



# Superfund

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# History of Superfund – Love Canal

- The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) was signed into law by President Jimmy Carter on December 11, 1980
  - CERCLA, also known as **Superfund**, was established to allow the EPA to address hazardous sites, and recover the costs of the cleanup from the responsible parties
  - Superfund was established in response to high-profile hazardous waste disasters in the 1970's like Love Canal in Niagara Falls, New York



# History of Superfund (*cont.*) — Love Canal

- 1890s: William T. Love excavates Love Canal for a proposed hydroelectric power project (never implemented).
- 1942-1952: Hooker Chemicals disposes over 21,000 tons of various chemical wastes, including halogenated organics, pesticides, chlororbenzenes and dioxin.
- 1953: landfill covered and deeded to Niagara Falls Education Board
- 1953 +: area near the covered landfill extensively developed, including construction of an elementary school and homes.



# History of Superfund *(cont.)* — Love Canal

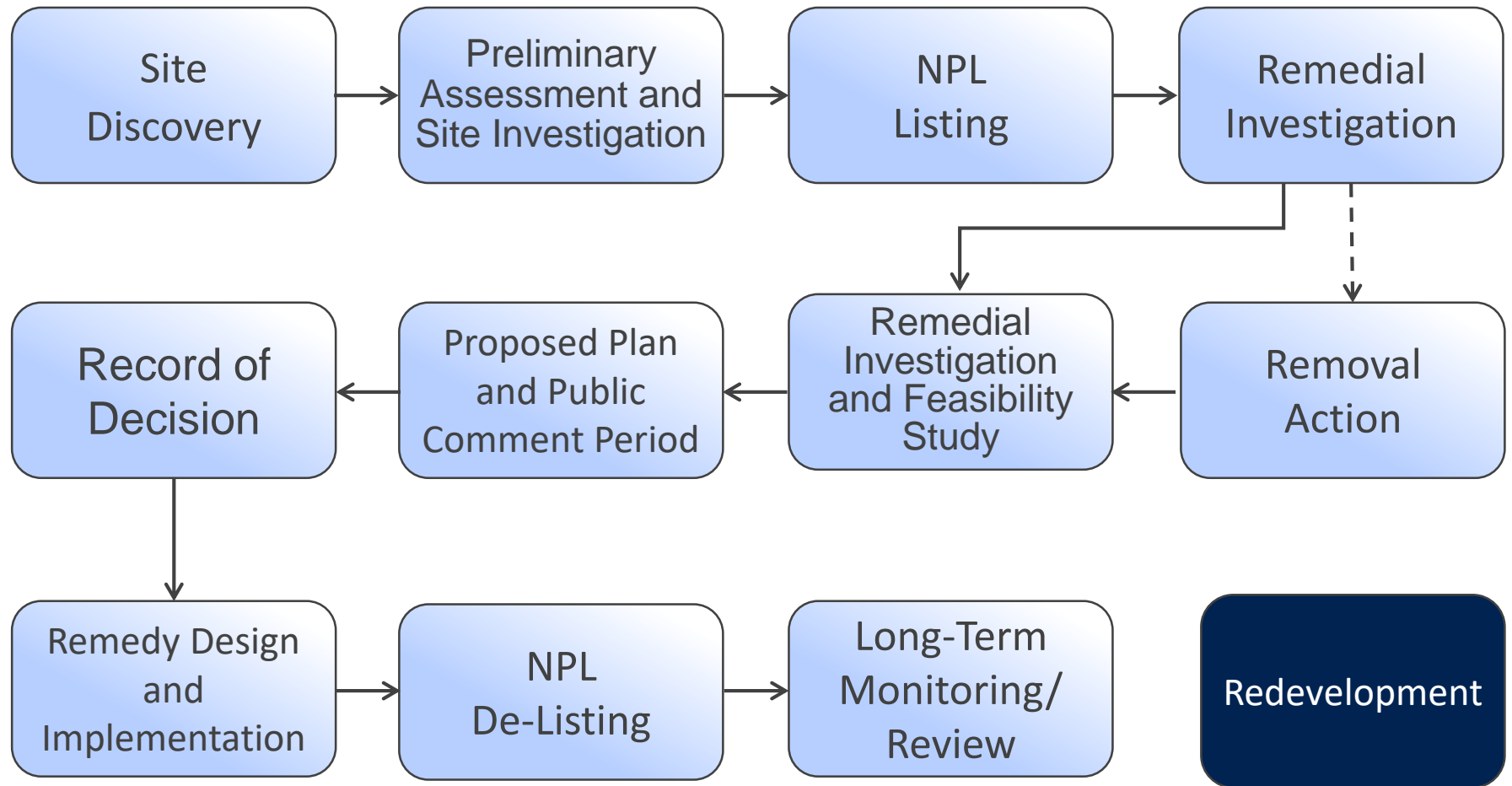
- 1960s and 70s -- Problems with odors and residues increase as water table rises, bringing contaminated groundwater to the surface.
- Studies indicated that numerous toxic chemicals had migrated into surrounding area directly adjacent to original landfill disposal site.
- Health data showed elevated miscarriage and birth defect rates and other health effects.
- 950 families were evacuated from a 10-square-block area.
- The successor to Hooker paid over **\$130 million** for cleanup activities



