

I. Overview of CERCLA and RCRA

A. CERCLA

1. General Information

In 1980, in response to public concern about abandoned hazardous waste sites such as Love Canal, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675. CERCLA, commonly referred to as Superfund, authorizes the federal government to assess and/or clean up contaminated sites and provides authority for emergency response to hazardous materials incidents.

CERCLA provides the federal government with a source of funds, the Hazardous Substance Trust Fund (the Fund), and the legal authority to respond to actual and threatened releases of hazardous substances, pollutants and contaminants. CERCLA also establishes a comprehensive liability scheme to hold certain categories of parties liable to conduct and/or pay for cleanup of such releases.

EPA may exercise its response authority through removal or remedial actions. A removal action generally is a short-term and/or emergency action intended to stabilize or clean up an incident or site which poses an imminent threat to human health or the environment. CERCLA § 101(23). A remedial action generally addresses long-term threats to human health and the environment caused by more persistent contamination sources. CERCLA § 101(24). Fund-financed remedial responses are undertaken only at sites on EPA's National Priorities List (NPL). The National Contingency Plan (NCP), 40 C.F.R. Part 300, provides the "blueprint" for conducting removal and remedial actions under CERCLA.

2 CERCLA's Liability Scheme

CERCLA's "polluter pays" liability scheme ensures that parties who caused the contamination, rather than the general public, pay for cleanups. To be held liable for the costs or performance of a cleanup under CERCLA, a party must be a "potentially responsible party" (PRP) as described in CERCLA § 107(a), which includes:

- (1) The owner or operator of a facility;
- (2) An owner or operator at the time of disposal;
- (3) A person who arranged for the disposal or treatment of hazardous substances ("generator"); and
- (4) A person who accepted hazardous substances for transport and selected the site to which the substances were transported ("transporter").

Under CERCLA's comprehensive liability scheme, a PRP's liability for cleanup is:

- **Strict** - A party is liable if it falls within one of the above categories in CERCLA § 107(a), even if it did not act negligently or in bad faith.
- **Joint and several** - If two or more parties are responsible for the contamination at a site, any one or more of the parties may be held liable for the entire cost of the cleanup, regardless of their share of the waste contributed, unless a party can show that the injury or harm at the site is divisible.
- **Retroactive** - A party may be held liable even if the hazardous substance disposal occurred before CERCLA was enacted in 1980.

Additionally, EPA has adopted an “enforcement first” policy throughout the Superfund cleanup process to compel those responsible for hazardous waste sites to take the lead in cleanup, thus conserving the resources of the Fund. Using the enforcement authorities provided by Congress, EPA may enter into settlements with or compel PRPs to implement a cleanup at a site where a release of hazardous substances has occurred. When the Agency spends Fund monies to finance a removal or remedial action, EPA may seek reimbursement from responsible parties.

3. Traditional CERCLA Liability Protections

CERCLA includes several defenses to liability or liability protections. The traditional defenses -- those found in the statute prior to the Brownfields Amendments -- include an act of God, an act of war, or what is commonly known as the third-party or “innocent landowner” defense. *See* CERCLA § 107(b).

A party may qualify as an innocent landowner if it meets the criteria set forth in CERCLA §§ 107(b)(3) and 101(35). CERCLA §101(35)(A) distinguishes between three types of innocent landowners:

- (1) Purchasers who acquire property without knowledge of the contamination;
- (2) Governments who acquire contaminated property by escheat, other involuntary transfers or acquisitions, or the exercise of eminent domain authority by purchase or condemnation; and
- (3) Inheritors of contaminated property.

CERCLA also excludes from the definition of owner/operator a unit of state or local government that acquired ownership of the property involuntarily. *See* CERCLA § 101(20)(D). Discussed below are the

liability protections addressed in the Brownfields Amendments, such as the bona fide prospective purchaser protection.

4. EPA's Brownfields Program and the Brownfields Amendments

There are many different types of contaminated property in the United States. Some may be “Superfund sites”-- sites where the federal government is or plans to be involved in cleanup efforts, many of which are listed on the NPL. Other contaminated properties may be “brownfields”-- properties that are unused or underutilized because of fears about actual or possible contamination from past uses. Often, the federal government is not involved in cleanups at brownfield sites. Rather, state and tribal response programs play a significant role in cleaning up and helping to revitalize these sites. Other contaminated properties may be “RCRA brownfields” -- RCRA facilities where reuse or redevelopment is slowed due to real or perceived concerns about requirements imposed by RCRA or actual or potential contamination.

