

**12 STEPS TO SUPERFUND SANITY:  
A PRIMER ON SUPERFUND**

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# **12 STEPS TO SUPERFUND SANITY: A PRIMER ON SUPERFUND**

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**THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION,  
AND LIABILITY ACT OF 1980 (“CERCLA”),  
AS SUBSEQUENTLY AMENDED BY  
THE SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986 (“SARA”),  
AND THE SMALL BUSINESS LIABILITY RELIEF AND BROWNFIELDS REVITALIZATION  
ACT OF 2002**

**ENVIRONMENTAL LAW INSTITUTE**

**SUMMER SCHOOL 2016**

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- **SUPERFUNDS 35<sup>TH</sup> BIRTHDAY – DECEMBER 15, 2015**
    - **QUITE A PROGRAM!**
  - **BY THE NUMBERS**
    - **6700 PRP SEARCHES FOR RESPONSIBLE PARTIES**
    - **6,774 CLEAN-UP AGREEMENTS AT 3009 SUPERFUND SITES**
    - **632 SETTLEMENTS WITH 31,921 SMALL WASTE CONTRIBUTORS AT 277 SUPERFUND SITES**
    - **\$35.1 BILLION IN SECURED PRP (PRIVATE) COMMITMENTS TO PERFORM CLEAN-UP WORK**
    - **\$6.9 BILLION IN COST RECOVERY BY GOVERNMENT FOR RESPONSIBLE PARTIES**
    - **TOTAL – APPROXIMATELY \$42 BILLION SPENT ON SUPERFUND CLEAN-UP WORK**
    - **SINCE 2004, 8 BILLION CUBIC YARDS OF CONTAMINATED SOIL AND GROUNDWATER ADDRESSED**
  - **KEY POLICY CONCEPTS:**
    - **FILLS THE GAPS IN EXISTING LAWS**
    - **POLLUTERS PAY**
    - **ENFORCEMENT FIRST**
    - **FEDERAL FACILITIES INCLUDED**
    - **PRIVATE SECTOR SECONDARY OR “SHADOW” IMPLEMENTATION**
    - **STATE PARALLEL PROGRAMS**
- <sup>1/</sup> See EPA – Superfund Enforcement 35 Years at EPA website.

# 12 STEPS TO SUPERFUND SANITY

- **STEP 1:** Why Superfund in 1980?
- **STEP 2:** Why RCRA and Superfund?
- **STEP 3:** Liability for Who and for What?
- **STEP 4:** If I am basically innocent, how do I escape?
- **STEP 5:** How does a Superfund site get started?
- **STEP 6:** How does a Superfund site get cleaned up?
- **STEP 7:** How are Superfund site clean up costs incurred?
- **STEP 8:** How does this really work in practice?
- **STEP 9:** How do I make myself whole if I get caught up in the Superfund liability web?
- **STEP 10:** How can I avoid Superfund liability and still purchase contaminated property?
- **STEP 11:** What are Natural Resource Damages and how are they different from clean up costs?
- **STEP 12:** Is Superfund liability perpetual?
- **STEP 12+:** Is Superfund all there is?



## STEP 1: WHY SUPERFUND IN 1980?

- Doubts regarding RCRA's ability to address abandoned hazardous waste sites developed after the 1976 enactment of RCRA.
- RCRA is forward looking and compels conduct pursuant to a detailed regulatory program that is designed to avoid future uncontrolled hazardous waste disposal sites and exposures to human health and the environment.
- Historically contaminated waste sites, either abandoned or inactive, presented obstacles to the government's ability to directly respond and clean up the wastes under RCRA; liability was limited.
- Superfund immediately established a broad liability scheme for "responsible persons" to enforce a "polluter pays" policy, authorized government response options, established a Fund to finance certain clean ups, and established new release reporting obligations to avoid future sites.
- Combined with RCRA, the new Superfund law created an overarching federal program, implemented by EPA, to address and resolve the issue of contaminated media and control unreasonable risks to human health and the environment.



## STEP 2: WHY RCRA AND SUPERFUND?

- RCRA is implemented primarily by an extensive regulatory program where current conduct is governed and enforced to avoid future uncontrolled hazardous waste exposures; CERCLA has an important regulatory component in the National Contingency Plan, but is largely developed by EPA guidance and case law and has spawned a large private shadow program of clean ups and cost recovery litigation.
- Liability under RCRA derives from failure to comply with the applicable regulatory program; liability under Superfund is strict liability and without regard to fault or compliance with law and, subject only to very limited defenses.
- RCRA applies to a wide range of wastes, but the wastes are arguably reasonably defined; Superfund applies to an extremely large universe of “hazardous substances,” as well as pollutants and contaminants.
- Superfund “Fills the Gap”



