA). In order to facilitate the identification of CERCLA hazardous substances, EPA has prepared a list of these substances which is located at 40 C.F.R. Part 302.

3. Quantity of "Hazardous Substance"

CERCLA contains no requirement that a specified amount of a hazardous substance be present before a response action must be taken or a party found liable for a release or threat of release of such substance. While CERCLA's reporting requirements specifically require that a minimum quantity be discharged before a report need be filed, the "reportable quantity" has no effect on a party's liability. The release of any quantity of a hazardous substance is sufficient to establish liability. This distinction is based on CERCLA's response and enforcement provisions that are designed to deal with a "release," which is defined as "any spilling, leaking," etc.

4. Petroleum Exclusion

Excluded from the definitions of "hazardous substance," and "pollutant or contaminant" is "petroleum, including crude oil or any fraction thereof."

Petroleum release, accordingly, must generally be addressed under the authority of other law such as the underground storage tank (UST) provisions of RCRA, or the Clean Water Act (CWA). This exception, which has become known as the "petroleum exclusion," plays a significant role in CERCLA since many sites contain petroleum contamination. Petroleum frequently contains other listed hazardous substances, the most common of which are BTX compounds such as benzene, toluene and xylene. Whether these substances, when present in petroleum, are hazardous substances has been the source of controversy. In general, such substances are not treated as CERCLA hazardous substances as long as they are found in refined petroleum fractions and are not present at levels that exceed those normally found in such fractions. In short, indigenous, refinery-added hazardous substances are exempted. Substances added to petroleum as a result of contamination during use or from mixing or combining are not within the petroleum exclusion and that in such cases the substances are considered CERCLA hazardous substances.

5. "Pollutant or Contaminant"

While the vast majority of actions taken under CERCLA relate to CERCLA hazardous substances, CERCLA also provides authority for EPA to respond to "a release or substantial threat of release . . . of any pollutant or contaminant which may present an imminent and substantial danger to public health or welfare. . . ." (42 U.S.C. § 9601(33)). Under CERCLA the term "pollutants or contaminants" encompasses just about anything. By definition, such substances include compounds that upon exposure "will or may reasonably be anticipated to cause" certain specified harmful health effects. While EPA and the USCG can respond to and clean up a site polluted by either a hazardous substance or a pollutant or contaminant, the statute does not authorize EPA to recover its cleanup costs from private parties or to issue an order directing the parties to perform a cleanup when the substance involved is only a pollutant or contaminant. In addition, many releases of pollutants or contaminants do not meet the requirement that there be an "imminent and substantial danger" which is a higher threshold than that for hazardous substances. Therefore, while the definition of a pollutant or contaminant is broad, as a practical matter, we rarely use CERCLA authority to respond to its release.

6. "Release" or "Substantial Threat of Release"

To require a response action under CERCLA and for liability to attach, there must be a "release" or "substantial threat of release" of a hazardous substance into the environment.

Under CERCLA, the terms "release" and "substantial threat of a release" are defined broadly to include almost any situation where a hazardous substance escapes into the environment from its normal container. A release thus occurs whenever there is "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) . . ." (CERCLA § 101(22)). While not specifically excluded from the definition of release, federally permitted releases, such as releases pursuant to permit under the Clean Water Act, are treated differently (see CERCLA §§ 101(10) and 107(j)). The only remedy generally provided under CERCLA for a permitted release is under the law relating to the permit issued.

7. "Facility" or "Vessel"

For response action obligations under CERCLA to apply, there must first be a release or threatened release from a "facility" or "vessel." CERCLA defines a facility in two parts. First, it lists a variety of things that constitute facilities, for example, a building, structure, installation, equipment, pipe or

pipeline, or well. Second, it provides that a facility is also "any site or area where a hazardous substance has . . . come to be located." It is easier to consider what is not a facility. Specifically excluded are consumer products in consumer use and vessels. Under CERCLA, the term "vessel" means any craft used as a means of transportation on water.