# Superfund – What Does it Authorize?

- Response:
  - Provides broad authority to the President (mostly delegated to Environmental Protection Agency) to respond to releases of hazardous substances, pollutants or contaminants.
- EPA can:
  - Perform the cleanup itself (using the Superfund, initially funded at \$1.6 billion from a tax on chemical feedstock).
  - Order responsible parties to perform the cleanup.

# The Superfund Clean Up Process in One Slide




# Two Approaches to Cleanup Under Superfund

- Removal – Section (101(23)):
  - Typically short-term clean up where quick action is needed
- Remediation - Section (101(24)):
  - A longer process that involves a Remedial Investigation and Feasibility Study followed by a Record of Decision.
  - Can usually only be performed at sites on the National Priorities List
- In practice, the processes are not mutually exclusive.

# Removal Action



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Midco II, as the site is known, became a Superfund site in 1986. Cleanup was complete in 2009.

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# How does EPA select a remedial action?

# Who Conducts the Remedial Action?

- EPA can implement itself and then cost recover (Section 104)
- EPA can enter into a Consent Decree with PRPs to implement the remedy (104(a)(1))
- EPA can issue an order under Section 106 of CERCLA directing the implementation
  - Recipients face penalties and treble damages if they don't comply
  - Order cannot be challenged immediately in court
  - Implementing PRP can seek to recover its money if it can show the remedy was improper.
    - Timing of Review – Section 113

# How Clean is Clean?

- Nine criteria for remedial options (Section 121):
  - 1) overall protection of human health and the environment;
  - 2) compliance with **ARARs—applicable or relevant and appropriate requirements**; BUT SEE Section 121(e)
  - 3) long-term effectiveness and permanence;
  - 4) reduction of toxicity, mobility, or volume;
  - 5) short-term effectiveness;
  - 6) implementability;
  - 7) cost;
  - 8) State acceptance; and
  - 9) community acceptance.
- Treatment preferred for Principal-Threat Waste
- Human Health Risk Assessment and Ecological Risk Assessment
  - Lifetime cancer risk of  $10^{-4}$  -  $10^{-6}$
  - Focus on receptors and pathways

# Who is Liable? When Are They Liable? And for What?

# How the Process Begins and Leads to Liability (Sections 140 and 107)

## 1. Release/Threatened Release

- Wind
- Clothing



## 2. Hazardous Substances

- But not petroleum



## 3. From a Facility

- "Any site where a hazardous substances has been deposited."

## 4. Incurrence of Response Costs

## 5. Covered Person

# Liability — Polluter Pays (That is the theory, anyway)

- Courts have held that liability is:
  - Strict — no fault, negligence or illegality required
  - Retroactive — applies to activities before 1980
  - Often joint and several — everyone can be liable for everything
- **Broad liability, limited defenses**

# Clean Up: Categories of Liability

Section 107: Four categories of PRPs (potentially responsible parties):

- Present owner or operator
- Past owner or operator at time of waste disposal
- Persons who arranged to dispose of their wastes at the site
  - "takes intentional steps to dispose of a hazardous substance" – *Burlington Northern v. United States*, 556 U.S. 599, 610 (2009)
  - Anyone who “entered into the sale ...with the intention that at least a portion of the product be disposed of...” *Id.* at 612.
  - Fact-intensive inquiry – see *United States v. Dico, Inc.*, 920 F.3d 1174 (8<sup>th</sup> Cir. 2019).
- Transporters who selected the site.