## STEP 3: LIABILITY FOR WHO AND FOR WHAT?

- **Liability exists for:**
  - Current owners and operators of a facility where there is or has been a release of a hazardous substance.
  - Past owners and operators of a facility at the time of disposal of a hazardous substance.
  - Persons who arranged for disposal of a hazardous substance.
  - Persons who transported substances to a facility from which there has been a release.
- Courts quickly ruled that Superfund liability was not only strict, but also presumptively joint and several.
- Liability is retroactive.
- The liability scheme is intentionally draconian and broad to compel cleanups; one cannot challenge a response action in court until it is done.
- Liability exists for all costs of removal or remediation incurred by 1) the United States, State or Indian Tribe not inconsistent with the National Contingency Plan (“NCP”); (2) any other person if consistent with the NCP; 3) natural resource damages; and 4) cost of health risk assessments covered under law.
- But liability does not exist for bodily injury.
- Common misunderstandings despite breath of program: The mere presence of hazardous substance does not necessarily mean Superfund liability will be imposed.

## **STEP 4: IF I AM BASICALLY INNOCENT, HOW DO I ESCAPE?**

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- **Defenses are limited to:**
  - Acts of God.
  - Acts of War.
  - Act of Unrelated Third Party.
- **But harshness of liability scheme has been mitigated in the real estate purchase context – will discuss later.**
- **“Divisibility of contamination,” not simply joint and several liability, is gaining traction. Is zero liability a new defense?**
- **Not legal defenses, but highly practical liability management tools exist:**
  - Section 107(e) – Contractual Liability Shifting and Indemnity.
  - Insurance products.



## **STEP 5: HOW DOES A SUPERFUND SITE GET STARTED?**

- **Section 103(c):** Designed to identify the initial group of Superfund sites by June 1981 – Historic start.
- **Section 103(a):** Immediate reporting to the National Response Center of new spills and releases of hazardous substances to the environment:
  - 2 Hours Reporting of “Release” of “Reportable Quantities” within 24 hours to the Environment.
  - Patterned after CWA Spill Reporting Obligations.
- **Section 104** establishes EPA’s authority to respond to any release of a hazardous substance to the environment in a manner consistent with the NCP:
  - EPA can act on its own.
  - EPA can authorize a responsible party to respond under the NCP.
- **Information Requests Under Section 104(c):**
  - This “environmental subpoena” enables EPA to collect information from responsible parties to inform its enforcement actions.
- **States have reporting systems that identify potential sites to EPA.**
- **Section 106** establishes EPA’s authority to issue abatement orders in circumstances of imminent and substantial endangerment:
  - Enforced by substantial daily fines for noncompliance.
  - Judicial review of liability and reasonableness is deferred until after completion of the clean up.

# STEP 6: HOW DOES A SUPERFUND SITE GET CLEANED UP?

- **EPA's Policy – Enforcement First:**
  - Find responsible parties and compel acceptance of clean up obligations.
  - Clean ups are managed through the NCP – the blueprint for clean ups.
- **Removal actions:**
  - Short-term actions to address contamination of immediate concern.
  - Limited on time and dollar amount.
- **Remedial actions:**
  - Long-term actions to permanently clean up a contaminated site.
- **The National Priorities List (“NPL”):**
  - These sites are evaluated and pursuant to a special assessment protocol, and are identified as the most serious sites in the country.
- **Clean up plans based upon risk -- both for human, health and ecological risks:**
  - How clean is clean?
  - Acceptable Risk Range: One excess Cancer death per 10,000 to 1 excess death per 1,000, 000
- **Steps:**
  - Preliminary Assessment/Site Investigations.
  - NPL Listing?
  - Remedial Investigation/Feasibility Study (“RI/FS”).
  - Remedial Design/Remedial Action (“RD/RA”).
  - Construction.
  - Post Completion Review.
- **Clean up plan must consider all relevant and appropriate requirements of other federal and state laws.**

# STEP 7: HOW ARE SUPERFUND SITE CLEAN-UP COSTS INCURRED?

- **EPA will initiate discussions with PRPs:**
  - Will seek to establish a “PRP-Lead” site clean up.
  - If not, clean up may proceed as a “Fund-Lead” clean up.
- **Most common, PRP-Lead clean up:**
  - Consent decree will identify all parties, establish obligations to perform agreed NCP steps.
  - EPA will retain oversight.
  - Consent decree may cover the complete site clean up or portions of the NCP, such as the RI/FS or distinct portions or Operable Units of a site, leaving future actions to future negotiations.
- **“Carrots” for joining a PRP-Lead clean up:**
  - Covenants not to sue.
  - Contribution Protection.
  - Certainty(?)
- **If Fund-Lead with EPA Contractor Clean-Up, then DOJ eventually files suit to recover federal clean up costs from responsible parties.**
- **Note, U.S. government agencies and departments may be a responsible party and liable for Superfund liability like any other private sector responsible party.**