8. "Environment"

The term "environment" under CERCLA is important as a "release" requires the escape of a hazardous substance into the "environment." As with other CERCLA terms, "environment" is defined broadly. It includes any surface water, groundwater, drinking water supply, land surface, subsurface strata, and ambient air. "Environment" does not include releases occurring solely in a workplace.

9. "Lead Agency"

The lead agency is the agency responsible for planning and implementing response actions addressing contamination. For releases occurring on or from CG facilities or vessels, the CG is the lead agency (Executive Order 12580 § 2d). (40 CFR § 300.5; see also 58 Fed.Reg. 49044 fn.2 (21 Sep 93)).

10. "National Priorities List"

The National Priorities List (NPL) was established in 1981 under § 105(a)(8)(B) of CERCLA. It is included as Appendix B of the NCP and must be updated annually. CERCLA requires EPA to develop criteria (known as the Hazardous Ranking System (HRS) and found at Appendix A of the NCP) for determining priorities among the various releases or threatened releases throughout the nation. These criteria are based on risks to public health, welfare, or the environment, taking into account a variety of factors including the extent of population at risk, the hazard potential of the facility's hazardous substances, the potential for contamination of drinking water supplies, and the threat to ambient air. Applying these criteria, EPA scores and ranks sites for possible listing on the NPL. Once on the NPL, a facility becomes a priority for long-term remedial evaluation, funding, and response. For federal facilities, NPL status triggers numerous responsibilities and time-lines for conducting remedial action.

11. On-Site

The areal (three dimensional geographic) extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action.

12. Remedial Action

The term "remedial action" generally refers to long-term, permanent cleanups of CERCLA sites.

13. Removal Action

Under CERCLA, "removal actions" are cleanup actions undertaken to promptly deal with environmental emergencies. Such actions could include providing alternate water supplies to persons whose groundwater has been polluted, the immediate removal or cleanup of hazardous substances spilled from a container, or the erection of a fence around a hazardous waste site. In short, just about any action that tends to prevent, minimize, or mitigate damage to public health or the environment from hazardous substance releases and that can be done promptly qualifies as a removal.

14. Response Action

CERCLA refers to the actions it mandates to address inactive hazardous waste sites as "response actions." There are two basic response actions: "removals"

and "remedial actions." The terms "response action," "remedial action," and "remedy" are sometimes used interchangeably.

B. The Response Action Process

1. The Removal Process

As noted above, a removal action is usually taken in response to an imminent danger to human health or the environment. They generally take place over a short period of time. There are three types: emergency, time critical and non-time critical. The decision is made among these choices based on the circumstances and seriousness of the risk involved. "Emergency" removals are undertaken when the danger is so great that there is no time to undertake a planning process. "Time critical" removals are those actions for which there is a planning period of less than six months before site activities must be initiated. "Non-time critical" removals require at least six months but not more than twelve months of planning before the removal action will be performed. Removal actions can be taken at any point in the response process, but normally they occur as part of the initial response to a seriously contaminated site that will later be the subject of a more formal and extensive remedial action. Because the administrative requirements imposed on a removal action are far less than those for a permanent response action, removals are frequently done before and in conjunction with the long-term remedial action for the site. Where practical, removal actions should contribute to the efficient performance of the long-term remedial action.

After discovery of contamination, it may not be readily apparent whether a removal action, a long-term remedial action, or a combination of the two is appropriate. Therefore, as discussed below, the early phases of the removal and long-term actions are the same. Except for emergency removals, removal actions require at a minimum a Preliminary Assessment (PA), a Site Inspection (SI), a decision document and the removal action itself. For "non-time critical" removals the lead agency must perform an engineering evaluation/cost analysis (EE/CA) to analyze removal alternatives. An EE/CA is similar to a feasibility study, except an EE/CA does not analyze alternatives in the same level of detail. The lead agency chooses the removal action whether the facility is on the NPL or not. Removal actions must comply with ARARs "to the extent practicable" considering the urgency of the situation and the scope of removal action to be taken.

2. The Remedial Action Process

a. Preliminary Assessment (PA).

