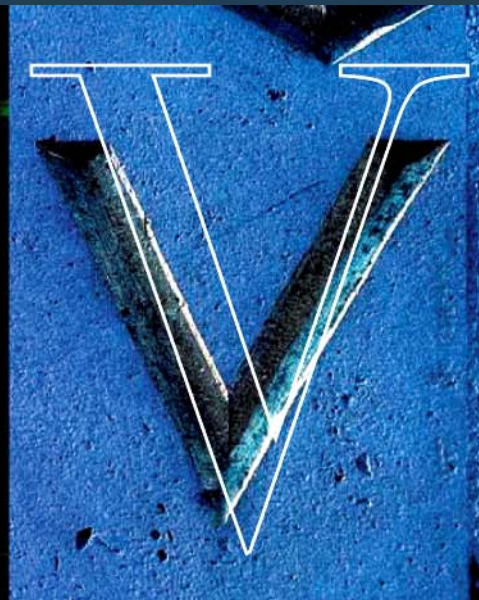
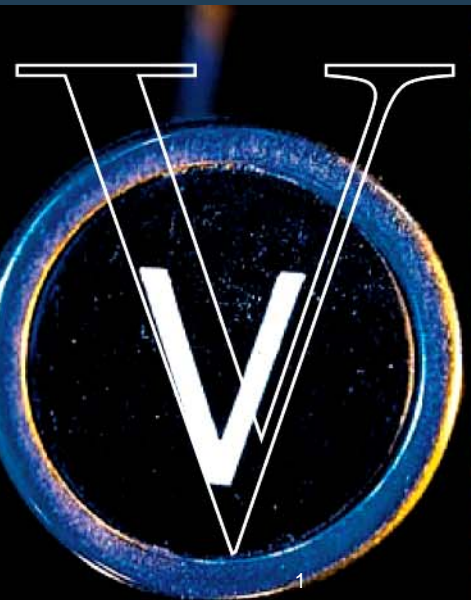


CERCLA & The “Super”-fund

Environmental Law Institute
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CERCLA

Comprehensive Environmental Response, Compensation, and Liability Act

42 U.S.C. §§ 9601-9675
40 C.F.R. Part 300

- I. Empowers federal government to address sites contaminated by hazardous substances.
- II. Allocates liability for contamination.
- III. Authorizes the federal government, states, and others to seek cleanup costs from “responsible” parties.



CERCLA HIGHLIGHTS

- Enacted in 1980, in response to environmental disasters such as Love Canal near Niagara Falls, New York.
- Primarily addresses the clean-up of abandoned hazardous wastes.
 - Also contains spill reporting provisions with criminal penalties and
 - Brownfields redevelopment rules and funding
- “Superfund” is the trust fund established by CERCLA funded by taxes on petroleum and chemical producers. Expired, but not dead.
- Imposes unusually severe form of retroactive joint and several liability.
- Authorizes EPA to compel potentially responsible parties (“PRPs”) to perform cleanups or reimburse the government for cleanups.
- Provides for private party contribution and, possibly, cost recovery.
- Establishes mechanisms to aid the development of brownfields.



1 in 4 Americans live within 3 miles of a Superfund site.







Mining

Heavy Industry



Splendidly Clean!



Love Canal

Niagara Falls, New York



- 1978 Love Canal is declared a National Emergency by President Carter.
- Chemical company purchased abandoned canal to dump waste. Dump closed in 1950s. School board purchased property for \$1 despite protests and warnings from company.
- Construction of school buildings and other projects revealed waste.
- High incidence of miscarriages, birth defects, and other health problems.



CERCLA: “not a model of legislative draftsmanship.”

Justice Thurgood Marshall, Exxon Corp. v. Hunt, 475 U.S. 355, 363 (1986)

- “Courts have widely acknowledged that CERCLA is a poorly drafted statute with numerous ambiguities and internal contradictions.”
 - Comm’r of the Dept. of Planning and Natural Resources v. Century Alumina Co., No. 05-0062 (D.V.I. 2010)

- CERCLA jurisprudence is a “hopelessly confusing patchwork of case law”
 - New York State Electric & Gas Corp. v. Firstenergy Corp., No. 03-0438, (N.D.N.Y. 2007)



Basic CERCLA Provisions

- § 101 – Definitions
- § 103 – Reporting requirements
- § 104 – Removal & Remediation Authority
- § 106 – Abatement Orders & Information Requests
- § 107 – Liability
- § 111 – Superfund
- § 113 – Private Party Contribution
- § 121 – Cleanup standards