## **STEP 8: HOW DOES THIS REALLY WORK IN PRACTICE?**

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- **PRP Group Formation:**
  - Performing parties.
  - Financing parties.
  - Formal PRP Group Agreements.
  - Committees for Engineering, Consent Decree Investigation and allocations.
  - Threats and cajoling; cost of defense versus cost of participating is constant calculus.
- **Allocation Theory or putting Equity into Action:**
  - The “Gore” Factors and other considerations.
  - Tiers and *Di Minimis* Groups.
- **Consent Decree Negotiation:**
  - EPA’s Model Decrees.
- **To hide in the weeds, or not, that is often the question.**

## **STEP 9: HOW DO I MAKE MYSELF WHOLE IF I GET CAUGHT UP IN THE SUPERFUND LIABILITY WEB?**

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- **Private party cost recovery against other PRPs:**
  - Section 107 action if costs were voluntary and liability to EPA not resolved in a settlement agreement.
  - Section 113(f) action if claim is in contribution.
- **Private party costs must be consistent with the NCP.**
- **As a practical matter, a private party cannot recover more than the excess over its equitable share of costs under Section 107 or Section 113.**
- **Statute of Limitation often is Key:**
  - Practical Consideration: Clean ups take a very long time and are slow motion processes.
- **Section 107 Recovery Actions.**
  - Removal costs – 3 years after completion of removal.
  - Remedial costs - 6 years after initiation of physical onsite construction.
- **Section 113 Contribution Actions:**
  - 3 years.

# STEP 10: HOW CAN I AVOID SUPERFUND LIABILITY AND STILL PURCHASE CONTAMINATED PROPERTY?

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- **Initially Superfund liability drove buyers, investors, etc., to greenfields; leaving vacant vast swaths of historic industrial and commercial parcels to linger in inactivity and/or abandonment:**
  - Remember, current owners/operators always liable regardless of fault.
  - Gradually, EPA, the private sector and Congress agreed on new defenses and management schemes to address this problem and encourage re-use of historically contaminants parcels. Hence, Brownfields.
- **EPA's Definition of Brownfields:**
  - “real property the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substances, pollutants or contaminants: (CERCLAs 101(3a).
- **The following categories of persons can avoid Superfund liability when becoming a new owner of a parcel:**
  - Bona fide Prospective Purchase (BFPP) [Acquisitions after January 11, 2002].
  - Contiguous Property Owners.
  - Innocent Land owner.
- **Focus on BFPP:**
  - All appropriate inquiries.
  - Current and Future appropriate care of known hazardous conditions.
  - Respect for institution and Control.
  - Ongoing cooperation.



# STEP 11: WHAT ARE NATURAL RESOURCE DAMAGES AND HOW ARE THEY DIFFERENT FROM CLEAN UP COSTS?

- **Natural Resources:**

- Defined broadly as “land, fish,” wildlife, biota, air, water, groundwater, drinking water supplies, held in trust for the public.

- **Natural Resource Damages:**

- Defined as “injury to, destruction of, or loss of natural resources including cost of damage assessment.”
- Measure of damages – Restoring to baseline condition, compensation for interim loss, and reasonable costs of the damage assessment.



- **Distinction between clean up costs and NRD:**

- Clean up costs - To protect human health and environment.
- NRD – To make the public whole from loss due to contamination.

- **NRD Responsibility falls to Federal, State and/or Tribal Trustees:**

- Federal trustees are either the Department of Interior or the Department of Commerce National Oceanic and Atmospheric Administration. Indian tribes, other federal departments and states may also be Trustees.
- Liability runs to the Trustee.

- **NRD issues may be part of comprehensive site clean up, or deferred until a future time.**

## **STEP 12: IS SUPERFUND LIABILITY PERPETUAL?**

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- **The answer is yes, no, usually, and maybe. Consider:**
  - **Consent Order Re-Openers? No Further Action?**
  - **De-Listing of NPL Sites – It has happened.**
  - **Continual revision of detection limits for sampling data: existing contamination can be “newly” discovered.**
- **New Concerns can arise from previously closed sites, such as vapor intrusion.**
- **Simple rule – “Often tis better to clean up than to litigate, draft liability shifting agreements, etc.”:**
  - **In other words, engineering clean up dollars go much further in limiting Superfund liability than legal/consultant dollars.**



- **No, that would be too easy.**
- **Most states have a comparable clean up statute.**
- **EPA and state agencies usually cooperate and share responsibility:**
  - EPA may fund and implement Removal Action short-term.
  - State Agency may fund and/or enforce a long-term remediation at the same site.
- **Some large municipalities also have clean up programs.**
- **Therefore, a complete understanding of a contaminated site requires integrating Superfund, RCRA, state and, occasionally, local laws.**

# THANK YOU!

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