The first step in the remedial process is the remedial site evaluation, which includes the PA (40 C.F.R. § 300.420(b)). PA means **review** of existing information and an off-site reconnaissance, if appropriate, to determine if a release may require additional investigation or action. During the PA, the lead agency uses existing site records and interviews to evaluate potential hazards at the site, to identify the source and nature of a release, and to identify any other potentially responsible parties. The PA can result in prompt removal action or further remedial evaluation. Sites which pose no significant threat or potential threat to public health and the environment are excluded from further consideration for remediation via a site closeout report commonly referred to as a no further remedial action planned (NFRAP) decision.

b. Site Inspection (SI).

Following the PA in the remedial site evaluation is the SI (40 C.F.R. § 300.420(c)) The SI "means an on-site investigation to determine whether there

is a release or potential release and the nature of the associated threats. The purpose is to augment the data collected in the preliminary assessment and to generate, if necessary, sampling and other field data to determine if further action or investigation is appropriate." The SI is the second step in the "evaluation" stage of the NCP remedial action process. The SI occurs only if the lead agency and EPA needs additional information to complete HRS scoring or to determine the need for a response action. This step in the process includes visual on-site inspection and may include sampling. As with a PA, an SI can result in a NFRAP decision, removal action, or further remedial action.

c. Remedial Investigation (RI).

If the remedial evaluation determines further action is warranted, a RI is initiated to collect data necessary to characterize the site to develop and evaluate remedial alternatives (40 C.F.R. §§ 300.430 (b) and (d)). The RI "is a process undertaken by the lead agency to fully determine the nature and extent of the problem presented by the release. The RI emphasizes data collection and site characterization, and is generally performed concurrently and in an interactive fashion with the feasibility study . . ." Prior to the RI, the lead agency must prepare a sampling and analysis plan (SAP) which provides a process for obtaining data of sufficient quality and quantity to satisfy data needs. These plans consist of two parts: (1) the field sampling plan which describes the number, type, and location of samples, and the type of analysis to be done; and (2) the quality assurance project plan (QAPP) which describes policy, organization, functional activities, data quality objectives, and measures necessary to achieve adequate and reliable data for use in selecting the appropriate remedy.

During the RI, the lead agency must collect and analyze data, identify data quality objectives, prepare project plans, define the nature and extent of the contamination at the site, conduct a site-specific baseline risk assessment, and identify federal and state ARARs. The NCP requires a Baseline Risk Assessment (BRA) be conducted, usually during the RI to assess the degree to which site releases of hazardous substances constitute a threat to human health and the environment (40 C.F.R. §§ 300.430(d)(1), (2), and (4)). The BRA is then used to identify contaminant levels that are adequately protective for a site. If the BRA shows that contaminants present at the site or threatening the site do not create unacceptable risk to human health or the environment, further remedial action is not generally warranted.

d. Feasibility Study (FS).

The FS "means a study undertaken by the lead agency to develop and evaluate options for remedial action (40 C.F.R. § 300.430(e)). The FS emphasizes data analysis and is generally performed concurrently with the remedial investigation (RI), using data gathered during the RI. The RI data are used to the define the objectives of the response action, to develop remedial action alternatives, and to undertake the initial screening and detailed analysis of the alternatives . . ." (40 C.F.R. §§ 300.5 and 300.430(e)(1)).

The FS is the second step in the "investigation" stage of the remedial action process. The primary purpose of the FS is to ensure that appropriate remedial alternatives are developed and evaluated so that relevant information concerning the remedial action options can be presented to a decision-maker and an appropriate remedy selected. To do this the lead agency must identify potential treatment technologies and screening technologies, assemble technologies into alternatives, screen the alternatives preserving an appropriate range of alternatives, identify ARARs, and perform a detailed analysis of alternatives (40 C.F.R. § 300.430(e)). Within the FS, an ARARs table is developed to document all federal and state ARARs with which the final remedy must comply. The FS must utilize nine criteria to assess each alternative and to compare

alternatives: (1) protectiveness of human health and the environment; (2) ARARs compliance; (3) long-term effectiveness and permanence; (4) reduction of toxicity, volume or mobility through treatment; (5) short-term effectiveness; (6) implementability; (7) cost; (8) state acceptance; and (9) community acceptance (40 C.F.R. § 300.430(e)(9)).

e. Remedy Selection Criteria.