CERCLA and Amendments

- 1980 Comprehensive Environmental Response, Compensation, and Liability Act
- 1986 Superfund Amendments and Reauthorization Act (SARA)
- 1990 Omnibus Reconciliation Act
- 1992 Community Environmental Response Facilitation Act
- 1996 Asset Conservation, Lender Liability and Deposit Insurance Protection Act
- 1996 Defense Authorization Act of Fiscal Year 1997
- 1999 Superfund Recycling Equity Act
- 2002 Small Business Liability Relief and Brownfields Reauthorization Act (SBLRBRA)

CERCLA History

- Passed in 1980

- Initial Lack of Vigorous Enforcement
 - Rita Lavelle, OSWER - Convicted
 - Anne Gorsuch, EPA Administrator - Resigned

- SARA – Superfund Amendments and Reauthorization Act, 1986
 - Stressed permanent remedies and innovative treatment technologies
 - Required consideration of standards found in other State and Federal environmental laws and regulations, “applicable or relevant and obtainable requirements” (ARAR)
 - Increased State involvement
 - Increased the size of the Superfund to \$8.5 billion.

- Asset Conservation Act of 1996
 - Codified EPA’s Lender Liability Rule, which was struck down in Kelley v. EPA, 15 F.3d 1100 (D.C.C.A. 1994), as an unlawful exercise of power by EPA.

- SBLRB - Small Business Liability Relief and Brownfields Revitalization Act (2002)
 - Municipal Solid Waste (MSW) Exemption
 - De micromis exception
 - Brownfields Revitalization Funding



EPA



- Office of Solid Waste and Emergency Response (“OSWER”)
- OSWER divides Superfund responsibility among:
 - The Office of Emergency Management, which is responsible for short-term responses
 - The Office of Superfund Remediation and Technology Innovation, which manages the long-term response program
 - The Federal Facilities Response and Reuse Office, which manages responses involving federal facilities.
- OECA & DOJ ENRD EES



National Contingency Plan (NCP)

§ 105, 40 CFR 300

- The National Oil and Hazardous Substances Pollution Contingency Plan.
- Organizational structure and procedures for preparing and responding to oil spills and hazardous substance releases.
- The first National Contingency Plan was developed and published in 1968 after a massive oil spill from the oil tanker *Torrey Canyon* in the North Atlantic.
- Revised by CWA in 1972, CERCLA in 1980, Oil Pollution Control Law in 1994.



Reporting releases

§ 103



- Any person “in charge” of a vessel or facility from which a hazardous substance is released
 - Other than a federally permitted release
- Of a certain quantity
 - Reportable Quantities (RQ), 40 CFR 302.4
- Who fails to “immediately” notify the appropriate agency
 - “as soon as” he has knowledge
- Or submits false information
- May be imprisoned for up to 3 years and subject to fines.
- U.S. v. Sauseda, 596 F.3d 279 (5th Cir. 2010)



CLEAN UP



**FOR HAZARDOUS WASTE REMOVAL
SERVICES YOU CAN TRUST,
CALL BOOMER ENVIRONMENTAL AT
405-417-3333 OR 405-414-1766.
24 HOUR RESPONSE.**

Initiation of Cleanups

- EPA or a state or an “Indian Tribe” may implement a response action, then look for PRPs.
- EPA may order PRP to implement a remedial action, § 106.
- EPA may enter into a settlement with PRP.
- A would-be PRP can voluntarily begin response/remediation, and then look for PRPs.
- Citizen suit provision, § 310.



National Priorities List (NPL)

§ 105(a)(8)(B)

- Sites are listed on the National Priorities List upon completion of Hazard Ranking System (HRS) screening and public comment.
- HRS four scoring pathways - ground water, surface water, air and soil exposure.
 - Vapor Intrusion is proposed as a new pathway, 76 Fed Reg. 5370
- Over 1200 active NPL sites.
- Not all CERCLA sites are on NPL.
- Affects funding.





2010

- Red is National Priority List
- Yellow is proposed
- Green is deleted (usually cleaned up).



Two Types of Cleanup Actions

- Removal
 - Short term
 - Non-NPL sites may be funded
 - \$2 million limit

- Remediation
 - Long-term
 - NPL sites only may be funded
 - Expensive



Remediation

- Discovery
- Investigation, 104(e)(2) letters
- Remedial Investigation & Feasibility Study (RI/FS)
 - Scoping;
 - Site Characterization
 - Development and Screening of Alternatives
 - Treatability Investigations
 - Detailed Analysis
- Record of Decision (ROD)
- Implementation
- Litigation



Who Pays?