# Clean Up: Here is what you owe

PRP is liable for:

- all costs of removal or remedial action incurred by government *not inconsistent* with NCP (burden is on defendant in government cases to prove inconsistency)
- all costs incurred by others consistent with NCP (burden is on plaintiff in private party cases)
- natural resource damages

# Defenses to Liability

- Liability is explicitly subject to only limited defenses (Section 107(b))
- "Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section. . ."
- Only four defenses—release must have been caused solely by:
  - Act of God
  - Act of War
  - Act of Entirely Unrelated 3rd Party
  - Combination of foregoing

# *These are not defenses!*

- Due Care (liability is strict)
- Lack of Fault
- Lack of Negligence
- Lack of Causation
- Facility was licensed to take the waste
- Waiver
- Estoppel
- Contributory negligence
- The rule against perpetuities

# Act of War Defense - 9/11



# Is Climate Change An Act of God?

- Hurricane Harvey – unprecedented flooding to Texas and Louisiana
- Act of God?
- Or is climate change now foreseeable?



# Superfund Settlement Process—Key Concepts

1. A key provision of CERCLA, Section 122, places limitations on settlements:
2. Settlements of remedial action have to be in Consent Decree filed in court. Section 122(d)(1)(a).
3. General requirement for reopeners for unknown conditions. Section 122(f)(6).
4. Payment of government oversight costs and provision of financial assurances
5. Orphan share policy—very limited
6. De Minimis and de micromis settlements—get the little guys out
7. PRP negotiating groups—majors and minors
8. CD versus “taking an order”

# Other important CERCLA provisions

- **Statute of limitations** in Section 113—three years from completion of removal action, six years from start of remedial action, three years for contribution actions.
- **Exclusive jurisdiction** over CERCLA disputes is in federal court (Section 113(b))
- **Petroleum exclusion**—oil spills not addressed under CERCLA
- **Federal PRPs**—liable like any other PRP under Section 120, and often have major roles at sites

# Important Developments

- Actions under State law . . .



# Atlantic Richfield v. Christian

- 1884 -1980 -- Anaconda Smelter operated in Butte, Montana.
  - From 1912 to 1973, Anaconda Company payrolls totaled over \$2.5 billion, compensating around ⅓ of Montana's work force.
- 1983 - EPA designated more than 300 square miles around the smelters as one of the inaugural Superfund sites.
  - Arsenic and lead
- Atlantic Richfield (corporate successor) conducted remediation.
  - Removed 10 million cubic yards of tailings, mine waste, and contaminated soil; cap in place 500 million cubic yards of waste over 5,000 acres; and reclaim 12,500 acres of land.
  - Removed and replaced soil in yards with arsenic levels above 250 ppm and treat water with arsenic levels above 10 parts per billion (ppb).



# *Atlantic Richfield v. Christian (con't)*

- 2008 -- 98 owners of property within the Superfund site filed a lawsuit against Atlantic Richfield in Montana state court, asserting trespass, nuisance, and strict liability claims under state common law.
- Sought restoration damages and a restoration plan that goes beyond the plan approved by EPA.
  - For example, EPA approved max soil contamination level of 250 ppm of arsenic and landowners want 15 ppm.
  - landowners estimate that their cleanup would cost Atlantic Richfield \$50 to \$58 million.



# *Atlantic Richfield v. Christian*, 140 S.Ct. 1335 (April 20, 2020)

## **Question 1: Does CERCLA strip State courts of jurisdiction over the landowners claim for restoration damages?**

- HELD: No. Section 113(b) of the Act provides that “the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter,” so state courts lack jurisdiction over such actions.
  - This case does not “arise under” the Act -- > The landowners’ common law claims for nuisance, trespass, and strict liability arise under Montana law.

## **Question 2: Who are liable parties? Who are covered persons in section 107?**

- Any “owner” of a “facility”; Current owner of property, past owner or operator when release occurred, arrangers, transporters.

## **Question 3: What is a facility?**

- “Facility” is defined to include “any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.” §9601(9)(B).
- HELD: Landowners are PRPs (liable parties as current owners) under CERCLA and must seek EPA approval of their cleanup plans before commencing their extra cleanup work.
  - Arsenic and lead are hazardous substances. 40 CFR §302.4, Table 302.4. Because those pollutants have “come to be located” on the landowners’ properties, the landowners are potentially responsible parties.

Questions?