The same nine selection criteria above are utilized in selecting the remedial action (40 C.F.R. § 300.430(f)(1)(i)). The alternatives developed in the FS must be judged against these criteria which are grouped into "threshold criteria" (first two factors), "primary balancing criteria" (next five factors), and "modifying criteria" (last two factors). The remedy selected must be: (1) protective of human health and the environment; (2) ARAR compliant or ARAR waiver applicable (in limited, defined circumstances a lead agency may waive ARARs compliance (see 42 U.S.C. § 9621(d)(4) and 40 C.F.R. § 300.430(f)(1)(ii)); (3) cost-effective; and (4) based on utilization of permanent solutions and alternative treatment technologies or resource recovery technologies to maximum extent practicable (40 C.F.R. § 300.430(f)(1)(ii)).

f. The Proposed Plan (PP) and Responsiveness Summary.

Before documenting its decision selecting a response action among the alternatives developed in the FS, the lead agency must present its selection to the public in a PP (40 C.F.R. § 300.430(f)(2)). The PP is intended to give the public and environmental regulators a reasonable opportunity to comment on the lead agency's preferred alternative for response action. Following the public comment period, the lead agency must prepare a Responsiveness Summary that contains a written summary of comments, criticisms, and new relevant information submitted by the public (40 C.F.R. § 300.430(f)(3)).

g. Record of Decision (ROD).

After completion and presentation of the RI/FS and PP, the lead agency must make its final remedy decision and document its remedial decision in a Record of Decision (ROD), which sets forth the selected remedy and the factors leading to its selection (40 C.F.R. § 300.430(f)(4)). The ROD must contain several categories of information listed at 40 C.F.R. § 300.430(f)(5)(ii). It explains how the remedy protects human health and the environment, details applicable ARARs and how they will be attained or why they are waived, and sets forth how the remedy is cost-effective and uses permanent solutions to the maximum extent practical. A ROD. A public notice of its availability must be published and the ROD must be placed in the administrative record supporting the remedial action (40 C.F.R. § 300.430(f)(6)).

h. Remedial Design (RD) and Remedial Action (RA).

In the narrower sense of the terms, RA means the actual cleanup at the end of a long discovery, evaluation and investigation process and RD simply means the engineering and construction plans and specifications prepared to implement the RA (40 C.F.R. § 300.435(a) and (b)). The RD/RA phase is often termed "turning dirt" because, unless there has been a removal action, this is the point at which the lead agency finally begins to clean the environment. Types of remedial action include excavation, pumping and treating contaminated groundwater, use of various containment mechanisms, use of institutional controls, etc.

i. Operation and Maintenance (O&M).

These are measures required to maintain the effectiveness of response actions and are initiated after the remedy has achieved the remedial action objectives and goals in the ROD and is determined to be operational and functional (40

C.F.R. § 300.435(f)(1)). For example, if a historic disposal site is capped to prevent water from migrating into and then leaching out with hazardous substance into groundwater, measures to maintain the integrity of the cap are O&M.

C. DETERMINING THE APPROPRIATE LEVEL OF CLEANUP

Perhaps the most important question at a CERCLA site is the level or degree of cleanup that must be achieved before the site is considered "clean." This is not always an easy question to answer. The scope and type of contamination and pathways of exposure are different at every site. Also, while not technically a determining factor, the degree of public and regulator interest differs from site to site.

Section 121 of CERCLA sets the statutory requirements for cleanup standards. It requires remedial actions conducted under CERCLA be accomplished in accordance with the rest of CERCLA and, to the extent practicable, with the NCP. Section 121(b) shows a clear preference for remedies that are permanent, cost-effective, and involve the treatment of hazardous substances to reduce their volume, toxicity or mobility. Section 121(b) also states a preference against off-site transport and disposal of hazardous substances without such treatment. When hazardous substances are left on-site at levels which will not allow unrestricted use and exposure, § 121(c) requires that EPA **review** the adequacy of the remedy every five years.