- The EPA's cost estimate for cleanup of 1,269 existing Superfund sites exceeds current funding levels. Government Accountability Office Report. GAO-10-857T (June 2010).
- Since the trust fund was exhausted in 2003, all funds for EPA's cleanups of so-called orphan sites have come from general revenues.
- EPA has asked Congress to reinstate the taxes that financed the Superfund and indicated that if the taxes were reinstated at the beginning of 2011 through the end of tax year 2020, they would generate nearly \$19 billion.
- Senator Frank Lautenberg has again introduced a bill and there are also two House bills to reinstate the tax.

Superfund Taxes

Some of the bills would reinstate taxes as in the original 1980 law:

- a 97-cent-per-barrel tax on imported crude oil,
- an excise tax ranging from 22 cents to \$4.87 per ton on 42 chemicals used as feedstock in manufacturing products,
- an imported chemical derivative tax on imported chemicals that contain or use any of the 42 feedstock chemicals
- an environmental corporate alternative minimum tax of 0.12% on taxable corporate profits in excess of \$2 million.



CERCLA Liability

- Retroactive
- Strict
- Joint and several, but allocation may be possible
- No causation between a PRP's actions and the actual cleanup costs has to be shown
- Cannot contract away, 107(e)



Liability § 107

When there is a

- “release” or a “threatened” release
- of a “hazardous substance”
- from a “facility,”
- PRPs are liable for all costs of response incurred by the US, a state, an “Indian Tribe,” or “any other person”
- if consistent with the National Contingency Plan.

In fiscal 2009, EPA got commitments worth \$2.4 billion from private parties for site remediation.

CERCLA Definitions

- “Hazardous Substance”
 - Broadly defined, 40 CFR 302
 - RCRA
 - CWA
 - CAA
 - TSCA
 - Petroleum Exclusion
 - MSW Exemption
 - Pollutants and contaminants

- “Release or Threatened Release”
 - “Spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or **disposing** into the environment”
 - No minimum quantity threshold
 - Limited Exclusions

- “Facility”
 - Defines “facility” broadly to include any site or area where a hazardous substance is located.



PRPs

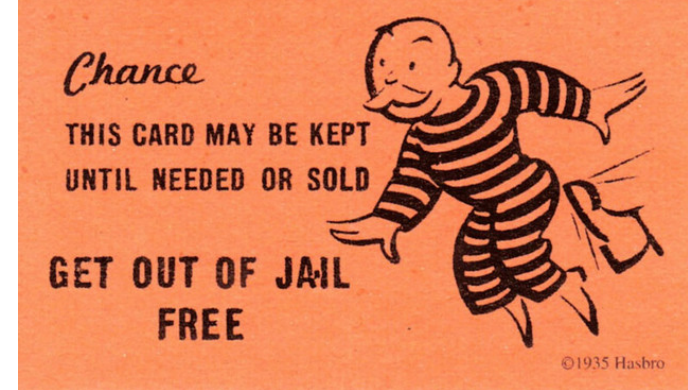
Potentially Responsible Parties

- Responsible Party, § 107
 - Owner/operators
 - Current and past
 - Generators/Arrangers
 - Transporters

- “Person” includes corporate and government entities



Exempt Parties



- Innocent landowners, §101(35)(B).
 - Did not know and had no reason to know (AAI)

- Contiguous property owners, §107(q).

- Secured Creditors, §101(20)(E). Lender Liability Rule

- Bona fide prospective purchasers, §§ 101(40) and 107(q) and (r).
 - Brownfields

- Units of state or local government that acquire ownership or control involuntarily through bankruptcy, tax delinquency, or abandonment, §101(20)(D).

- Government entities that acquire property by eminent domain, §101(35)(A)(ii).



Major Defenses to Liability, § 107(b)

Where the release or threatened release is caused solely by:

- An act of God
- An act of War
- An act or omission of a contractually unrelated third party, and (i) where the defendant exercised due care and (ii) took appropriate precautions (e.g., an innocent landowner)



Contribution and Cost Recovery Actions

Cost Recovery Actions under § 107

- Joint and Several Liability Possible
- 3 year SOL after completion of removal actions, unless...
- 6 year SOL from initiation of remedial actions

Contribution Actions under § 113

- Only Several Liability
- Equitable factors
- 3 year SOL from date of judgment or AO

Plaintiff must have “incurred costs”



Key Tronic v. U.S., 511 U.S. 809 (1994)

- “In its original form CERCLA contained no express provision authorizing a private party that had incurred cleanup costs to seek contribution from other potentially responsible parties. In numerous cases, however, district courts interpreted the statute--particularly the §107 provisions outlining the liabilities and defenses of persons against whom the Government may assert claims--to impliedly authorize such a cause of action.”