EPA launched the Brownfields Initiative in the mid-1990's and developed tools within the Superfund program and the enforcement office to help further the Initiative's goals of empowering states, communities, and other stakeholders in redevelopment to assess, safely clean up, and sustainably reuse brownfields, and to prevent future brownfield sites.

Congress codified many of these practices, policies, and guidances that had been adopted to promote the redevelopment and revitalization of brownfields when it passed the Small Business Liability Relief and Brownfields Revitalization Act of 2002 (Public Law 107-118) (Brownfields Amendments). The Brownfields Amendments define a brownfield site as “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.” CERCLA § 101(39). The Brownfields Amendments also include provisions to address the liability concerns of certain landowners, provide statutory authority for EPA’s site-specific brownfields grant program, and authorize EPA to provide grants to states and tribes to develop response programs.

As noted above, under CERCLA’s liability scheme, the owner of a contaminated property is responsible for the property’s cleanup based solely on its ownership status, even if it did not contribute to the contamination. As a result, entities that want to purchase contaminated properties are often concerned about incurring CERCLA liability once they acquire the property. To address these liability concerns, the Brownfields Amendments included new liability protections for landowners who acquire property and meet certain criteria. The three landowner liability protections addressed in the Brownfields Amendments are:

- Bona fide prospective purchasers (BFPPs);
- Contiguous property owners (CPOs); and
- Innocent landowners (ILOs) (specifically innocent or unknowing purchasers).

The BFPP liability protection applies to an entity that purchases property after January 11, 2002, even with knowledge of contamination at the site, so long as the entity complies with certain pre- and post-purchase obligations.

The CPO provision protects owners of contaminated property where the contamination originated from a contiguous or similarly-situated property not owned by the entity asserting CPO status. This liability protection also has pre- and post-purchase obligations, and notably, unlike the BFPP liability protection, the person cannot have knowledge of the contamination at the time of purchase.

The ILO provision, as discussed above, excludes from CERCLA liability unknowing purchasers of contaminated property where the contamination was caused by a third party, the unknowing purchaser made all appropriate inquiry but did not discover the contamination, and the purchaser meets certain statutory conditions. The Brownfields Amendments clarified the all appropriate inquiry aspect of this protection. This liability protection also has pre- and post-purchase obligations.

For more information on these liability protections and related cleanup enforcement policy and guidance, please see Section II.

More information on the Superfund enforcement program is available on EPA's Web site at <http://www.epa.gov/compliance/cleanup/superfund/index.html>. Information on the Superfund program is available at <http://www.epa.gov/superfund>.

B. RCRA

In 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k, which authorizes EPA to establish programs to regulate solid waste (Subtitle D), hazardous waste (Subtitle C), and underground storage tanks (Subtitle I). RCRA's goals include:

- Protecting human health and the environment from the potential hazards of waste disposal;
- Conserving energy and natural resources;
- Reducing the amount of waste generated; and
- Ensuring that wastes are managed in an environmentally sound manner.

Congress gave EPA the authority through RCRA to control hazardous waste from “cradle to grave.” The regulatory program includes procedures to facilitate the proper identification and classification of hazardous waste. The program also includes standards for facilities that generate, transport, treat, store or dispose of hazardous waste, and requires that certain persons managing waste obtain a permit. Unlike CERCLA, RCRA does not contain a bona fide prospective purchaser or similar liability protection, as the Brownfields Amendments only addressed CERCLA.

Since waste management at RCRA facilities may result in spills or releases into the environment, Subtitle C of the statute also includes provisions governing the cleanup of contaminated soil, groundwater, and air resulting from such management, also known as “corrective action.” As a condition of a RCRA permit, owners/operators are required to clean up contamination caused by the mismanagement of wastes.

Elements of the RCRA Corrective Action Enforcement Program

- Conduct investigations;
- Conduct a thorough cleanup of the hazardous release; and
- Monitor the cleanup to make sure it complies with applicable state and federal requirements.

States are an integral part of the RCRA program. Under Subtitle C, EPA reviews state programs that consist of requirements for the generation, transportation, treatment, storage, and disposal of hazardous wastes for facilities within that state. If the state program is deemed to be at least as stringent as the federal requirements, EPA authorizes that state to administer the state program in lieu of the federal program and facilities must then comply with the authorized state requirements rather than the corresponding federal requirements. After authorization, both the state and EPA have the authority to enforce those requirements. Currently, 50 states and territories have been granted authority to implement the base, or initial, program. Many are also authorized to implement additional parts of the RCRA program, such as corrective action. More information on the RCRA state authorization program is available on EPA's Web site at www.epa.gov/epaoswer/hazwaste/state. More information on the RCRA cleanup enforcement program is available on EPA's Web site at <http://www.epa.gov/compliance/cleanup/rcra/index.html>.