The primary driver for clean up levels and treatment is the requirement that a remedy achieve all Applicable or Relevant and Appropriate Requirements (ARARs) where hazardous substances are left on-site. In addition to CERCLA, federal facilities are required to comply with all federal and state laws and regulations that apply or are relevant or appropriate to environmental remediation. State laws and regulations may also provide ARARs for remedial actions. Section 121(d)(2)(A) states that the following are potential ARARs: (1) any standard, requirement, criteria, or limitation under any federal environmental law; and (2) any promulgated standard, requirement, criteria, or limitation under a state environmental or facility siting law that is timely identified and more stringent than any federal standard.

Federal laws that may apply include, but are not limited to the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. §§ 6901-6992k), the Clean Air Act (CAA) (42 U.S.C. §§ 7401-7671q), the Clean Water Act (CWA) (Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1251-1387), the Safe Drinking Water Act (SDWA) (Public Health Services Act (PHSA), 42 U.S.C. §§ 300f-300j-26), and the Toxic Substances Control Act (TSCA) (15 U.S.C. §§ 2601-2692).

Applicable requirements are "cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or federal facility siting laws that specifically address a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance at a CERCLA site" (40 C.F.R. § 300.5). For example, if the remedial action involves extracting and treating contaminated groundwater and discharging the treated water into surface water, Clean Water Act water quality criteria and standards must be met.

Relevant and appropriate requirements are "cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or federal facility siting laws that, while not 'applicable' to a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance at a CERCLA site, address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site" (40 C.F.R. § 300.5). For example, Safe Drinking Water Act maximum contaminant levels govern the level of contaminants allowable in drinking water provided to consumers. While not specifically applicable to cleanup levels for

contaminated groundwater, if the groundwater is an actual or potential source of drinking water, the use of maximum contaminant levels is relevant and appropriate. Only state standards that are identified in a timely manner promulgated and more stringent than federal requirements may be ARARs (40 C.F.R. § 300.5, 42 U.S.C. § 9621(d)).

The three types of ARARs are:

(1) chemical specific that place a health or risk based limit on the amount of a chemical that can be discharged into or present in the environment, for example, Maximum Contaminant Levels (MCLs) and Maximum Contaminant Level Goals (MCLGs) under the Safe Drinking Water Act and Water Quality Criteria (WQC) under the Clean Water Act;

(2) action specific that place restrictions on particular remediation or waste management activities such as RCRA closure regulations; and

(3) location specific that place restrictions on certain actions due to the location of the site, for example, the Clean Water Act §§ 401 and 404 limits on activities in wetlands.

Application of ARARs has meant that remedies must achieve the highest cleanup levels established by other federal and state standards. By incorporating requirements from other state and federal environmental statutes and regulations into CERCLA, § 121 guarantees that CERCLA remedies will be conservative and more expensive. Determining which ARARs apply at a specific site is part of the RI/FS process.

D. PERMIT EXCLUSION

CERCLA provides that "No federal, state or local permit shall be required for the portion of any removal or remedial action conducted entirely on-site . . ." (42 U.S.C. 9621(e)). In its implementing NCP regulations, EPA clarifies that on-site "...means the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action" (see 40 C.F.R. § 300.5 definition of on-site and 40 C.F.R. § 300.400(e)). Therefore, a response action taken within a site that has off-site emissions is exempt from permitting requirements, as well as actions taken outside of a federal facility where contamination has migrated off-site, such as an off-site extraction well. This exclusion is extremely important as it precludes the delay, cost increases, and duplication that would accompany subjecting CERCLA response actions to permitting and approval processes of other federal and state laws.

E. ADMINISTRATIVE RECORD AND PUBLIC PARTICIPATION

The remedial process involves the public through public notice and an opportunity for those interested to comment. The public, the state, and EPA if it is not conducting the cleanup itself may **review** and comment on the proposed remedial action. These comments are included in the administrative record. The administrative record also contains the response to significant public comments and the significant documents that were considered and relied upon in selecting the remedy (42 U.S.C. § 9613(k) and 40 C.F.R. Part 300, subpart I)). The administrative record is important not only to provide public access to the comments, responses, and documents, but also to any judicial **review** of the

remedy. Judicial **review** of the remedy selection decision is generally limited to the contents of the administrative record. The decision will be upheld unless **review** of the administrative record shows the remedy was selected in an arbitrary and capricious manner or was not otherwise in accordance with law (42 U.S.C. 9613 (j)).