- Subsequent to SARA (1986),
 - the statute now expressly authorizes a cause of action for contribution in §113 and impliedly authorizes a similar and somewhat overlapping remedy in §107.



Cost Recovery Actions Under § 107

- § 107(a) identifies the types of PRPs that can be held liable.
- § 107(a)(4)(A) states that U.S., state, or an “Indian Tribe” that has incurred removal/remediation can seek reimbursement from PRPs.
- § 107(a)(4)(B) states that a PRP can be held liable for response costs of “any other person” (implied).
- Volunteers can sue PRPs.
- “Longer” statute of limitations.



NATURAL RESOURCE DAMAGES

§ 113(g)

- 60 DAY NOTICE REQUIRED
- 3 YEAR STATUTE OF LIMITATIONS
 - begins to run on “the date of the discovery of the loss and its connection with the release in question.” 113(g)(1)(A).
 - 104(b)(2) and 122(j)(1) require EPA to notify federal and state trustees of potential damage claims.
- UNLESS NPL SITE
 - 3 years from the date of completion of the remedial action.



Private-party Actions - Contribution under § 113

- A PRP may also bring a suit for contribution against other PRPs under § 113(f).
- § 113(f)(1) allows a party to seek contribution "during or following any civil action" under § 106 or § 107.
- § 113(f)(3)(B) allows a party that has “resolved” their liability to the U.S. to seek contribution.
- Cost Allocation based on “equitable” or Gore Factors.
- Causation is considered.



Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157 (2004)

- The Court held that § 113(f)(1) does not allow a PRP to seek recovery of cleanup costs from another PRP unless it has first been subjected to a "civil action" brought under either § 106 or § 107.
- The Court's decision left unanswered whether a party that voluntarily undertakes remediation can seek cost recovery pursuant to § 107.
- PRPs and Volunteers are not amused.



US v. Atlantic Research Corp., 551 U.S. 128 (2007)

- After Aviall some courts held that PRP's must sue under § 113 and that § 107 was limited to "innocent" parties.
- In a unanimous opinion issued on June 11, 2007, the Court held that § 107(a) provides "any person" with a cause of action to recover costs from PRPs.
- Under the plain terms of § 107, a PRP can recover incurred cleanup costs from other PRPs where there is no corresponding legal action (suit or settlement) by EPA or a state under CERCLA §§ 106 or 107.



Atlantic Research

- Cost incurred voluntarily are only recoverable by way of §107. Reimbursement of expenses due to legal judgment or settlement are only recoverable under §113.
- What is “voluntary” – Consent Order?
- Can parties use both?
- Split regarding whether Consent Order resolves liability.



Morrison Enterprises, LLC v. Dravo Corp.,
Nos. 10-1468, 10-1469 (8th Cir. 2011).

Court rejected Morrison's claims that it was a voluntary cleaner-upper entitled to cost-recovery under 107 because it had entered an AOC.

Cited Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 128 (2d Cir. 2010), for proposition that to allow 107 claims would nullify effect of 113 and limits on contribution.

But see, Agere Systems, Inc. v. Carpenter Technology Corp., 602 F.3d 204 (3d Cir. 2010), cert. denied, 131 S.Ct. 646 (2010), allowing 107 claims by PRP.



ARRANGER LIABILITY & APPORTIONMENT

Burlington Northern and Santa Fe Railway Co. v. US,
129 S.Ct. 1870 (2009)

- Interprets “arranger” liability
- Arranger: “Any person who by contract...arranged for disposal or treatment...of hazardous substances...”
§ 107(a)(3)
- For “arranger” liability to attach, putative PRP must have *intended* that at least a portion of the product would be disposed of during the transfer process



Arranger Developments

- Celanese Corp. v. Martin K. Eby Construction Co., U.S., 620 F.3d 529, (5th Cir. 2010), cert. denied, No. 10-958 (2011).
 - Backhoe operator who knowingly damaged pipe many years ago, not liable as arranger for subsequent methanol pipeline leak.

- United States v. Washington State Dept. of Transportation, 716 F. Supp. 2d 1009 (W.D. Wash. 2010).
 - Washington State Department of Transportation must pay CERCLA response costs for storm water and hazardous waste contamination of two Tacoma, Washington waterways.

 - Judgment for U.S. in March 2011.



BNSF & Apportionment

- Reenergizes apportionment of liability.
- Joint and several liability is appropriate when multiple PRPs cause a single and indivisible environmental harm.
- Apportionment – dividing liability into % shares – is appropriate if there is “a reasonable basis” for dividing up the contributions of each PRP to a single harm.