Public participation is a critical part of the NCP process. Community Relations Plans (CRP) are required for certain response actions (40 C.F.R. § 300.155(c)). The scope of the CRP will depend on the scope of the response action (see 40 C.F.R. §§ 300.415, 300.430, and 300.435). For a final decision on a remedial action, public involvement activities include publishing a notice of availability of the proposed remedial plan and a summary; making the plan and supporting analysis and information available; providing a reasonable comment period; provide an opportunity for a public meeting regarding the plan; keeping a transcript of the public meeting; preparing a written summary of significant comments, criticisms, and new information submitted during the comment period. If after publication of the plan and before selection of the remedy new information becomes available that changes the remedy, the lead agency must discuss the new information and changes, or some cases, seek additional public comment (see generally 40 C.F.R. § 300.435). The lead agency for removal and remedial actions must establish and maintain an information repository accessible to the public and containing, at a minimum public notices, comments received from the public, responses to those comments, a brief analysis of the alternative response actions and the selected alternative, and a statement of the basis for and purpose of the proposed action (CERCLA § 113(k)(2)).

F. LIABILITY AND ENFORCEMENT

CERCLA has two basic liability provisions that: (1) permit the recovery of response costs (§ 107), and (2) permit EPA to seek a judicial order requiring a potentially responsible party (PRP) to abate an endangerment to public health, welfare, or the environment (§ 106). CERCLA also includes provisions: (1) permitting EPA to take certain administrative actions to compel PRPs to take actions necessary to protect public health, welfare or the environment (§ 106(c)); (2) permitting "citizen suits" to enforce CERCLA's provisions (§ 310); (3) providing authority for federal, state, and Indian tribe natural resource trustees to bring actions for damages to natural resources (§ 107(f)); and (4) allowing contribution claims among PRPs (§§ 107 and 122).

Most CG CERCLA liability arises from its pollution of its installations and other facilities (i.e., as owner and operator). However, it also includes liability as "generator" of substances that contaminate other sites, where the CG can be a potentially responsible party like any other person.

1. Strict, Joint and Several, and Retroactive Liability

CERCLA imposes strict, joint and several liability with no requirement that a party's hazardous substances have been the sole cause for the need for a response action. Therefore, negligence is not required. Likewise, conducting activities consistent with standard industry practices is not a defense. CERCLA does not specifically require liability be joint and several, however, courts have found such liability exists.

2. Bar Against Pre-Enforcement **Review**

Section 113(h) of CERCLA limits the jurisdiction of courts to hear challenges to response actions or administrative orders requiring PRPs to perform cleanups.

The general rule is that there can be no judicial **review** prior to the completion of the response action. Courts have jurisdiction to hear such matters only for: (1) § 107 cost recovery actions or actions for contribution; (2) actions to enforce a CERCLA § 106 order or seek penalties for violation of such an order; (3) actions under § 106(b)(2) for private party reimbursement from the Superfund; (4) citizen suits under § 310 alleging that a removal action taken violated CERCLA's provisions after it has been completed, (except where a removal action is to be followed by a remedial action, in which case the action can not be heard until the remedial action is concluded); or (5) actions brought by EPA under § 106 in which EPA is seeking an order compelling a PRP to perform a cleanup.

3. Categories of Liable Parties

A PRP under CERCLA § 107(a) can be: (1) current owners and operators of the facility or vessel involved; (2) former owners and operators of a facility who were involved with the facility during the time any hazardous substance was disposed at the facility; (3) persons who arranged for disposal or treatment of hazardous substances which they owned or possessed at a facility; and (4) persons who accepted hazardous substances for transport to disposal or treatment facilities or sites which they helped select. These categories of liable parties are often referred to as: (1) owners and operators, (2) former owners and operators, (3) generators or arrangers, and (4) transporters.

4. Defenses to Liability

There are few affirmative defenses available in a CERCLA § 107 liability action. The defenses available in a § 106 abatement action appear to be broader, and may include certain equitable defenses. CERCLA § 107(b) limits affirmative defenses to situations where a release was caused solely by: (1) an act of God; (2) an act of war; or (3) an act or omission of a third party, other than an employee, agent, or party with whom there is a contractual relationship, as long as the defendant exercised due care and took precautions against foreseeable acts of the third party. However, other defenses such as due care, compliance with existing standards, estoppel, clean hands, and laches can be raised. In some cases, the courts have appeared willing to go beyond CERCLA's three statutory defenses and consider these additional defenses based on the theory that they raise issues relating to apportionment of liability among the PRPs.

5. Statute of Limitations

CERCLA contained no specific statute of limitations provision until the 1986 SARA amendments. This was changed by the addition of § 113(g), which contains limitation periods for recovery actions, natural resource damages, and contribution actions.

G. NATURAL RESOURCES DAMAGES

Almost all CERCLA litigation has involved the assessment of liability and damages for costs related to response actions associated with a release. Natural resource trustees, however, are increasingly invoking claims under CERCLA's natural resources damages provision to recover costs associated with injury to a contaminated area's natural resources. Section 107(a)(4)(C) of CERCLA states that PRPs are liable for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." The definition of natural resources is broad in scope and encompasses not only more commonly considered resources such as land, wildlife, fish, and biota, but also air,

water, groundwater, drinking water supplies, and any other resources (CERCLA § 101(16)). It is limited, however, to those resources owned, held in trust, or otherwise controlled by a federal or state government agency or an Indian Tribe. Damages to private property are not recoverable.

Natural resource damages are compensatory, rather than punitive, in nature. Any moneys recovered for natural resources damages must be used for restoration or replacement of the resource or for acquisition of an equivalent resource (CERCLA § 107(f)(1)). CERCLA contains limitations on the recovery of natural resources damages. (CERCLA § 107(c)(1)). CERCLA also limits liability for natural resource damages to situations where the contamination that caused the damages occurred on or after 11 December 1980. (CERCLA § 107(f)(1)). I

IV. FEDERAL FACILITIES

CERCLA contains broad waivers of sovereign immunity which permit individuals and states to bring cost recovery actions against federal facilities and to bring "citizen suits" for the facilities' compliance with the statute (CERCLA §§ 107 and 310). The authority of citizens and states to bring action against these facilities has been a spur toward their cleanup. Also, the 1986 SARA amendments created an entire section, § 120, which is a complement to DERP, devoted to the cleanup of federal facilities. Section 120(a) provides for federal facility compliance with CERCLA, both substantively and procedurally, to the same extent as any private entity. This compliance includes EPA guidelines, rules, regulations, and criteria (§ 120(a)(2)).

These requirements include the creation of a Federal Agency Hazardous Waste Compliance Docket listing facilities that manage hazardous waste or have potential hazardous waste problems (§ 120(c)). This list is used to prioritize cleanups at each facility. A preliminary assessment and a site inspection, if needed, are required within 18 months of a facility being listed. Subsequently, the facility is scored under the hazardous ranking system to determine whether it should be placed on the NPL. If listed on the NPL, the facility must begin an RI/FS within six months of its NPL listing (§ 120(e)(1)). While performing the RI/FS, consultation with EPA and the state must occur. Within 180 days of EPA's **review** of the RI/FS, an Interagency Agreement (IAG), often called a Federal Facility Agreement (FFA), must be entered into with EPA for the performance of the selected remedy. Although sites not listed on the NPL are not required to have FFAs, DoD often enters into clean up agreements with the state where the site is located which has similar functions and provisions as an FFA.

Web Sites of Interest

- CERCLA/ Superfund Headquarters Homepage
- Environmental Protection Agency Homepage
- EPA Links to Environmental Laws and Regulations
- EPA Office of Federal Activities
- Council on Environmental Quality's "40 Most Asked Questions"
- Environmental Law Information Center
- Agency for Toxic Substances and Disease Registry
- State Environmental Regulatory Links