Not much impact, yet ...

- US v. Saporito, 684 F. Supp. 2d 1043 (N.D. Illinois 2010)
- Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., No. 05-2782 (D.S.C. 2011)



RISK



All Appropriate Inquiry (AAI)

- Conduct All Appropriate Inquiries in compliance with 40 CFR Part 312, prior to acquiring the property

- Comply with all Continuing Obligations after acquiring the property. (CERCLA §§101(40)(C – G) and §§107(q))

- American Society for Testing Materials (ASTM)
 - “The Standard Practice for Environmental Site Assessments – Phase I Environmental Site Assessment Process” (ASTM E-1527-05)



Lender Liability Rule

§§ 101(20)(E),(F), and (G)

- Asset Conservation Act amended CERCLA to codify EPA's Lender Liability Rule.
- Activities such as performing an environmental audit, providing financial or administrative advice, or requiring compliance with environmental laws do not destroy lender liability protections.

See § 101(20)(F)(iii).

- Similarly, an inchoate right to assume management of a facility does not trigger liability if the lender has not acted on their prerogative or “participated in management.”



Participation in Management

§ 101(20)(f)

- Actually participating in the management or operational affairs of a vessel or facility
 - Does not include merely having the capacity to influence, or the unexercised right to control

- If, while the borrower is still in possession, the lender
 - Exercises decisionmaking control over environmental compliance
 - Exercises control at a level comparable to that of a manager
 - for the overall management or
 - for everything but environmental compliance

- A lender that forecloses on a property may retain the exemption if it acts promptly, as is “commercially reasonable” under the circumstances, to divest itself of the property. § 101(20)(E).



Managing CERCLA Liability

- **Risk Assessment**

- **Environmental Insurance**
 - Specialized insurance for environmental risks now exists
 - Can cover remediation costs, tort liability, and off-site transportation and disposal

- **Risk Transfer**
 - It is also possible to transfer liability by contract to a third party
 - Provides cost certainty for PRPs and minimizes litigation



CERCLA Accomplishments

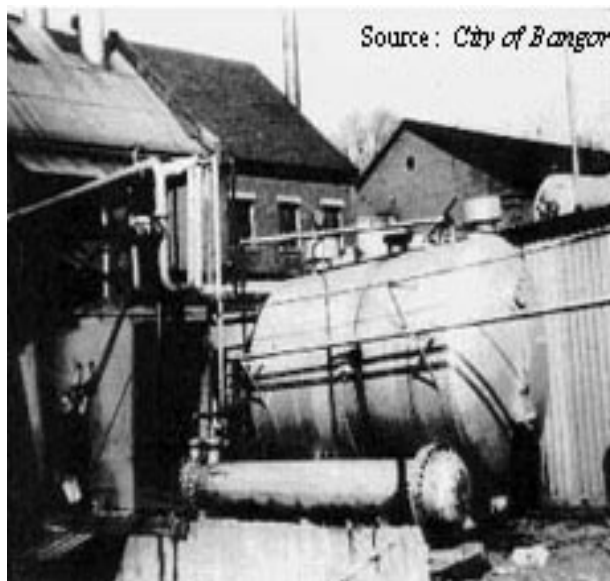
- The “Superfund Redevelopment Program.”

- As of December 2005, 550 Superfund Sites “are ready for reuse or have returned to productive uses,” including:
 - 56 sites in ecological use
 - 68 sites in recreational use
 - 40 sites in public service use
 - 108 sites in industrial use
 - 50 sites in residential use
 - 21 sites in agricultural use
 - 117 sites in commercial use

(U.S. EPA)



Bangor Gas Works Bangor, Maine (coal gasification plant)



Luminous Processors Athens, Georgia



Source: U.S. EPA

Using funds from Superfund, workers from the State of Georgia cleanup the radioactive contamination at the site in 1982.



Source: U.S. EPA

A McDonald's fast food restaurant and playground now occupies the former hazardous waste site, providing many positive benefits to the community.



What did we miss? Lots

- **General Electric v. Jackson**,
610 F.3d 1210 (D.C. Cir. 2010), cert. denied, No. 10-871 (2011)

- **Preemption of State Law**

- **“Subsequent actions” for cost recovery**

- **Intervention**

- **Small Business Liability Relief and Brownfields Revitalization Act**
 - **Renewable Energy Siting Program**



Resources

- <http://www.epa.gov/superfund/policy/index.htm>
- U.S.C.A.
- ALI-ABA & ELI



Questions?

THANKS FOR ATTENDING

